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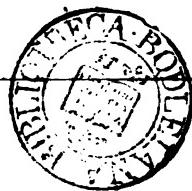
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LAW

THE
LEGAL GUIDE.

VOL. I.

FROM DEC. 1, 1838, TO APRIL 27, 1839, INCLUSIVE.



LONDON:

PUBLISHED FOR THE PROPRIETORS, BY

JOHN RICHARDS & CO.

LAW BOOKSELLERS AND PUBLISHERS, 194, FLEET STREET.

1839.

G. NORMAN, PRINTER, MAIDEN LANE, COVENT GARDEN.

The Legal Guide.

SATURDAY, NOVEMBER 3, 1838.

P R E F A C E.

THE object of this Publication, which will be devoted to subjects of *Legal importance* unconnected with Politics, is to supply the Profession weekly with an interesting GUIDE to what is daily passing in all our Courts of Law and Equity, (including the Courts of Bankruptcy and Insolvency, where points of practice and decisions upon new Laws shall occur), and also to afford useful information upon which *reliance may be placed*, as well by the experienced Practitioner as by the youthful Student.

The Proprietors have been for a length of time pressed to publish a Periodical of this nature; and they consider the present time to be peculiarly favourable to its production.

We live in an age in which it is with some difficulty that a Practitioner can understand what THE LAW really is upon any subject. So great and varied are the constant changes—so often are those changes again *changed*—and as often are Laws made that *will not work at all*, that he is never certain what course he should pursue.

The *Student* is placed in even a more distressing situation—he commences his career and studies one set of Laws, and ends his clerkship under another set; consequently as ignorant of the Laws as he began.

To remedy these evils, as far as is practicable, will be one of the important subjects to which this Publication is devoted, by affording to *Practitioners* such useful information and knowledge as shall help them to keep pace with the times; and to the *Students*

the means of acquiring progressive knowledge that shall be beneficial to them, and enable them to pass their examinations with satisfaction and credit. To facilitate the latter object, it is intended to propose *Legal Problems* that shall be open to all, and which will be solved in subsequent Numbers.

It is proposed, as the general plan of this Periodical, that it should consist of an Original Reading upon some one of the laws in actual operation, every week (the present Number will commence with the new laws affecting *Real Property*); of brief REPORTS of CASES IN ALL THE COURTS, superior and inferior, where points of law or practice have been determined, and in the House of Lords, with explanatory remarks; of NEW RULES and ORDERS made by any of the Courts; of all Legislative alterations—the practical effects of which will be explained as occasion may serve; of all Business of the Courts, viz. the Sittings, Cause Papers, &c.; of Names of Articled Clerks applying for admission, and passing their examination, and of those who shall be admitted; of Contributions of character and interest; of occasional Reviews of Law Books; and of such other matter as will be useful and interesting as well to Practitioners and their Articled Clerks as to the whole Profession of the Law.

It is also proposed, in the course of this Publication, to shew the liabilities of all persons connected with JOINT STOCK COMPANIES of every description, and to notice their progress judicially.

LAWS OF REAL PROPERTY.**ESSAY I.***On the Title a Purchaser may require.*

SINCE the passing of the Statute of Limitations, 3 & 4 W. 4, c. 27, many questions have arisen in practice (caused by the absence of any judicial decision) as to the title which a purchaser may now require. By section 2 of this statute it is enacted, that "after the 31st December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

Previous to the passing of this statute a sixty years' title was in all cases required, and even that period was not at all times considered sufficient. Lord Eldon, in *Paine v. Miller*, (6 Ves. Jun. 849; see *Robinson v. Elliott*, 1 Russ. 599), was of opinion, that an abstract not going further back than 43 years was a serious objection to the title. It is necessary that we should briefly refer to the practice as it formerly was, that the new law may be the more perfectly understood. The period of sixty years was considered heretofore necessary with reference to the *first Statute of Limitations*, 32 Hen. 8, c. 2, s. 1, which enacted that no person should sue, have, or maintain any writ of right, or make any prescription, title, or claim of, to, or for any lands, &c., but only of the seisin or possession of his ancestor within 60 years next before the *testate* of the writ, or next before the prescription, title, or claim, sued, commenced, brought, made, or had.

This writ is now abolished by sect. 36 of the new act.

The *Second Statute of Limitations*, 21 Jac. 1, c. 16, enacted that no person should

make an entry upon any lands, &c. but within 20 years after his right and title shall have first descended or accrued.

The *Third Statute of Limitations*, 4 & 5 Anne, c. 16, s. 16, enacted that no claim or entry to avoid a fine with proclamations should be sufficient, unless upon such entry or claim an action be commenced within one year after, and prosecuted with effect.

It is very erroneously considered by many persons that a twenty years' title is now sufficient and all that can be required by a purchaser. We will endeavour to shew that this is a mistaken notion, however largely it may be supported, and that *no purchaser can be satisfied with a vendor's title depending solely on an undisturbed possession of twenty years*; but, on the contrary, that a purchaser is warranted in requiring the same abstract of title as heretofore.

An Ejectment must now be brought within 20 years after the party's right accrued. Heretofore the mere nonpayment of rent was not alone sufficient to render the possession of the tenant adverse to that of his landlord; but the new statute has the effect of making 20 years' possession without payment of rent, or any written acknowledgment of a tenancy, a bar to an ejectment. Suppose, however, the possession to be adverse to a tenant for life, although the tenant for life himself may be barred, it will not run against the reversioner or remainderman, because it will require another period of 20 years' adverse possession, commencing from the death of the tenant for life, to bar him, except in certain cases, where the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the limited period, and such person shall at any time during the same period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action, can be made or brought by such person, or any person claiming through him, to recover such land or rent in respect of

such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited or taken effect after or in defeasance of such estate or interest in possession. (See 20.) In these cases, therefore, the bar operates as well against the estates in remainder as against all other estates of the remainderman.

We will further suppose that a person is tenant for life for a long term of years.—Mr. Brodie relates an instance within his knowledge, of a person being tenant for life for more than 80 years, and observes, that such a person might have been dispossessed at the time when his right first accrued. An adverse possession to him during the whole period of his life would *not* have made a good title against a remainderman or reversioner under the old law, nor will it do so under the new law.

We must also look to cases of *disabilities*. It is enacted by the new statute (Sect. 16), that if, at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as declared by the Act, such person shall have been under any of the following disabilities, viz.: Infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the limited period of 20 years shall have expired, make an entry or distress, or bring an action to recover such land or rent at any time within 10 years next after the time at which the person to whom such right shall first have accrued, shall have ceased to be under any such disability, or shall have died, (which shall have first happened.)

In cases of this nature, however, Sect. 17 declares, that no action shall be brought within 40 years next after the time at which the right of action shall first accrue, although the person under disability at such time may have remained under disability during the whole 40 years, or although the 10 years from the time at which he shall have

ceased to be under disability, or have died, shall not have expired.

In cases where a *succession of disabilities* occur, Sect. 18 declares, that no further time beyond the 20 years and the 10 years allowed in cases of disability shall be allowed.

(To be continued.)

PROBLEM I.

What are the changes made in the law by the statute, 1 Vict. cap. 26.—“An Act for the Amendment of the Law with respect to Wills?”

Law Reports.

KENT SUMMER ASSIZES.—2 VICT.

Reg. v. Lover.

LARCENY.—The prisoner, who had no counsel, when called on for his defence, set up an alibi, to prove which he examined several witnesses:—

Deedee, for the prosecution, claimed a right to reply, as the prisoner had called witnesses in his defence.

TINDAL, C. J.—You have clearly a right to address the jury.—*Guilty.*

If a prisoner who has no counsel call witnesses in his defence, the counsel for the prosecution is entitled to reply.

Reg. v. Arnold.

HOUSEBREAKING.—The prisoner, after having made a confession, which was ruled to be inadmissible in evidence, on the ground of the improper inducement to make it having been held out, was subsequently brought before a magistrate. He there received a caution that “any thing he might say for or against himself would be taken down, and in the event of his being committed, would be used at the trial as evidence against him.” On this he made a statement:

Clarkson, for the prisoner, objected that these words amounted to an inducement to confess, on the authority of the very recent case of *Reg. v. Drew*, 8 C. & P. 140, where Coleridge, J. rejected a statement made by a prisoner, after the magistrate had told him that whatever he said “would be taken down and used as evidence for or against him,” saying, that the telling a man that what he said would be evidence for him, amounted to as direct an inducement to make a statement as any that could be imagined.

Bodkin replied on the part of the prosecution.

Lord DENMAN, C. J. (after communicating with *Patteson, J.*) I am of opinion that this evidence is admissible; however, I shall, in the event of the prisoner being convicted, reserve the point for the consideration of the judges.

Magistrates are often in too great a hurry to warn prisoners against making statements. Provided that no stratagem be made use of to induce a prisoner to make one, he ought to be encouraged to say what he thinks proper; if what he state be true, it may be of great benefit to him afterwards on his defence; and if he make a false one, it is only right that it should operate to his prejudice. He should not, however, be entrapped into making statements; and whenever a man who has been so entrapped (as was the case of the prisoner here,) is brought before a magistrate, it is the duty of that magistrate to inform him, that all that he may have said previously, is to go for nothing; but that any thing he is about to say then, will be taken down and used as evidence *against* him. Magistrates had better drop the use of the word *for*, as it tends to raise a question of law.—*Guilty.*

Lord DENMAN subsequently mentioned, that as the prisoner would only be sentenced to a term of imprisonment, which would expire before the opinion of the judges could be taken, the above point would not be brought before their Lordships.

The Charge of Lord Chief Justice DENMAN to the Grand Jury upon the Arraignment of the prisoners at these Assizes, amongst whom were those connected with Thom, alias Sir William Courtenay, for Murder, occasioned by the changes made in the Criminal Laws.

LORD DENMAN—“ Gentlemen,—I have, according to my duty, gone through the calendar, and have read the depositions which have been returned to me; and, generally speaking, I think I may state that there is nothing to call from me any remarks to the effect that the state of crime in this county is more unfavourable than that of any other. On the contrary, there are some circumstances which may be observed as shewing a pleasing fact,—namely an absence of malice and wanton cruelty in the offences set forth. There are two cases to which I more particularly feel myself called on to allude, but it is from the depositions alone that I have become acquainted with them, whilst you will have the advantage of having the witnesses before you, and of hearing their testimony; you will therefore be better able to form a more correct opinion. Of these cases one was for an offence revolting to our nature. The other was a case of one person shooting at another. There are also two or three cases under the class burglary. *I ought, perhaps, to mention the recent alterations in the law respecting these cases.* The changes in the law no longer make it necessary for the grand jury to inquire into the precise hour of the night when the offence was committed, inasmuch as the act now lays it down that it is sufficient to constitute burglary if the breaking and entering be committed between the hours of nine at night and six in the morning—the period when the light of the heavens, by the working

of nature, is excluded. These are the general observations which I feel called on to make, but you will, of course, expect some peculiar remarks from me in reference to cases with which you yourselves are acquainted, which appear to have grown out of a series of circumstances as extraordinary on the one hand, as on the other they have been unfortunate in their results, and being too, as they are, without precedent on record. It appears that towards the close of May a large body of men were parading certain districts of this county, under the guidance of an individual of a wild and desperate character, who had obtained an influence of a strange nature over their minds, all armed, some of them with fatal weapons, and others with dangerous instruments, to the peril of the lives of individuals and the disturbance of the public peace; that they continued for some days banded together before any opportunity was afforded to the magistrates to act with a view to arresting their progress, and then that they proceeded threatening acts of violence of the most dangerous description. It appears, then, that the magistrates having been duly informed of their proceedings most properly sent out warrants for the apprehension of the principals in the riot; that when the person who was intrusted with that instrument attempted to take the ringleader into custody, that individual instantly shot him and he died. It seems that after this proceeding, another course which, under the circumstances, was in itself undoubtedly the most humane that could have been adopted, was pursued; a large body of the military were called into requisition—a force which from its number was the best calculated at once to overcome all resistance, and to put an end to the scene which was going on,—which was sent to meet the band of rioters. On the arrival of this force, one of the officers advanced, as he had a right to do, in front of the rest, when the same ringleader shot him through the heart. These cases have undergone investigation before a coroner's jury, and by them declared to be wilful murder, thereby leading to this result, that as many as 16 persons were committed for that offence. Such being the case, it is fit that I should put you in possession of what the law on the subject is. It has been held by all the judges, and is reported by Lord Coke, ‘that if any magistrate or minister of justice, in keeping the peace, according to the duty of his office, be killed, it is murder, for their contempt and disobedience of the king and his laws; and if any justice of peace or constable acting in his office be killed, it is murder for the cause aforesaid, for when the officer requires the breakers of the peace to keep the peace in the king's name, and they notwithstanding disobey the command and kill the officer, reason requires that this killing shall be an offence in the highest degree of any offence of this nature, and that it is voluntary, felonious, and murder of malice prepense.’ Now the same protection which is given to the justice of the peace or to the constable is ex-

tended to any other individual when lawfully interfering with a view to the preservation of the peace, and it is highly and absolutely necessary that the provisions of such an act of parliament in that particular respect should be known to every person, and that by some of those provisions they are bound, when properly and legally called on for that purpose, to assist in the endeavour to keep the peace. I may read to you, for your further satisfaction, a quotation from another book of very great authority in regard to what has been held upon former occasions. That quotation is taken from the book of Mr. Serjeant Hawkins, a book, as I have already said, of great authority, and runs thus—‘ When divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and prosecute it in such a manner as materially tends to raise tumults and frays, and in so doing happen to kill a man, they are all guilty of murder ; for they must at their peril abide the event of their actions who wilfully engage in such bold disturbances of the public peace in open opposition to, and defiance of, the justice of the nation, but in such case the fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled.’ This authority will be found in Hawkins, book 1, c. 13, s. 51 and 52. These principles are as old as the laws of England. The benefits which are manifest from their observance have accrued from the feeling arising out of the principle of self-defence ; and furthermore, neither individual nor state would be for a single moment safe if such principles were not to be held sacred, and being held sacred, then duly regarded. Now, if these principles are applied to the late transactions, it will appear that all these persons were certainly guilty of the crime which the coroner’s jury have returned against them. You will, however, have the best opportunities of judging of the particular part which each of these unfortunate individuals may have taken on the occasion in question, inasmuch as bills against them will be presented before you, and it is not for me, after the careful inquiry which the proceedings underwent, to suppose that the result will not be borne out. It is enough for me to lay down these general principles, and inasmuch as it appears that all the parties accused were present at the time of the illegal assembling, it is sufficient, death happening to have ensued to some of the individuals who were clothed with the proper legal authority, to constitute their crime the highest known to the law ; perhaps in saying that, I am wrong in my expression, because the highest offence known to the law is that of high treason. But this offence, it will be admitted, approaches very near to that which I have just named. If, then, you shall think that all these persons who, under the strange circumstances of which you have heard, being under the control of a wild individual, were perfectly aware of the mischievous intentions by which he was actuated—if you shall think that they were prepared to resist all or any

legal authority which might be sent to arrest their career, and in so doing the death of a man has ensued, they are all guilty of murder, and have all rendered themselves equally liable to the peril of the law. Now, all those who remained together for days after the first act had been committed, when the military were called out, were in a different situation, for they also knew what had been done, and it appears to me that it would be stretching the feeling of charity somewhat too far were we to consider that they were not fully cognisant of the intention to offer resistance to the law of the country. If, therefore, you find that they remained there for the purpose of carrying out their particular object, and that the same act of violence took place as when the constable was shot, it would appear that they, being aware of the former proceeding, were ready to go all lengths in defeating the operation and execution of the law, and consequently were guilty of the crime of murder. It is not necessary for me, probably, to go into the case of each of these 16 persons ; but I think I should not be doing my duty were I to omit to notice that when the military afterwards attacked them, several of their body fell under the bullets and bayonets which were directed against them. In those cases the coroner’s jury sat, and the verdict they returned was ‘justifiable homicide,’ and supposing those facts to have appeared which I have spoken of, and those depositions to be correct, there can be no doubt but that every person who was engaged in the necessary process of stopping the progress of these men would be perfectly justified in taking the course which had unfortunately led to so much loss of life ; quite as much so, indeed, as though the parties who were so killed had been indicted, tried, and convicted of the offence, and afterwards undergone execution. On this subject I will refer to the authority of my Lord Coke, written in the fanciful language of his time, because it has direct reference to the principle in question. He says—‘ And it is true that the life of a man is much favoured in law, but the life of the law itself (which protects all in peace and safety) ought to be more favoured, and the execution of the process of law, and of the office of conservator of the peace, is the soul and life of the law, and the means by which justice and the peace of the realm are kept.’ Now, we must all hope that the consequences which have arisen to these poor deluded men, and the lesson which yet awaits them, will have a salutary effect, and act as a warning and as a prevention to the encouragement of similar proceedings in other parts of this country. It is greatly to be hoped that all persons will feel the danger they are incurring by associating together for the purpose of offering resistance to the laws. It appears to me to be a most extraordinary circumstance, that a large body of persons should have been got together within so short a space of time, and that they should have been able to compel others to join them without any

apparent cause, without any apparent suffering or deprivation, without the slightest ill-feeling against any obnoxious individual, but solely from the harangues of a single person, who did not appear to have been governed by any specific object. Neither were they actuated by a cause which had been represented in other parts of the country to have been the origin of the events out of which these results had sprung, viz., a spirit of discontent, issuing from the existing New Poor Laws. If there really had been that spirit of discontent abroad, and the administration of that law had led to deprivations, it is not easy to imagine that the person by whom they appear to have been infatuated would have missed the opportunity of alleging these facts as a cause for their combination. It is impossible, on reflection, to suppose that he would have abstained from imputing, as had been done elsewhere, to that law—a law which tends so greatly to the alleviation of the distresses, and extends relief so largely to the poorer and more unfortunate classes of society—hardships under which his victims might, by possibility, have been labouring at the time. The only cause for the proceedings which does appear to have existed in an astonishing degree of credulity and ignorance, which it is hardly possible to conceive could have existed to such an extent in any part of this country. Now, I heard it said yesterday in a most admirable sermon preached after my arrival in this place, ‘That the great end of public justice is not to avenge crimes, but to prevent them, by teaching that practical morality founded on religious truth which is necessary both to secure good conduct in this world, and to prepare men for the enjoyment of happiness in the world to come; and if it is the credulity arising from extreme ignorance which has made these unfortunate men the dupes of one, himself not under the guidance of reason, and supposed not to be responsible for his acts, still if they adopt and make those acts their own, they are responsible in law. If that be so, I am sure (and I wish it to become known throughout the country, that the consequences of similar conduct to that charged against these men are those to which I have referred) it is urgently necessary that the country should apply itself to the discovery of some remedy for an evil so great and so alarming. Should it then appear that ignorance has been the cause of these unfortunate men having been so easily led away, I trust that we shall all admit the necessity there is for the most strenuous efforts being made on our parts to secure a better state of things, and thereby lay a foundation for a better observance and obedience of the laws. If the minds of these poor men had been properly directed, or if they had enjoyed a higher degree of intelligence, it would to a considerable extent, if not entirely, have tended to the defeat of the strange delusion under which they appear at the time to have been labouring. If this be proved to be the case—if the mischiefs which have taken place have arisen from the absence of a proper cul-

tivation of the mind, there is no one who will not readily join in effecting the improvement which these events shew to be loudly demanded—an improvement which might materially be effected by inculcating the great truths of religious morality, and teaching them to understand and reason on the occurrences passing around them. In my opinion, too, opportunities may arise of introducing into the pastimes of the people such a spirit of cheerfulness and interest, as may have the effect of laying the foundation for weaning them from the dangerous delusive inclinations they seem to have existing amongst them. The noble and learned lord concluded by strongly urging the magistrates and gentry of the county to exert themselves in the improvement of the minds of their peasantry.’

PREROGATIVE COURT.

HOBBS v. KNIGHT.

This was a question under the New Will Act, 1 Vict. c. 28. The testator, Mr. John Hobbs, died in the present year, leaving a will, dated in 1835, from which (at what time did not appear) he had cut out his signature, intending to make a new will, which intention he had partly carried into effect in February last, the latter instrument, however, being invalid. The question was, whether the cutting out the signature was a revocation of the will under the new statute, which enacts, that “no will or codicil, or any part thereof, shall be revoked otherwise than aforesaid,” that is, by marriage, “or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.” The question was raised on the admission of the allegation.

Dr. Phillimore, in opposition to the allegation, contended that the excision of the signature was a destroying of the will, which became thereby inoperative as a testamentary paper.

Dr. Lushington, on the other hand, argued, that the act of the testator was not one of the modes prescribed by the new statute for the revocation of a will. Under the old law devises of lands could be revoked by burning, cancelling, tearing, or obliterating the same. The statute of Victoria prescribed “burning and tearing,” omitted “canceling and obliterating,” and inserted “otherwise destroying.” This act must be construed strictly, and as the Legislature had omitted the words “canceling and obliterating,” it must be taken to have been advisedly so done. If the testator had struck his pen through the whole will, nay, if he had said “I revoke this will,” that would be no revocation under the statute. It might be a demonstration of his intention to revoke, but not an execution of that inten-

tion under the statute, which prescribed specific forms by which alone a will once valid could be revoked. The tearing of a will, under the exposition given of the Statute of Frauds, must be such a degree of tearing as evinced intention to revoke. Cutting out was not tearing at all.

The COURT.—Where is the distinction? Would not cutting to the same extent as tearing suffice? Would not separation by an instrument be of the same effect as separation by hand?

Dr. Lushington.—I am inclined to think that under the statute they are totally different acts.

The COURT.—I should be inclined to hold that what would be a good revocation if done by the hand would be equally good if done by knife or scissors, otherwise it would lead to absurd consequences.

Dr. Lushington.—Then, what was meant by destruction? It must mean torn in pieces or thrown in the fire.

The COURT.—The signature at the bottom of a will is absolutely necessary to the existence of the will; if what is essential to the existence of the will is destroyed, is not that a destruction of the will? Suppose a will is torn through?

Dr. Lushington.—That would be a sufficient revocation.

The COURT.—Suppose it was cut through?

Dr. Lushington.—That would be a demonstration of intention to revoke, but not a cancellation under the statute.

Dr. Phillimore, in reply, said the legislature had omitted the word "cancelling" by reason of its vagueness. But though it had excluded the words "cancelling and obliterating," it had substituted more precise and comprehensive words, "otherwise destroying." Could it be said that if a testator cut his name out of his will, he did not destroy it?

Sir H. JENNER said he would consider the question.

In the Goods of CORNELIUS REGAN.

This was a question under the New Will Act. The testator died in March last, having made a will the day preceding his death, bequeathing all his property to his wife. This will was executed in the presence of, and attested by, one witness, but afterwards the deceased acknowledged his signature in the presence of three witnesses, who attested the same. The question was, whether this was a good execution under the 9th section of the act.

The COURT was clearly of opinion that it was a good execution.

In the Goods of G. M. BLIGH, Spinster.

This was likewise a question under the late act. The deceased died in April last, having in January made a will with her own hand, signing the same, but not in presence of witnesses. Afterwards, on the same day, she acknowledged the signature in the presence of two witnesses, but at separate times, and apart from each other.

The COURT was of opinion that the deceased had not complied with the provisions of the act, which required that the signature "shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time."

INSOLVENT DEBTORS' COURT,

Applications from insolvents to be admitted to bail until the days of hearing their cases were made to the court.

The Chief Commissioner REYNOLDS took the occasion of stating, that the court was anxious to carry the provisions of the act on the question of bail, as far as they could, into effect, consistently with the powers with which the legislature had vested them. Under the 38th section of the act it was provided, that after confinement the court could admit parties to bail. The section also provided, "that after any order shall have been made directing any insolvent to be brought up to be dealt with according to the provisions of this act, it shall be lawful for the said court for the relief of insolvent debtors, on such notice to the detaining creditor or creditors of such insolvent as the said court shall deem proper, to direct such insolvent to be discharged out of custody on his finding two sufficient sureties to enter into a recognizance to the provisional assignee of the said court, in such sum as the said court shall think fit, with a condition that such insolvent shall appear at the time and place fixed for the hearing of such insolvent, and on every adjourned hearing, and shall abide the final judgment of the said court, or a commissioner thereof on his circuit, or such justices as hereinafter mentioned, and on such other terms as the said court shall think fit to impose; and to issue a warrant ordering the discharge of such insolvent, who shall be free from arrest or imprisonment by any creditor whose debt shall be specified in the schedule filed by such insolvent as hereinafter mentioned, until the time appointed for the hearing of such insolvent, and for such further time as the said court shall by indorsement on such order from time to time appoint; and provided that in case any insolvent so discharged out of custody shall not appear at the time and place appointed for the hearing, or adjourned hearing, of such insolvent, (not being prevented by illness, or other lawful impediment to be allowed of by the said court,) the recognizance so entered into shall be forfeited, and the amount secured thereby shall be recoverable in a summary way, by a distress and sale of the goods and chattels of such sureties as the said court shall direct, and the amount so recovered shall be applied for the benefit of the creditors of such insolvent in like manner as if the same were part of his estate and effects; and the said court may also issue a warrant authorizing a specified person or persons to arrest such insolvent and deliver him into the custody of the gaoler or keeper in whose custody such prisoner was at the time when he was so discharged as aforesaid;

and all detainers which were in force against him at the time of such discharge or which shall have since been duly lodged against him, shall thereupon be deemed to be in force ; and that any insolvent so discharged out of custody as aforesaid, shall, on his appearing before the said court, or commissioner, or justices, be considered for all the purposes of this act, in the custody in which he was at the time he was so discharged." Now, a material question arose in respect to persons confined in country prisons. The court had, after mature consideration, arrived at the conclusion that they could not discharge any person on bail under the act unless the sureties presented themselves here in court. The commissioners had no power to depute any one to take bail in the country, and it would be seen in Tidd's *Practice* that the power of the superior courts on the subject of bail in country cases was specially provided for. The commissioners had anxiously looked through the act to see if they were empowered to dispense with the attendance of the proposed sureties, but they could find nothing so empowering them there. It was clear the sureties must attend the court in London in person. The court would moreover, in taking bail, consult the interests of all the creditors in the schedule, and fix the amount of the bail from an examination of it. They would not be doing justice to creditors if they did not, in fixing the amount of the bail required, vigilantly attend to the interests of the whole body of them. With respect to the question whether the court would receive objections to bail on a *viva voce* examination of witnesses or on affidavits, he would say that the majority of the commissioners were of opinion that the power of *viva voce* examination should be reserved.

Mr. Commissioner HARRIS remarked that, with respect to the amount of bail, the least the court could do would be to require the amount to be double the amount of the detainers lodged against the party applying at the time of his application.

The CHIEF-COMMISSIONER said the court would require the sureties to be possessed of the amount fixed in goods and chattels. They would not be satisfied with parties possessing property only in money or landed estate.

Two cases of bail, Samuel Richardson and George Patteson, were then investigated, and the sureties allowed.

In Re SAMUEL RICHARDSON.

The insolvent had on a former day been directed to be liberated till his day of hearing on filing bail. On the day on which the bail had been allowed, and before his actually leaving prison, but whilst waiting for the order of the court, a fresh detainer had been lodged, which rendered the order of the court of no effect.

Mr. Cooke now applied for the order to be amended, and the said detainer to be inserted, and complained of the hardship which would arise to applicants for liberation on bail, if they were rendered liable to fresh incarceration in cases like this, in which it was not in

their power to see what detainers awaited them pending the actual hearing of their applications in the court.

The COURT said they had no power to grant the application. The applicant must again give notice of bail, and again come up before them.

In Re WILLIAM LAWSON.

In this case, the court observed that it was important that the sheriff's-office should be searched on all applications for liberation on bail, in order to see if any further detainers were lodged against the applicants. In a case which occurred at the last sitting of the court an insolvent had been liberated on bail, but on his return to the prison it was discovered that a fresh detainer had been lodged against him, and the consequence was, that the order of the court for his liberation was perfectly nugatory.

COURT OF BANKRUPTCY.

THE SWEARING OF AFFIDAVITS IN BANKRUPTCY UNDER THE NEW ACT RELATING TO THE RE- LIEF OF INSOLVENT DEBTORS.

A solicitor appeared before the Court to swear an affidavit of debt under the 8th clause of the new act.

On the solicitor presenting the affidavit,

Mr. Commissioner MERIVALE said, now, as to the swearing of the affidavits under the new act, he had only to state that he entertained very great doubts whether he had jurisdiction to take those affidavits at all.

The Solicitor.—I know your Honour has expressed that opinion, and I have seen the observations you made yesterday respecting the clause, as reported in the daily journals.

Mr. Commissioner MERIVALE, in continuation, further remarked, that as far as a newspaper report went, it was nothing ; but what he had to say was, that the Commissioners were only empowered by act of Parliament to swear on oath affidavits in matters of bankruptcy : this was where the doubt arose, for these affidavits could not be termed matters in bankruptcy, as no bankrupt was yet declared. He knew that the Masters in Chancery took affidavits under the Lord Chancellor, and also in matters in bankruptcy ; but with respect to the present affidavits, they were in the same situation as the Commissioners. He had spoken to one of the Masters in Chancery on the question, and that party entertained the same doubts on the clause as himself. There could be no objection to receive them ; but it was difficult to say what would be the effect of them. If the applicant chose to swear in the affidavit after what he had said, it should be put on the file, but what could be done hereafter was another thing.

The Solicitor said he would take the chance of it.

Mr. Commissioner MERIVALE then observed —I wish to add, in the event of what I have said appearing before the public, that I am sincerely sorry these doubts should arise, because I believe the clause, as intended, would

have been of great public benefit, had it been so framed as to come into full operation. I express my doubts with very great reluctance, and am truly sorry it is so.

LEGISLATIVE CHANGES.

1 & 2 VICT. c. 85.

AN ACT TO AUTHORIZE THE USING IN ANY PART OF THE UNITED KINGDOM STAMPS DENOTING DUTIES PAYABLE IN GREAT BRITAIN AND IRELAND RESPECTIVELY. [10TH AUGUST, 1838.]

Stamps denoting duties Payable in one Part of the United Kingdom may be Used for Instruments liable to Stamp Duties Payable in any other Part. Proviso.— Whereas under and by virtue of the laws in force separate and distinct stamps are used for denoting the stamp duties payable in Great Britain and Ireland respectively, and it is expedient to permit stamps denoting the duties payable on deeds or instruments in either of the said parts of the United Kingdom of Great Britain and Ireland, to be used for deeds or instruments liable to stamp duties payable in the other part of the said United Kingdom: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act any deed or instrument liable to any stamp duty payable in either part of the said United Kingdom, and for or upon which any stamp or stamps denoting a stamp duty or stamp duties payable in the other part of the United Kingdom shall have been at any time heretofore or shall be at any time hereafter used, of equal or greater amount with or than the duty or duties chargeable by law upon or in respect of such deed or instrument, shall nevertheless be deemed valid and effectual in the law: Provided always, that nothing herein contained shall extend to authorize the using of any stamp denoting any of the Law, Chancery, or Exchequer fund duties in Ireland for any instrument other than such as is or shall be liable to the duty denoted by such stamp, nor to authorize the using for any instrument liable to any of the said last-mentioned duties any stamp other than such as is or may be

provided and appropriated for denoting the duty to which such last-mentioned instrument is or may be liable, nor to authorize the using for any instrument any stamp specially appropriated to any other instrument, by having its name on the face thereof.

Imprisonment for Debt.—It is worthy of remark that, under the New Rules of the Insolvent Debtors' Court, an attorney can be retained out of prison, the petition and schedule preparing for filing, and the other documents obtained. The brokers are authorized to value the excepted property (to the amount of 20*l.*) of persons who are *about to be* taken in execution. And if the party do not petition within fourteen days after such valuation, then another valuation to be made at half the charge. Thus, on being taken to prison, the several documents, including the appraisement, being obtained, the petitioner's schedule can be filed, and the order consequent on the filing is issued, and he can in a few days afterwards obtain his liberty on bail, and remain out of custody until the adjudication upon his case. By this process an applicant sustains but a very brief confinement.—*Monthly Law Magazine, November.*

There were only four Bankruptcies announced in Tuesday Night's Gazette, and none of them in the metropolis. This is the second Gazette which has appeared in succession without a London Bankruptcy.

Appointments.—Dr. Lushington, on the 18th October, was sworn into office and took his seat as Judge of the High Court of Admiralty, vacant by the death of Sir J. Nicholl. The salary is 2,500*l.* per annum. Anthony Olyphant, esq., to the Chief Justiceship of the Island of Ceylon.

TO CORRESPONDENTS.

The great space in our columns that the Court Business occupies, prevents the completing our own arrangements in this Number. We will attend to the communications in our next as far as we may have room at this busy season. We must, however, at starting, inform our friends that this Periodical being devoted to *actual practice*, only practical communications can be attended to.

A LIST OF ARTICLED CLERKS APPLYING TO BE ADMITTED AS ATTORNEYS IN THE COURT OF QUEEN'S BENCH, HILARY TERM, 1839.

Clerk's Name and Residence.

Acland, Lawford, 8, Clement's-inn - - - - -
Aylng, Charles, 48, Great Maze Pond; and Liss - - - - -

Atkinson, Josias, Skipton - - - - -

Axford, Frederick Pain, 13, New North-street,
Gloucester-street; and Great Ormond-street

Barker, Samuel, 162, Aldersgate-street; and Man-
chester

Brooke, Cooper Charles, 27, New-street, Dorset-
square; and Upper Montagu-street

Brown, Thomas Stephen, Folkestone; 25, Friday-
street; and 15, Little Carter-lane

To whom articled, assigned, &c., and Residence.

Edward Young, White Lion-court, Cornhill.
Edward Tribe, Great Russell-street; assigned to

John Pontifex, St. Andrew's-court.

Samuel James Blacklow, Frith-street, Soho; as-
signed to Henry Alcock, Skipton.

George Henning Pain, Bridgewater; assigned to
William Brissault Minet, Lawrence Pountney-

place.

John Hampson, Manchester.

John Ambrose, Manningtree.

John Gibbs, Rochester.

List of Articlecl Clerks applying to be admitted as Attorneys

<i>Clerk's Name and Residence.</i>	<i>To whom articled, assigned, &c., and Residence.</i>
Barber, Samuel, Heaton Norris; and Macclesfield Broadbent, Charles Edward, 11, Penton-place; and Sheffield	Henry Coppock, Stockport. John Ryalls, Sheffield.
Box, Frederick, Abingdon; and Harrison-street Buchanan, William Ralph, 4, Montagu-place, Old Kent-road	George Ansell, Keswick. Hugh Lewis, Artillery-place, West.
Boucher, Anthony, 2, New Boswell-court; and Great Duffield	Edmund Dade Conyers, Great Duffield.
Bradley, John, 23, Liverpool-street; Kirkby Lonsdale; and Great Coram-street	Robert Bradley, Kirkby Lonsdale.
Barratt, Robert, Wakefield	Dennis Barker, Wakefield.
Bunting, Jabez, the younger, 30, Middleton-square; and Manchester	Thomas Percival Dunting, Manchester.
Bayley, Thomas Heathcote, 2 Boswell-court; and Ampthill	Ezra and John Eagles, Ampthill.
Blake, William Wood, Castle Northwich	Thomas Ives, Brayne Hostage, Castle Northwich.
Barker, Charles Frederic, Northwich	John Barker, Northwich.
Bluck, Edward, Manchester	Robert Rodgers, Liverpool; assigned to John Morris, Manchester.
Baker, John, the younger, 61, Gower-street	John Baker, Aldwick; assigned to John Bethune Bayly, Devizes; assigned to Charles Meredith, Lincoln's-inn.
Bush, Henry, Beach; and Bristol	John Rooke, Hoyte, Bristol.
Brooksbank, James, the younger, 37, Nelson-square; and East-street	John Ward, Durham; assigned to Charles Bischoff, Cophall-court.
Bardouleau, Stephen René, Andover	Henry Earle, Andover.
Campion, Francis, Doncaster	Frederick Fis'ler, Doncaster.
Chinery, John, 5, Serjeant's-inn, Fleet-street	Richard Almack, Long Melford; assigned to Wm. Sandys, Serjeant's-inn.
Caton, George, Ventnor, Isle of Wight; Bayham-terrace; and Addington-place	Thomas Rawsthorne, Lancaster; assigned to Wm. Rymer, Darlington.
Curtis, Thomas Acres, Carpenters' Hall	Richard Webb Jupp, Carpenter's Hall.
Crowdy, Henry Crowdy, 6, Goulden-terrace; and Highworth	William Crowdy, Highworth; assigned to Thomas White, 11, Bedford-row.
Cotton, John Lucas, 1, Frederick-street; Wharton-street; and Clarence-terrace	James Dixon, Preston; assigned to Robert Bayley Follett, Bedford-row.
Davidson, James Christopher, 46, Drummond-street; and Stockton	William Crawford Newby, Stockton.
Elderton, Henry M., Norfolk-street, Strand	Edward M. Elderton, Queen-square.
Elton, John William, Redland, near Bristol; 3, Newman's-row, Gerrard-street; and Featherstone-buildings	Henry Andrewes Palmer, Bristol.
Evans, Wm. Jones, 18, Henrietta-street, Brunswick-square; and Haverfordwest	Thomas Evans, Haverfordwest; assigned to Jonathan Rogers Powell, Haverfordwest.
Engleheart, William Hayley, Blackheath	Charles Jenings, Elm-court, Temple.
Evans, James, Chepstow	Robert Evans, Chepstow.
Edwards, Francis, 67, Berners-street; Brislington; and Sussex-street	Thomas Edwards, Bristol.
Fryer, Kedgwin Hoskins, 21, Portugal-street; Coleford; and Oxford-street	Henry Hooper Fryer, Coleford.
Fox, George Frederick, 67, Berners-street; and Cadogan-place	Brooke Smith, Bristol; assigned to William Stevens, Frederick's-place.
Fawcett, John William, Hampstead; and Sedbergh	Ottewill Tomlin, Richmond; assigned to Thomas Fawcett, Sedbergh, and Richard Addison, Mecklenburgh-square.
Faithfull, Henry, 5, King's-road	Henry Faithfull, Brighton; assigned to Edward Chamberlain Faithfull, 5, King's-road.
Fenwick, Henry, Red-barns, near Newcastle-upon-Tyne	Mark Lambert Jobling, Newcastle.
Gibbon, William Henley, Olney	John Iliffe and John Garrard, Olney.
Gedye, Nicholas, 26, Doddington-grove, Surrey	William Rosher, Stamford-street.
Garfit, Thomas, 14, Milman-street; and Horbling	Benjamin Smith and Benjamin Wilkinson, Horbling.
Griffith, Edward Clavey, 3, Raymond-buildings	William Whitter, Worthing; assigned to James Hodgson, Raymond-buildings.
Gwynne, Sampson, 3, Grosvenor-terrace, Camberwell	Samuel Gwynne, Barton-street, Westminster; assigned to John Wright, 6, Hart-street.
Griffiths, Frederick Thomas, 25, Southampton-street, Strand; and Cheltenham	Edward Pruen, Cheltenham.
Hawkes, Robert Shafto, Rotherhithe-street; and Hertford	Edward Robert Spence, Hertford.
Hill, Henry Reginald, 101, Chancery-lane	Richard Hill, 101, Chancery-lane.
Hick, Henry, Richmond	Gabriel John Fielding, Richmond.
Hearle, Thomas Robert, 6, Southampton-buildings; and Falmouth	Pender, Genn, and Genn, Falmouth.

<i>Clerk's Name and Residence.</i>	<i>To whom articled, assigned, &c., and Residence.</i>
Humphreys, John, Upper Clapton	James Smith, Coopers' Hall.
Hunter, John, 6, Frederick's-place; and Newcastle-upon-Tyne	John Anderson Pybus, Newcastle.
Hodge, George William, 19, Adam-street, Adelphi; and Newcastle-upon-Tyne	George William Cram, Newcastle.
Hartcup, William, 49, Woburn-place; and Bungay	James Taylor Margetson, Bungay.
Hallett, Henry Hughes, 13, Clement's-inn	Thomas Charles Bellingham, Battle.
Hawkins, Henry Edward, Newport	Francis M'Donnell, Usk.
Hallen, William George, 5, River-street, Myddleton-square; and Kidderminster	Thomas Hallen, Kidderminster.
Holdsworth, Charles Hunt, 40, Finsbury-circus; and 4, Inner Temple-lane	Samuel Were Prideaux, Dartmouth; assigned to John Elliot Fox, Finsbury-circus.
Jones, John Griffith, Beaumaris; Liverpool; Thanet-place; and Hyde-street	Robert Grace, Liverpool.
[Articled by the name of John Jones]	
Jones, John, Liverpool	William Jones, Liverpool.
Kendall, James, Northallerton	John Sanders Walton, Northallerton.
Low, Archibald M'Arthur, 4, Manchester-street; and Portsea	Archibald Low, Portsea.
Leigh, Henry, 84, Dorset-street; New-wharf; and Blackburn	Robert Dewhurst and Richard Wilding, Blackburn.
Lloyd, George John, Hampstead	Henry Liing, Bloomsbury-square.
Leigh, Frederick, 10, Chapel-place, Cavendish-square; and Winchester	Charles Woolridge, senior, and Charles Woolridge, junior, Winchester.
Lindsell, William, Biggleswade; and Hemel Hempstead	Philip Richard Falkner, Newark-upon-Trent; assigned to William Smith, Hemel Hempstead.
Loveday, Richard, Warwick	William Griffin, Warwick.
Marshall, William John Frederick, Kettering	Thomas Marshall, Kettering.
Mason, Henry Baxter Branwhite, 16, New Ormond-street; and Downham-market	Frederic Brown Bell, Downham-market.
Markham, Henry Philip, Northampton	Charles Markham, Northampton.
Mends, Matthew Thomas, 2 Bennett-street, Stamford-street; and Exeter	John Geare, Exeter; assigned to George William Finch, Lincoln's-Inn-Fields.
Norman, James Ormond, 6, Frederick's-place, Old Jewry	Thomas Swain, 6, Frederick's-place.
Oakley, Thomas William, Lydgate-house, near Monmouth	James Powles, Monmouth.
Overend, Thomas, Kirkburton, York	Robert Overend, York and Manchester.
Ormerod, Henry Mere, 28, Southampton-row; Manchester; and 19, Featherstone-buildings	Joseph Denison, Manchester, Lancaster; assigned to George Wareing Ormerod, Manchester.
Powell, Henry, Northampton	Robert Hewitt, Northampton.
Palmer, Charles James, 6, Bedford-street; and Bristol	John Blake, Norwich.
Pearce, Frederick, Hoo, Kent; 10, Chapel-street, Bedford-row; and Chatham	James Pearce, Chatham, Kent.
Prichard, Charles Edward, 9, Wells-street; Bewdley, Worcester; and Sidmouth-street	John Bury, Bewdley, Worcester.
Plomer, Christopher Richard Norris, Hoddesdon, Hertford.	Christopher Edward Dampier, late of Raymond-buildings, now of Ware.
Pickover, John Gilbert, 5, New-square, Lincoln's-inn; 10, Soley-terrace, Pentonville; Helston, Cornwall; and 5, Serjeant's-inn	James Plomer, Helston.
Peter, Richard, Wimborne Minster, Dorset	Benjamin Hart Lyne, Liskeard, Cornwall; assigned to William Castleman, Wimborne Minster.
Pickup, Mark, Manchester; Pontefract, York; 63, Beresford-street, Surrey; Darlington, York	John Ramskill, Pontefract.
Pickering, George Smith, Clapham, Surrey	Edward Rowland Pickering, Lincoln's-inn.
Parteson, Edward John, 7, Bedford-street; and Doughty-street	Philip Matthew Chitty, Shaftesbury; assigned to Septimus Burton and George Fraser, Lincoln's-inn.
Robinson, William Cooper, Kingston-upon-Hull	James Robinson, Kingston-upon-Hull.
Rogerson, John, 9, Camden-terrace, Camden-town, Middlesex	Samuel Raynes, 24, Norfolk-street, Strand.
Ravenhill, James Holmes, City of Bristol	John Rocke Hoyte, City of Bristol.
Roscoe, Thomas, 2 Southampton-row; 3, Leicester-place; 51, Torrington-square; 5, Middleton-square; 14, Millman-street	James Roscoe, Knutsford, assigned to John Cole, 4, Adelphi-terrace, Middlesex.
Rouse, James Alexander, 67, Lamb's Conduit-street; and Great Torrington, Devon	William Hart Rouse, Great Torrington, Devon.
Square, John Henry, 20, Great James-street; and Kingsbridge, Devon	John Square, Kingsbridge, Devon.
Simpson, Thomas, Forebridge, Stafford	David Thomas, Forebridge, Stafford.
Skingley, George Deeks, 27, New-street; and 12, Milton-street	John Ambrose, Manningtree, Essex.

<i>Clerks Name and Residence.</i>	<i>To whom articled, assigned, &c., and Residence.</i>
Sladen, St. Barbe, 32, Ebury-street, Pimlico, Middlesex	Evan Morris, Harcourt-buildings, Temple.
Smith, Thomas, 17, Henrietta-street, Middlesex; and Wrington, Lancaster	Joseph Fisher Cleave, Somerset.
Simpson Thomas Brodrick, 41, Marchmont-street; and Whithy	James Walker, Whitby, York.
Sewell, Edward, Halsted, Essex; and Lower Clapton	Decimus Sewell, Halsted, Essex.
Swann, Edward Bonson, Gloucester	John Chadborn, Gloucester.
Tyssen, Henry, 27, Graham-street, Pimlico; High Holborn; Huntingdon; and 24, Stockbridge-terrace	Henry Sweeting, Huntingdon.
Tourle, John Joseph, 7, Warnford-court; and Maidstone, Kent	William Beale, Maidstone, Kent; assigned to Henry Head, 16, Austin-friars, London.
Truscott, George Frederick, 1, Judd-street; and Exeter	Charles Henry Turner, city of Exeter.
Taylor, Edward Moore, 9, Camden-street, Middlesex; and Birmingham	Roger Williams Gem, Birmingham.
Turnbull, John, Durham	John Burrell, Durham.
Tippett, Thomas, Dursley, Gloucester	Edward Bloxsome, the elder, Dursley.
Underhay, John, Brixham, Devon; 13, Warwick-court, and 24, East-street, Lamb's Conduit-street	James Pitts, the younger, Exeter.
Wetwand, William Henry, Kingston-upon-Hull	John Thorney, Kingston-upon-Hull.
Waters, Thomas, 47, Lower Stamford-street; and Salisbury	James Cobb, Salisbury.
White, John Richard, 27, Henry-street, Middlesex	Moulton Messiter, late of Sandwich; assigned to William Dyke Whitmarsh, City of New Sarum, Wilts.
Wilson, Thomas Luxmore, 6, York-place	Robert Samuel Palmer, 4, Trafalgar-square.
Witham, Francis, 49, Eaton-square, Pimlico	William Witham, 8, Gray's-inn-square.
Warren, Henry, 5, Wellington-street; and Canterbury	John Buckton, City of Canterbury.
Wilmshurst, John, the younger, Warwick	James Tibbets, Warwick.
Wainhouse, Robert, Leeds	Edwin Smith, Leeds.
Young, George, 41, Bedford-row; and 13, Red Lion-street	William Myers, Darlington, Durham; assigned to Ralph Park Philipson, Newcastle-upon-Tyne; assigned to George Walford Armstrong, 13, Red Lion-street; assigned to Robert Jackson, 41, Bedford-row.
Young, Samuel, David, Thetford, Norfolk	John Cambridge, Bury St. Edmunds; assigned to William Ransom, Stowmarket, Suffolk; assigned to Henry Rogers, Thetford, Norfolk.

Business in the Courts.**COURT OF CHANCERY.***Michaelmas Term, 1838.*

Friday, Nov. 2	Appeal Motions and Appeals.
Saturday.. 3	Petition Day.—Petitions and Appeals.
Monday .. 5	
Tuesday .. 6	Appeals.
Wednesday 7	
Thursday .. 8	Appeal Motions and Ditto.
Friday.... 9	
Saturday.. 10	Appeals and Causes.
Monday .. 12	
Tuesday .. 13	Appeals and Causes.
Wednesday 14	
Thursday.. 15	Appeal Motions and Ditto.
Friday .. 16	
Saturday.. 17	
Monday .. 19	Appeals and Causes.
Tuesday.. 20	
Wednesday 21	
Thursday.. 22	Appeal Motions and Ditto.
Friday ... 23	
Saturday.. 24	Appeals and Causes.
Monday.. 26	Appeal Motions and Ditto.

VICE-CHANCELLOR'S COURT.

Friday, Nov. 2	Motions.
Saturday.. 3	Petition Day.
Monday .. 5	
Tuesday .. 6	Pleas, Demurrs, Exceptions, Causes, and Further Directions.
Wednesday 7	
Thursday.. 8	Motions.
Friday ... 9	Short Causes, Unopposed Petitions, Pleas, Demurrs, Exceptions, Causes, and Further Directions.
Saturday.. 10	
Monday.. 12	Pleas, Demurrs, Exceptions, Causes, and Further Directions.
Tuesday.. 13	
Wednesday 14	
Thursday.. 15	Motions.
Friday ... 16	Short Causes, Unopposed Petitions, Pleas, Demurrs, Exceptions, Causes, and Further Directions.
Saturday.. 17	
Monday.. 19	Pleas, Demurrs, Exceptions, Causes, and Further Directions.
Tuesday.. 20	
Wednesday 21	
Thursday.. 22	Motions.
Friday.... 23	Short Causes, Unopposed Petitions, previous to General Paper.
Saturday.. 24	Pleas, Demurrs, Exceptions, Causes, and Further Directions.
Monday.. 26	Motions.

ROLLS COURT.

Friday, Nov. 2	Motions.
Saturday .. 3	Petitions in General Paper.
Monday .. 5	
Tuesday .. 6	Pleas, Demurrs, Causes, Further Directions, and Exceptions.
Wednesday 7	
Thursday.. 8	Motions.
Friday 9	
Saturday .. 10	Pleas, Demurrs, Causes, Further Directions, and Exceptions.
Monday .. 12	
Tuesday .. 13	
Wednesday 14	
Thursday.. 15	Motions.
Friday 16	
Saturday .. 17	Pleas, Demurrs, Causes, Further Directions, and Exceptions.
Monday .. 19	
Tuesday .. 20	Pleas, Demurrs, Causes, Further Directions, and Exceptions.
Wednesday 21	
Thursday.. 22	Motions.
Friday 23	Pleas, Demurrs, Causes, Further Directions, and Exceptions.
Saturday .. 24	Petitions in General Paper.
Monday .. 26	Motions.

At the Rolls.

Tuesday.. 27	Short Causes after swearing in the Solicitors.
Short and Consent Causes, and Consent Petitions, every Tuesday, at the Sitting of the Court.	

SITTINGS.
QUEEN'S BENCH.

Before LORD DENMAN, Chief Justice,
Michaelmas Term, 1838.

In Term.

MIDDLESEX.	LONDON.
Saturday Nov. 3	
Wednesday 7	
Friday 23	Saturday ... Nov. 24

After Term.

Tuesday Nov. 27 | Wednesday ... Nov. 28
 The court will sit at eleven o'clock in term in Middlesex, at twelve in London, and in both at half-past nine after term. Long causes will probably be postponed from the 3rd and 7th November to the 27th; and all other causes on the lists for the 3rd and 7th November, will be taken from day to day until they are tried. Undefended causes only will be taken on 23rd November. Defended as well as undefended causes entered for the sitting on 24th November, will be tried on that day, if the plaintiffs wish it, unless there be a satisfactory affidavit of merit.

COMMON PLEAS.

Before Lord Chief Justice TINDAL.

In Term.

MIDDLESEX.	LONDON.
Saturday..... Nov. 10	Wednesday... Nov. 14
Saturday..... 17	Wednesday..... 21

After Term.

Tuesday.....Nov. 27 | Wednesday.... Nov. 28
 The court will sit at ten o'clock in the forenoon on each of the days in term, and at half-past nine precisely on each of the days after term. The causes in the list for each of the above sitting days in term, if not disposed of on those days, will be tried by ad-

junction on the days following each of such sitting days. On Wednesday, the 28th November, no causes will be tried, but the court will adjourn to a future day.

EXCHEQUER.

SITTINGS IN MICHAELMAS TERM, 1838.

	Banc.	Nisi Prius.
Friday Nov. 2		B. Bolland.
Satur. .. 3		
Monday .. 5		
Tuesday .. 6		Midx. 1st sit.
Wedn. .. 7	Special paper	Ditto by adj.
Thurs. .. 8		Ldn. 1st sit.
Friday .. 9	Lord Mayor sworn, & Errors	
Saturday .. 10	Crown cases	
Monday .. 12	Spec. paper, & sheriffs chosen	
Tuesday .. 13	Errors	
Wedn. .. 14	Special paper	
Thurs. .. 15		
Friday .. 16		
Saturday .. 17		Midx. 2d sit.
Monday .. 19	Special paper	Ditto by adj.
Tuesday .. 20		
Wedn. .. 21	Special paper	Ldn. 2d sit.
Thurs. .. 22		Ditto by adj.
Friday .. 23		
Satur. .. 24		
Monday .. 26		

After Term.

Tuesday Nov. 27 | Wedn. (to adj.) Nov. 28.

SPECIAL PAPER.

REMANETS FROM TRINITY TERM, 1838.

STANDING FOR JUDGMENT.

Rivus v. Watson, demurrer.

Heard 17th January.

FOR ARGUMENT.

Alderman v. Neale and others—Special case.

Corral and Wife v. Cattle—Do.

Thickness v. The Lancaster Canal Company—Do.

Tobin v. Crawford—Do.

NEW TRIAL PAPER.

For Michaelmas Term, 1838.

STANDING FOR JUDGMENT.

Moved Easter Term, 1837.

Middlesex. East v. Hall.

FOR ARGUMENT.

Moved Easter Term, 1838.

Salisbury. Doe dem. Simon, Jno. Hiscocks Hiscocks.

Liverpool. Orrell v. Greenough.

Flintshire. Griffith v. Williams.

Moved after the 4th Day of Easter Term.

London. Horsey v. Hanks.

Moved Trinity Term, 1838.

London. Chanter v. Johnson.

Do. Chanter v. Hopkins.

RULES ENLARGED,

From Trinity to Michaelmas Term, 1838.

Rules Nisi moved.

May 10.—Browning, Esq., v. Jones, a prisoner ; to discharge defendant out of custody. Counsel, Mr. Kelly.

- June 7.—Colman v. Cann and others; to enter verdict for the plaintiff on all the issues on the record, according to the finding of the arbitrator. *Counsel*, Mr. Kelly.
- June 7.—Colman v. Foster and another; to enter verdict for the plaintiff pursuant to award. *Counsel*, Mr. Kelly.
- June 2.—Jones v. Rowland; to set aside or award. *Counsel*, Mr. R. V. Richards.
- June 6.—Clutterbuk v. Thornbury; for defendant to deliver up papers to plaintiff's now attorney. *Counsel*, Mr. Humfrey.
- June 2.—Anderson and another v. Fuller; to set aside award, unless parties will consent to refer the cause back to the same arbitrator. *Counsel*, Mr. Godson.

QUEEN'S BENCH.

Michaelmas Term, 1838.

SPECIAL PAPER.

TRINITY TERM, 1838.

- Archbishop of York and others v. Trafford and others—Special case
- Groom and others, assignees, v. West—Dem. A
- Doe d. Powell, and others, v. Cowdale—Special case
- Halliday v. Best—Special case
- Emanuel and others v. Rawlings—Dem. A
- Doe d. Bligh, esq. v. Brent, esq.—Special case
- Sewell, pub. officer, v. Barnett—Dem. A
- Hextall v. Kidger, in repla.—Dem. A
- Doe d. Taylor and another v. Crisp—Special case
- Fieldmann v. Hollingworth—Dem. A
- Doe d. Player and others v. Evans and others—Special case
- Wheeler v. Haynes—Dem. A
- Hill v. Same—Dem. A
- Bingley v. Durham—Dem. A
- Mattock, executors, v. Kinglake—Dem. A
- Fen v. Backhouse—Dem. A
- Doe d. Dolley v. Ward and others—Special case
- Tyler v. Braddon—Dem. A
- Tucker v. Udall, esq.—Dem. A
- Thomas v. Wigley—Dem. A
- Burroughs v. Hodgson—Dem. A
- Pack qui tam v. Tarpley—Special case
- Doe d. Kirkmann v. Howell and others—Special case
- Bond v. Dunks—Dem. A
- Richards v. James—Dem. A
- Luch v. Beckley—Dem. A
- Sirrell v. Edge—Dem. A
- Rhodes and another v. Charles—Dem. A
- Pickford v. Alvarez—Dem. A
- Strother v. Randerson—Dem. A
- Johnson v. Jones and another—Dem. A
- Allason and others, trustees, &c. v. Stark, trustee, &c.—Special case
- Lord Howden v. Simpson, Knight, and others—Dem. A
- Hogard v. Spencer—Dem. A
- Neile v. W. Postlethwaite—Dem. A
- Same v. J. Postlethwaite—Dem. A
- Iale and another v. Thompson and another, in repla.—Dem. A
- Heywood v. Collinge—Dem. A
- Trinquant Jacques Triston v. Guy county Cale D'Hombre—Dem. A
- Bartrum, pub. officer, v. Caddy—Dem. A
- Melton v. Warrant—Dem. A
- Same v. Pound—Dem. A
- Dangerfield v. Thomas Clerk—Dem. A
- Horridge v. Wilson—Special case
- Hall and others, assignees, v. Lear—Dem. A
- Wodmore, a pauper, v. Nicholas—Dem. A
- Drane v. Elmar—Dem. A
- Hitchcock v. Hallett—Dem. A
- Burghart v. Duncomb, esq.—Dem. A
- Colman v. Bedford—Dem. A
- In the case of Palmer and the Hungerford Market Company—Award
- Gomperts v. Levy—Dem. A
- Pitcher v. King, esq.—Dem. A
- Proctor v. Spradbury—Dem. A
- Davis v. Holding—Dem. A
- Doe d. Richardson, clerk, v. Thomas and another—Special case
- Talbot v. Brown—Dem. A
- Batson and others v. Spearman—Dem. A
- Stockdale, a pauper, v. Hansard and others—Dem. A
- Burden v. Flower—Dem. A
- Same v. Scorer—Dem. A
- Same v. Scriven—Dem. A
- Haigh and another v. Brooks—Dem. A
- Pearson, assignees, v. Rogers and Penn, sued with another—Dem. A
- Holford v. Latter—Dem. A
- Parks v. Joseph—Dem. A
- Isherwood v. Hardcastle and another—Dem. A
- Doe v. Wright—Dem. A
- Mills v. Wilson—Dem. A
- Knight v. Applyard—Dem. A
- Smith v. Tombs—Dem. A
- Thorpe, reg. officer, v. Barry—Dem. A
- Same v. Ramsbottom—Dem. A
- Hale, reg. officer, v. Greatwood—Dem. A
- Souter v. Hitchcock and another—Dem. A
- Fletcher v. Marillier and another—Dem. A
- Brusnike v. Robertson—Dem. A
- Robinson v. Wentworth and another—Dem. A
- Hersuam v. Dasent—Dem. A
- Jones v. Winwood—Dem. A
- Barry v. Arnard—Special case
- Banaz and another v. Maskell—Dem. A
- Hunnard v. Ranken—Dem. A
- Doe d. Tremeven and another v. Parmetten—Special case
- Wentworth and another v. Cock—Dem. A
- Nickels v. Hancock—Dem. A
- Mattock, executors, v. Kinglake—Dem. A
- Cockshot and another v. Thomlinson and others—Dem. A
- Brooks v. Stuart—Dem. A
- Bowden v. Pegg—Dem. A
- Ibbs v. Richardson and another—Special case
- Knowles v. Seagrim—Dem. A
- The New Brunswick and Nova Scotia Land Company v. Banbridge—Dem. A
- Doe d. Evans v. Evans—Special case
- The Cheltenham and Great Western Union Railway Company v. Clarke—Dem. A
- Same v. Daniel—Dem. A
- Collins v. Beanont—Dem. A
- Culley, esq. v. Doe d. Taylerson, in error—Error A
- Pearce v. Eastwood—Dem. A
- Jackson v. Hile—Dem. A
- Mitchell v. Gadsden—Dem. A
- Monkman v. Shepherdson—Dem. A
- Lapiere v. McIntosh—Dem. A
- Lane v. Chapman, esq.—Dem. A
- Davy and another v. Warburton and others—Dem. A
- Thurman v. Wilde and another—Dem. A
- Weeding v. Aldrich—Dem. A
- Wright v. Webster—Dem. A

Storr and another *v.* Lee and Rex—Dem. A
 Cuthover *v.* Gunn—Dem. A
 Burden *v.* Vely and another—Dem. A
 Stanforth *v.* Robson—Dem. A
 Ramsey *v.* Nornabah, in repla—Dem. A
 Bryan *v.* Sir G. Arthur—Dem. A
 Rowland, assignees, *v.* Hind—Special case
 Griffin *v.* Ellis and another—Dem. A
 Bushell *v.* Cridland—Dem. A
 Ferguson *v.* Mahon—Dem. A
 Keischner *v.* Ware—Dem. A
 Roffey *v.* Administrator and Greenwoode and another, executors—Special case
 Benjamin *v.* Belcher—Dem. A
 Ince *v.* Collins—Dem. A
 Bertram *v.* Stovin—Dem. A.

NEW TRIALS.

MICHAELMAS TERM, 1836.

Cornw. Lawrence *v.* Mathews.

HILARY TERM, 1837.

Lond. Thorpe *v.* Gilmour
 Do. Carlos *v.* Hennett
 Do. Spencer *v.* Colling
 Do. Baber *v.* Harris

EASTER TERM, 1837.

Mddlx. Uther *v.* Rich
 Do. Ladd *v.* Thomas and another
 Do. Barnes *v.* Jarrett
 Do. Palmer *v.* Temple
 Lond. Boorman and others *v.* Brown
 Do. Doe d. Warden *v.* Joll
 Do. Robertson *v.* Smith
 Derby. Bootan *v.* Dewes
 Linca. Carnaby *v.* Welby and others
 York. Fenton *v.* City of Dublin Steam Packet Company
 Do. Buckton and another, assignees, *v.* Frost and others
 Do. Raikes and another *v.* Todd
 Do. Stead *v.* Dawber and another
 Do. Dent *v.* Headlam
 Do. Sykes *v.* Dixon
 Lancr. Newton *v.* the Liverpool and Manchester Railway Company
 Do. Newton *v.* same
 Do. Swanwick and another *v.* Southern and others
 Cumb. The King *v.* Derby
 Durh. Lidster *v.* Borrow
 Devon. Pills and another *v.* Harvey and others
 Hants. Warwick *v.* Stoodley
 Somer. Hatcher *v.* Whittington
 Chest. Collinge *v.* Heywood
 Do. Chamberlain *v.* Wright and others
 Do. Evans *v.* Tomkinson
 Do. Doe d. Tomlinson *v.* Tomkinson
 Do. Blayney *v.* Howarth and another
 Carm. Doe d. Philip and another *v.* Benjamin
 Do. Doe d. Evans *v.* Evans and others
 Glam. Doe d. Jones and Strick *v.* Cook
 Radn. Price *v.* Rowlands
 Denb. Jones *v.* Flint
 Mont. Woolley *v.* Davies and others
 Angle. The King *v.* Inhabitants of Llangoishollis
 Surrey, Doe d. Hale and others *v.* Castle
 Do. Doe d. Willis *v.* Buckmore and another
 Kent, Doe d. the mayor, jurats, and commonalty of the town of Fordwich *v.* Tomlin
 Surrey, Doe d. Dunark and others *v.* Goldsmith
 Norwh. The King *v.* Brightwell
 Norfolk. Waters *v.* Saunders
 Suffolk. Heersum *v.* Finch
 Do. The King *v.* Inhabitants of Chillon

Bucks, Doe d. Aubrey, bart. and another *v.* Sutton
 Camb. Faulkner *v.* Chevall
 Do. Geldart *v.* Tabram, gent.
 Do. Docrora *v.* Flitton
 Oxfrd. Badcock *v.* Webb
 Staffd. Doe d. Butler and others *v.* Evans
 Monm. Williams *v.* Llewellyn
 Do. The King *v.* Legh and others
 Do. Knight *v.* Walker
 Glouc. Doe d. Chadborn *v.* Green

TRINITY TERM, 1837.

Lond. Wilson *v.* Ray
 MICHAELMAS TERM, 1837.
 Middl. Doe d. Carter *v.* James
 Do. Wilson, bart. *v.* Hoare and others
 Do. Gregg *v.* Wells
 Do. Utther *v.* Chichester
 Do. Davies *v.* Wilkinson
 Do. Bentall, esq. exor., &c. *v.* Sydney, knt.
 Do. Phillips *v.* Cold
 Do. Cooke *v.* Gravatt and others
 Do. Goodman *v.* Ford
 Lond. Phelps and others *v.* Lyle
 Do. Coles and others, executors, &c. *v.* Governor and Company of the Bank of England
 Do. Sowerby *v.* Lockerby
 Kent, Doe d. Filmer, bart. and an. *v.* Bradley, esq.

Surrey, Dobson, knt. and others *v.* Denne and others
 Sussex, De Goudrum *v.* Lewes and another
 Somer. Down *v.* Hatcher and wife
 Cornw. Major and others *v.* Chadwick and others
 Wilts, Ellison *v.* Iles
 Do. Strange and another *v.* Price
 Do. Doe d. Graves and another *v.* George Wills and Thomas Trowbridge

Devon, Doe d. Littlejohn *v.* Willisford
 Monm. Dos d. Lloyd and wife *v.* Bennett
 Warw. Green *v.* Creswell
 Do. Fludyer, exor. &c. *v.* Jeffery
 Do. Doe d. Townsend and others *v.* Mace and others
 Camb. Davies *v.* Wagstaff
 Lancr. Gardner and others, assignees, *v.* Moult and others
 Do. Anderton and another, exors., *v.* Arrowsmith, exor.
 Do. Sandys *v.* Hodgson
 York, Smith *v.* Dixon
 Do. Jackson *v.* Hill
 Do. Holmes *v.* Wilson and others
 Do. Williams *v.* Burgess, sen., with another
 Chesetr. Doe d. Higginbotham *v.* Barton and another
 Do. Plerin Canor *v.* Prince

HILARY TERM, 1838.

Mddlx. The Queen *v.* Charles Baldwin
 Do. Duncombe, esq. two motions *v.* Daniel, esq.
 Do. Wright and others *v.* Perceval
 Do. The Queen *v.* L. Levy
 Lond. Garry *v.* Pyke
 Do. Truman and others *v.* Lodex
 Do. Rawlins *v.* Desborough
 Do. Green *v.* the London Cemetery Company
 Johnson *v.* Usborne

EASTER TERM, 1838.

Mddlx. Merry and another *v.* Chapman, esq.
 Do. Frampton, executors, *v.* Champneys, bart.
 Do. The Queen *v.* Murphy and another, bart.
 Do. Good *v.* Bowditch
 Do. Thelwell *v.* Count Di Aceto
 Do. Godward *v.* Hannell and others
 Do. Peirse *v.* Fothergill

Lond. Stansfield *v.* The Corporation of Trinity House
 Do. Ritson and others *v.* Craig and others
 Do. Jones *v.* Stephens
 Do. Sturge *v.* Buchanan
 Do. Canna *v.* Clipperton
 Do. Lunniass *v.* Row
 Somer. Wilson, one of the pub. officers, *v.* Bull
 Do. Doe d. Parfitt and another *v.* Sheppard
 Hants. Holmes *v.* Mitchell
 Dorset. Carroll *v.* Slade and another
 Do. Flight and another *v.* Thomas
 Cornw. Shearm *v.* Burnard
 Devon. Ramsay *v.* Elms
 Wilts. Lee, clerk, *v.* Merrit
 Warw. Cuswell *v.* Wood
 Do. Smith and another *v.* Edwards and another
 Do. Day *v.* Eaves and another
 Do. Empson Glone & Co. *v.* Griffin
 Do. Horton *v.* Lord
 Do. Evans *v.* Fryer, the younger
 Do. Savage & another, assignees, *v.* Roberts, esq.
 Derby. Wain *v.* Bayley, sued with another
 Do. Doe d. Keetley *v.* Curton
 York. Fastwood *v.* Kepyon
 Do. Carter and another *v.* Carr and another, clerks
 Do. Doe several demises of Noble and others *v.* Bolton
 Do. Doe d. Winn, clerk, and another *v.* Simpson
 Do. Wedgewood, the younger, *v.* Hartley and others
 Lancr. Humble *v.* Mitchell, sen.
 Do. M'Clure *v.* Fraser
 Do. Greenough *v.* Orrell and others
 Do. Broadbent *v.* Ledward
 Do. Straker *v.* Cram
 Durham. Baxter *v.* Mann and others
 Chestr. Meegh *v.* Clinton
 Do. Doe d. Cope and others *v.* Hill and others
 Do. Sylvester *v.* Walker
 Do. Cooke *v.* Walker
 Montg. Pugh *v.* Griffith, esq.
 Do. Evans and others *v.* Jones and another
 Sussex. Doe d. Millward and another *v.* Wood
 Do. Rawlinson *v.* Elliott
 Surrey. Mills *v.* Claridge, knt. and others
 Bucks. Hitchcock *v.* Chaplin
 Bedf'd. Wright *v.* Waterford
 Monm. James *v.* Phelps
 Do. Latch *v.* Thomas Wedlake and Lewis Thomas
 Salop. Frank *v.* Edwards
 Do. Eaton and others *v.* Jervis
 Glouc. Cole *v.* Cresswell

TRINITY TERM, 1838.

Mddlx. Willis *v.* Bennett
 Do. Rowe *v.* Brookes
 Do. Cadby *v.* Martinez
 Do. Woolf *v.* Beard
 Lond. Brown and others *v.* Blakiston
 Do. Allen, a pauper, *v.* Flicker and another

COMMON PLEAS.

REMANETS.

MICHAELMAS TERM, 1838.

ENLARGED RULES.

- 1st day.—Dibb *v.* Pasmore
 2d day.—In matter of Peter Fry, gent. one, &c.
 5th day.—Butler, assignee, *v.* Hobson
 Enlarged until Rule of 1st June disposed of.
 Jones *v.* Price—James *v.* Lingham

NEW TRIALS.

Easter Term last.

Mddlx. Pennell *v.* Meyer
 Do. Forrest and another *v.* Ball
 Lond. Reeves *v.* Capper
 Do. Bottomley *v.* Forbes
 Do. Jackson *v.* Galloway
 Do. Callender *v.* Cebricho and another
 Do. Bonzi *v.* Stewart
 Do. Same *v.* Same
 Devon. Muskett *v.* Hill and another
 Lanc. Lawrence and another, assignees, *v.* Knowles
 Do. Manifold and another *v.* Morris
 Cam. Adeane *v.* Mortlock
 Norfolk Wrightup *v.* Chamberlaine
 Worce. Ward *v.* Suffield
 Lond. Boys *v.* Ancell

NEW TRIALS.

Trinity Term.

Lond. Hartshorne *v.* Watson
 Mddlx. James *v.* Lingham
 Do. Taverner *v.* Little
 Do. Hannay *v.* Herepath
 Do. Findall *v.* Norkes

CURIA ADVISARI VULT.

Franks *v.* Price
 Carden *v.* General Cemetery Company
 Duke of Grafton *v.* London and Birmingham Railway Company
 Penney *v.* Slades

DEMURRERS.

Saturday..... Nov. 10 | Saturday..... Nov. 17
 Wednesday..... 14 | Wednesday..... 21
 Brooks *v.* Humphreys
 Gibson and another, assignees, *v.* East India Company
 Stone and others *v.* Compton
 Newton *v.* Rooks
 Read *v.* Croft
 Ingram *v.* Lawson
 Ferguson *v.* Norman
 Baxter and another *v.* Hazier
 Webb and another *v.* Wilkinson
 Wright and another, assignees, *v.* Fearnley
 Pilmore *v.* Hood
 Devaux *v.* Jansons
 Toplis and another *v.* Grane
 Williams and others *v.* Green and another
 Smith *v.* Nicholls
 King *v.* Bennett
 Izon *v.* Gorton and another
 Allen *v.* Salsbury
 Upward *v.* Knight
 Jackson *v.* Nichol
 Edwards *v.* Bishop of Exeter and others
 Wilmhurst and another *v.* Bowker
 Devaux and another *v.* Steele
 Hilton *v.* Swann
 Redford *v.* Newman
 Samuel *v.* Rawson and another
 Gas and Coke Company *v.* Turner
 Sanderson and others *v.* Piper and others
 Stert, and another, executors, &c. *v.* Heatel
 Mills *v.* Fowkes

LONDON : W. M'DOWALL, PRINTER, PEMBERTON ROW, COUGH SQUARE.

The Legal Guide.

SATURDAY, NOVEMBER 10, 1838.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 3.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W^r. 4, c. 27.

This *succession of disabilities* (now abolished) heretofore prevented the operation of the Statute of Limitations.

The new Statute, (sect. 19), also determines that no part of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, or any islands adjacent to any of them, being part of the British dominions, shall be deemed to be beyond seas, within the meaning of the act; which removes a difficulty in cases of *disability* that heretofore existed, as to what places within them should be considered beyond seas; as for instance, Ireland was beyond seas, while Scotland was not.

The 16th, 17th, and 18th sections of the New Statute (upon which we observed in our First Number), relate to *disabilities*, and in these cases, an adverse possession for the period there limited will bar either an estate for life, in fee, or in tail; and all estates to take effect after, or in defeasance of an estate tail. Sir Edward Sugden, in his excellent Work upon Vendors and Pur-

chasers, (last edition, Vol. I, p. 331,) observes,—“The Act allows no further time for successive disabilities, and makes the bar of the tenant in fact extend to all whom he might have barred. This will *ultimately* tend to shorten abstracts considerably, and in the result, 40 years will probably be considered the proper period instead of 60 for an abstract to extend over; but still *cases must frequently arise, where it will be necessary to call for an earlier title.* As fines are abolished, a short bar as formerly cannot now be made.”

The *disabilities* are also more clearly defined by the New Statute than in the second Statute of Limitations, mentioned in our First Number.—“*Non compos mentis*,” or *non sane memory*, a disability so named in the latter Statute, is now distinguished by “*Idiotcy, Lunacy, and Unsoundness of Mind*,” and it should be observed, that the words “*imprisoned, or beyond seas*,” also disabilities named in the same Statute, do not occur in the 16th section of the present Statute, but only the words “*absence beyond seas*.”

These explanations of the New Laws tend to shew, that a purchaser cannot be satisfied with a title depending solely upon an undisturbed possession of 20 years, as the person to whom such possession may have been adverse, may be only a tenant for life, or may have been at the time when the adverse possession commenced under disability. The previous title, therefore, must, in all cases, be produced, before he

can make such a good title as a purchaser shall be compelled to take.

We will now look to *cases where there are no disabilities*, and which are provided for by the 2nd, 21st, and 22nd sections of the New Statute. Sect. 2 enacts, that after the 1st of December, 1838, no person shall make an entry or distress, or bring an action to recover any land or rent, but *within 20 years* next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then *within 20 years* next after the time at which the time to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

All the words and expressions made use of in the Statute are defined in the first section.

Sec. 21 also enacts, that where the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the limited period before named in the statute, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred; and the subsequent sect. 22, enacts, that when a tenant in tail of any land or rent entitled to recover the same, shall have died before the expiration of the period before limited by the statute, which shall be applicable in such case for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action.

In these cases, then, under these sections, an adverse possession of 20 years will bar the same estates as we have before named in cases where *there are* disabilities. The latter section (22) is a great improvement upon the second Statute of Limitations before referred to, under which, the 20 years for entry not commencing until the right accrued, an estate might be recovered by a remainder man against an *unlimited* adverse possession to a tenant in tail.

We will now proceed to cases where a *tenant in tail* may, by some assurance, have conveyed his interest in such a way as *not to have barred the remainders*. The 24th sect. of the new statute applies, whereby it is enacted, that when a tenant in tail shall have made an assurance which shall not operate to bar an estate, to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of the land, or in receipt of the rent, and the same person or any other (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail,) shall continue or be in such possession or receipt for 20 years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar the estate or estates before-mentioned, then, at the expiration of such period of 20 years, such assurance shall be effectual as against any person claiming any right to take effect after or in defeasance of such estate tail.

By these two sections (22 & 24), a *tenant in tail* may, with a possession of 20 years, by a *common assurance*, bar all remainders, in the same manner as he might formerly have done by fine and recovery, and all the expensive trammels by which those fictions were surrounded.

TO THE EDITOR OF THE LEGAL GUIDE.

JOINT STOCK COMPANIES.

ANSWER TO PROBLEM I. in No. I.

Nov. 9.

By the old law, all wills bequeathing real property required to be attested by three witnesses, and no witness was necessary to a will of personal property, for it might have been made by word of mouth and without signature: 2ndly, a person of the age of discretion was capable of making a will, and it seems that females were considered to have attained the age at twelve, and males at fourteen, but a contrariety of opinion existed, the testamentary power not being regulated by any statute: 3rdly, it was not necessary that the testator should see the witnesses sign the will, only that he should be so situated as to be able to see if he would. In *Doe v. Manifold*, 1 M. & S. 294; *Todd v. Winchelsea*, 1 M. & C. 12, where the testator desired the witnesses to go into another room, seven yards distant, to attest his will, and there was a window broken, through which he might have seen them, the attestation was held sufficient, (*Shires v. Glasscock*, 1 Salk. 668). Now, by the recent statute, the following alterations are made; 1st, By section 9 it is enacted, "that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator *in the presence of two or more witnesses, present at the same time*, and such witness shall attest and shall subscribe the will *in the presence of the testator*, but no form of attestation shall be necessary: (a)" 2ndly, By section 7 it is enacted, "that no will made by any person under the age of twenty-one years shall be valid:" 3rdly, Section 15 preserves the validity of the instrument, notwithstanding the incompetency of the witness.

G. W.

(a) See Reports, Prerogative Court, *supra*, *In re Milward*.—EDITOR.

LIABILITIES OF SUBSCRIBERS TO SCRIP COMPANIES.

The state of the Law, in regard to Partnership, has deterred many persons—and more especially those who, from education or habit, are cautious and fearful of entering into business—from aiding in the advancement of any commercial pursuit, however tempting it might be, lest they should be so mixed in the transaction as to render them and their property liable to the Law of Partnership.

To remove this objection, and to induce Capitalists out of Trade to advance great objects, and to assist in undertakings of great national importance, such as Mining, Railways, &c., by bringing forward their capital, *Scrip Companies* were introduced.

In pursuing this subject, we shall endeavour to ascertain how far Scrip Associations relieve parties connected with them from the liability involved in ordinary Partnerships, and what may be the consequent advantages of the Scrip System to the public.

In many parts of Europe *limited partnerships* are admitted, provided they be entered on a register; but the law of England is otherwise—the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership, a communion of profit and loss is essential, and this is the true criterion to judge by, whether persons are partners or not. The shares must be joint, though it is not necessary that they should be equal. A number of persons, for instance, associating together, and subscribing sums of money for the purpose of obtaining a bill in Parliament to make a Railway, are partners in the undertaking. This was decided in *Holme v. Higgins*, (1 Barn. & Cres. 74; 2 D. & R. 196); and upon this principle, a subscriber to such a speculation, employed as surveyor, or in any other capacity, for the body of subscribers cannot maintain an action for work done by him in that character, on account of the partnership, against all or any of the other subscribers.

In the formation of the various companies of all descriptions now afloat, and we speak now of Joint Stock as well as Scrip Companies, very few of the subscribers who *really pay their money for the Scrip*, to set the company going (as it is termed), know any thing of the liabilities to which they subject themselves, nor the chances that do exist that they may be ruined in the adventure. They rely in many cases, on a high-flown title, and pin their faith to the names of directors placed in a specious advertisement, whose respectability and character cannot be questioned, but who probably know nothing about the matter, or if they do, it is in the interested character of bankers, surveyors, engineers, auditors, and others—persons who expect or hope to profit by the scheme; and if dupes are gained to support it with their money, these gentry walk out of the direction to save their liability, never having subscribed a shilling, to make way for others who intend to work the concern, and who in many cases are mere men of straw—needy adventurers. This is no varnished picture of some of the numerous companies already defunct, and probably of some now afloat.

The case of *Holmes v. Higgins*, to which we have already alluded, was briefly this:—Holmes was a surveyor, and, in the year 1820, notices were given of an intended application to Parliament for leave to bring in a bill for making a railway from Womersley to the river Dun. These notices were given by Holmes, as agent for the bill. A subscription was then commenced for the purpose of passing the bill and making the railway. Several persons subscribed to the undertaking, and Holmes subscribed for two shares; the defendant Higgins subscribed for one share. A solicitor was appointed, with directors, to apply to Parliament, and Holmes was appointed agent to the company, and assistant to the solicitor. These appointments were made at a meeting of the subscribers, at which Higgins acted as chairman. A bill was brought into Parliament, which, from the opposition made to it, was ultimately withdrawn, and of course the company failed, and the sub-

scribers were liable to all the debts and losses.

Holmes, considering himself a creditor for business done, brought his action against Higgins as a subscriber, and as such he was considered liable. The action was referred to a barrister, who awarded in favour of Holmes, but annexed to the award a certificate, expressing that as it was not his wish that Higgins should be precluded by the award from taking the opinion of the Court of King's Bench, he certified that it was proved before him that the plaintiff and the defendant were subscribers to, and shareholders in the undertaking, for the benefit of which the work and labour was performed, and the expenses incurred by the plaintiff, which formed his demand of action.

Higgins did apply to the Court, and Lord Tenterden, in delivering judgment, said it was a case of a number of persons jointly associated together for a common purpose. The plaintiff and defendant were both members of the association. The action was brought against the defendant, who acted as chairman of the meeting when the work done was ordered, and he might have pleaded that he undertook jointly with the other subscribers. The members of the association were therefore partners, and it was perfectly clear that one partner could not maintain an action against his co-partners for work and labour performed, or money expended on account of the partnership; and his Lordship was of opinion, therefore, that the plaintiff could not support the action either against the defendant, who was chairman of the meeting, or against the body of subscribers at large.—The award was set aside.

EXAMINATION OF ARTICLED CLERKS.

MICHAELMAS TERM, 1838.

One of the objects of this periodical is (as stated in the preface) to afford students the means of acquiring progressive knowledge that shall be beneficial to them, and enable them to pass their examinations with satisfaction and credit.

It appears that the examinations in future will extend to *equity* as well as law. The questions will be upon the *practice* of all the superior courts and the Court of Bankruptcy, and upon the *laws* administered in each of such courts, as also the criminal law.

As the examination upon the practice and principles of *equity* may take some gentlemen by surprise, and as it requires very extensive reading astutely to understand those principles, we will endeavour to assist them as far as our limits will allow, and therefore request attention to our second problem.

PROBLEM II.

WHAT IS EQUITY?

Law Reports.

VICE-CHANCELLOR'S COURT.

INJUNCTION. COPYRIGHT.

CAMPBELL v. CHAPPELL.—Nov. 3.

K. Bruce moved, *ex parte*, for an injunction to restrain the defendant, the music-seller in Bond-street, from publishing a song, the copyright of which belonged to the plaintiff. The affidavit stated, that the copyright of 26 poems, called "Hebrew Melodies," composed by Lord Byron, had been assigned by his Lordship to Mr. Nathan, who had set them to music, and that one of the poems, known by the title "I saw thee weep," which had since become the property of the plaintiff by assignment, had been adapted with two slight verbal alterations to different music, composed by Mr. Hodson, of the Yorkshire Stingo, and published by the defendant under the same title.

His Honour granted the injunction.

ROLLS COURT, Nov. 3.

TULETT v. ARMSTRONG.

LORD LANGDALE pronounced judgment in this case. The plaintiff claimed to be entitled to two annuities granted to him by the defendants, William Armstrong and his wife, Mary Augusta, formerly Tilt, and prayed for an account of these annuities, and that the arrears should be paid to him out of the rents of certain estates devised by the wills of Nathaniel Bradford and Ann Bradford. Nathaniel Bradford, by his will, dated the 27th of March,

1820, gave to his daughter, Ann Bradford, and William Gates, and their heirs, all his freehold, copyhold, and leasehold estates, and the residue of his personal estate, upon trust, for his wife, Ann Bradford, for her life, and after her decease he devised part of the property to his daughter, Ann Bradford, and her heirs, and other part upon trust for and to hold equally between his daughter, Ann, and his granddaughters, Georgiana Pierpoint and Mary Augusta Tilt, during their joint and several lives, as tenants in common, so and in such manner that neither of his daughter or granddaughters might anticipate, charge, sell, or dispose of their life estates, and that no husband might have any control over them, nor should they be liable to their debts, and the receipts of his daughter and granddaughters were to be good discharges, and after the decease of the survivor he gave the property over to Henry Tilt, in fee, but if he died without issue, then between Ann Bradford, Georgiana Pierpoint, and Mary Tilt, as tenants in common in all respects similar to the aforesaid devise made to them, to be free from the control of any husband, to have no power of anticipation, and their receipts to be good discharges, and he appointed his daughter and Gates executors. The testator died in October, 1820. Mary Augusta Tilt, now Armstrong, the granddaughter, was then unmarried, and it was argued for the plaintiff that the limitation to her separate use was on that account not effectual, and that the restraint against the anticipation of her life interest was void, because the devise was not accompanied with a gift over on an attempt to alienate. On the 25th of August, 1826, Ann Bradford, the daughter, made her will, and devised to trustees, subject to the life estate of her mother, upon trust to receive the rents and pay them unto her niece, Mary Augusta Tilt, for her life, so as she should not sell or dispose of her life interest, or raise money thereon by mortgage or otherwise, and so as the rents should not be subject to, but be exclusive of, the control or interference of any husband, nor be liable to his debts, and her niece's receipt only was to be a good discharge for the rents, and after her decease she gave the premises to her children. On the 23rd of April, 1827, the legatee, Mary Augusta Tilt, married the defendant, William Armstrong, and two days afterwards Ann Bradford, the daughter, made a codicil, and died in the October following. Mary Augusta being married, it was argued that the attempt to restrain alienation was inoperative, because there was no gift over. In January, 1830, Mrs. Ann Bradford, the wife of the testator, died, and then the bequests took effect in possession. In 1832, an annuity of 31*l.* 17*s.* was, in consideration of 300*l.*, granted to the plaintiff by the defendant Armstrong and his wife, and deeds were executed to secure it upon the bequests in the two wills to Mary Augusta Armstrong, then Tilt, and payments were made up to January, 1834. In January, 1835, Armstrong took the benefit of the Insolvent Debtors' Act,

and the bill was filed. In this court a married woman had for more than a century past been considered capable of possessing property for her own use, independent of her husband, as a *feme sole*. The property might be created by contract before the marriage or by gift from the husband or any stranger, and the Court would treat the husband as a trustee. The estate for separate use sustained by courts of equity had its peculiar existence, and acted in contravention and control of the legal rights of the husband and as a protection against his marital influence.

As this separate estate owed its origin to courts of equity, those courts had the power of modifying it so as to secure the property to the wife, in conformity to the intention of the donor. From the time of Lord Thurlow's opinion on Miss Watson's settlement, now 50 years ago, it had been usual to introduce into wills a clause giving to women a separate use without power of alienation or anticipation, and such clauses had been repeatedly approved of and carried into effect. Lord Eldon said, in *Jackson v. Hobhouse*, (2 Merivale, 188), that it was too late to contend against the validity of a clause of anticipation. His Lordship then cited the cases of *Jones v. Salter*, *Woodmeston v. Walker*, and *Brown v. Pocock*, and was of opinion that a woman was not at liberty to defeat the intention of the testator by any act of her own whilst single. It had been argued that if property given for the separate use of a married woman without power of anticipation came to her whilst she was a *feme sole*, she possessed an absolute control over that property, and upon her marriage it would vest in her husband; but it appeared to his Lordship, that the Court had not considered that a woman by the fact of marriage subjected an estate given to her for her separate use to the martial rights of her husband. He could not agree to the proposition that where a gift was limited to a woman for her separate use, that limitation would become nugatory if she chanced to be single at the time when the gift vested in her. He had found himself embarrassed from the conflicting opinions, and had wished to have had the case reargued before the Lord Chancellor and the Vice-Chancellor; but, as that course had not been approved of, he must state his opinion; still he was desirous that the case should be brought under the consideration of a higher tribunal. It appeared to him, that property given to a woman for her separate use without power of anticipation, might, under the authority of the Court, be enjoyed by her as her separate estate during coverture, and that in respect of such estate she might be considered as a *feme sole*. The words "independent of her husband" meant that the Court would not permit the marital power of the husband to be used in contravention of the donor's intention. His Lordship then declared his opinion, that as to the estates given by the will of the testator, Nathaniel Bradford, to Mrs. Armstrong, for her separate use, without power of alienation, the plaintiff had acquired no right over them in

virtue of the security executed to him by Mr. and Mrs. Armstrong; but as to the other estate, he thought the plaintiff was entitled to the relief prayed for. His Lordship added he really hoped the case would be further investigated.

SCARBOROUGH v. BORMAN.

Lord LANGDALE pronounced judgment in this case, in which the bill stated that Thomas Smith, by his will, in June, 1820, bequeathed to Marris and to Borman, the defendant, 1,500^{l.}, upon trust to invest it in the funds, and during the life of his daughter, Frances Brown, then the widow of George Brown, deceased, to pay the dividends into her own hands, for her sole, separate, and exclusive use and benefit, exclusive of and without being in any way subject or liable to the debts, intermeddling, or control of any future husband, and her receipt, notwithstanding any future coverture, to be a good discharge for the dividends. The testator died in June, 1820, and in April, 1832, Mrs. Frances Brown married the plaintiff. There was issue by the first husband three children. The prayer of the bill was for an account of all sums received by Borman, the acting trustee, and that what might be found due should be paid to the plaintiff, and that the plaintiff might be declared entitled to the dividends of the stock during the life of his wife. The defendant put in a demurrer to the plaintiff's bill. There was no argument, the parties agreeing to the case being decided according to the decision of the Court in the preceding case of *Tullet v. Armstrong*." His Lordship declared his opinion that the wife was entitled, and upon that ground allowed the demurrer. The dividends were for the separate use of the wife, and the stock was in the hands of trustees.

Review of the Judgment of the Master of the Rolls, in the above reported Cases.

—*By the EDITOR.*

In these cases the *conscientious* judgment given by Lord Langdale, who is so highly respected, must be admired by every person in or out of the profession. The question is one of high importance to all classes of society, and upon which much doubt and uncertainty has long prevailed, caused by the doctrines ruled by the Courts of Equity on the subject.

His Lordship *demurs to the proposition that where a gift was limited to a woman for her separate use, that limitation would become nugatory, if she chanced to be single at the time when the gift vested in her*, and

expresses his opinion, that "property given to a woman for her separate use, *without power of anticipation*, might, under the authority of the Court, be enjoyed by her as her separate estate during coverture, and that, in respect of such estate, she might be considered as a *feme sole*;" and that the words "independent of her husband" meant that the Court would not permit the marital power of the husband to be used in contravention of the donor's intention.

By the general principles of our law, a man takes an estate with all its incidents. Upon these principles Sir Edward Sugden in his valuable Treatise on Powers, Vol. I. p. 203, observes, "Therefore, although a provision may be made to cease on the bankruptcy or insolvency, for example, of the party for whom it is made; yet, if it is given to him for life, it is subject to his debts, and he may alien the property notwithstanding any declaration to the contrary in the instrument by which the estate was created;" see *Brandon v. Robinson*, (1 Rose, 197.

It is equally a principle of our law that the property of a married woman vests in her husband upon marriage; he takes her real property for their joint lives, and her personal property absolutely.

Courts of Equity have, however, imposed restrictions upon those rights, of serious importance, which infringes the legal principles first mentioned, by giving him an estate with his marriage, without a commensurate power of treating it as his own—it being the practice of such courts to create an unalienable personal trust in favour of married women, so that they may possess estates which their husbands cannot alien.

Lord Langdale has observed upon *Watson's Case*, as the commencing (as the fact is) of these restrictions; in that case the words, "*and not by anticipation*," were first introduced by Lord Thurlow, whose reasoning for their introduction was, that he did not thereby take away any of the incidents of property at law; that this interest, which a married woman is suffered to take,

is a creation of equity, and equity might modify the power of alienation (1 Rose, 200). Notwithstanding this doctrine, the general opinion was *against the validity* of this new restriction, that *the words were simply void, and that the woman's power of alienation still existed*. "Equity in upholding settlements on a married woman for her separate use, considered her for this purpose as a *feme sole*, and, viewed in that light, she must, like a person *sui juris*, take the property with the power of alienation. There is, perhaps, no sound principle upon which a restraint upon alienation can be supported where the interest is not given over, or made to cease upon alienation." (Sugd. Powers, vol. i. p. 294).

Lord Eldon, in his observations upon the words introduced by Lord Thurlow (who was a trustee of Miss Watson's settlement), 11 Ves. J. 221, says, he did not attempt to take away any power the law gave her as incident to property, which, being a creation of equity, she could not have at law, but as, under the words of the settlement, it would have been hers absolutely, so that she could alien. Lord Thurlow endeavoured to prevent that, by imposing upon the trustees the necessity of *paying to her*, from time to time, and *not by anticipation*; reasoning thus,—that *equity* making her the owner of it, and enabling her as a married woman to alien, might limit her power over it, but the case of a disposition to a man who, if he bar the property, has the power of alienating, it is quite different.

The old way of expressing a trust for a married woman is described also by Lord Eldon, in *Brandon v. Robinson*, (18 Ves. J. 434), as being, that the trustees should pay into *her proper hands and upon her own receipt only*, and yet the court of equity always said she might dispose of that interest; *Pybus v. Smith* (3 Bro. C. Ca. 340.; 1 Ves. J. 189) and if she had disposed of it, the Court would compel her to give her own receipt, if that were necessary, to enable her assignee to receive it.

(To be continued.)

ROLLS' COURT, (*continued.*)*ROWLEY v. ADAMS and Others.—Nov. 5.**Assignee of a Lease not under Covenant—his Liability to Rent and Covenants.*

This was a petition of the plaintiffs to confirm the Master's report, and that it might be declared that the estate of Henry Wyatt, the testator in the pleadings, ought not to be charged with any liabilities in respect of a leasehold house in Portpool-lane, Gray's-inn-lane, under the lease thereof, from September 29, 1833.

The testator took an assignment from the lessee of the house and brewery in Portpool-lane of his lease, but entered into *no covenant or obligation to pay the rent or perform the covenants in the lease*. On his death, the suit was instituted against his executors, the defendants, to carry his will into effect, and as the house was considered as not worth the rent, there was a reference to the Master to consider of the best means of getting rid of the liability of paying it. Mr. Wyatt being only the assignee of the lessee, and not the lessee himself, his executors were only liable to the rents and covenants during the time they continued assignees. The Master reported in August last, that a state of facts supported by affidavits had been laid before him, that if the executors had used due diligence they could have terminated the liability of the testator's estate at Michaelmas, 1833; that attempts had been made by the solicitor of the executors to prevail upon the lessors to accept of a surrender of the lease, which they refused to do, but that no evidence had been laid before him to shew any attempt on the part of the executors to assign the lease; but he was of opinion, that if the executors had used due diligence, they could have terminated the liability of the testator's estate to the rents and covenants from the 29th of September, 1833, by executing an assignment of the lease.

Pemberton contended it was the duty of the executors, if they could not prevail upon the lessors to accept a surrender, to assign the lease to some person, so as to relieve the testator's estate from the liability.

Kindersley argued that such conduct could not be proper, that it was a question of very doubtful honesty with respect to the executors making the assignment, but it was clear that the party accepting the assignment without any ability or intention to pay the rent and perform the covenants would be guilty of a fraud, and that would be at the instigation of the executors, who were not bound to adopt a proceeding of such doubtful morality as to assign to a beggar.

Lord LANGDALE said, that the testator, Henry Wyatt, held the premises by the assignment of the lease only, and not under any obligation to pay the rent and perform the covenants in the lease. The premises were let, and a receiver was appointed. The tenants became bankrupt, and the premises got into the possession of their assignees. On the 8th of

September, 1833, that possession ceased, and on the 23rd of July following, an order was pronounced, referring it to the Master to inquire what was proper to be done. There was a contradiction in the affidavits, but a report by the consent of the parties was made, that it would be for the benefit of the testator's estate that the receiver should be dismissed as to the leasehold premises, and that they should be got rid of upon the best terms that might be procured, so as to relieve the estate from the rents and covenants after the 29th of September then next. It must be admitted, that the estate was liable to the rent and covenants up to that 29th of September, and it must have been agreed that the best thing to be done was to get rid of the lease. The report was confirmed, and it was ordered that the executors should take steps to put an end to their liabilities under the lease. This it was in their power to do, as they were under no contract with the lessor. *If they had assigned to a beggar without communicating with the lessor, he should have thought it a wrongful act, although it might be sustained at law and in equity.* But they ought to have communicated with the lessor, and have stated the circumstances of the trust, and offered an immediate surrender upon proper terms, and if then the lessor refused to accept it, the case would be altered, and the executors might, without imputation on their honesty, when so held to a strict legal obligation, get rid of it as they could, especially as they were not acting for themselves, but for others. Had they done so, this investigation probably would not have been necessary, as it was for the landlord's benefit to have accepted the offer, because otherwise, he might be put into a situation to conflict with a beggar, and have great difficulty in getting possession of his property. No such step was taken. Due diligence had not been used. An end to the liability might have been put by an assignment, and no explanation had been given why this was not done. The Master's report was right, and the declaration prayed for must be granted.

Pemberton for the plaintiff.

Kindersley for the defendants.

Review of the Judgment of the Master of the Rolls in the last Case.—By the EDITOR.

Where an assignee of a lease is *not bound by a covenant* to pay the rent and perform the covenants, his liability ceases upon his assigning over, (see *Taylor v. Shum*, 1 Bos. & Pull. 21); he is only liable in respect of his privity of estate, and when he has parted with the estate by assignment he determines that privity, and frees himself from all future liability. Nor is there any legal method, as between lessor and assignee, of holding him personally responsible for rent.

or breaches of covenant during his tenancy. Notice to the lessors is not at all necessary to discharge an assignee from his liabilities, nor is there any fraud in assigning to any one the assignee pleases with the view of getting rid of the term. Lord C. Eyre, in the case just referred to, observed, "If you have no remedy against the assignee, you must lose your rent, and get possession of the premises as you can. The only case where a question of fraud could arise is, when the assignor has kept possession of the premises of which he makes a profit, and has made an assignment to prevent responsibility. But even then, if the possession be profitable, there will be always something for the landlord to distrain, so that *I doubt whether there can be ever such a thing as a fraudulent assignment*, and whether an issue on such a point can ever be well taken. It is clear that *there is no fraud in assigning to a beggar, or to a person leaving the kingdom*, provided the assignment be executed before his departure.

An assignee who assigns to another person is now liable to the lessee for breaches of covenant during the assignee's possession, upon which the lessor shall recover against the lessee, although such assignee may not be under covenant to indemnify the lessor against such breaches. *Burnett v. Lynch* (5 Barn. & C. 589; 8 Dowl. & R. 368). See, however, *Jones v. Hill*, (7 Taunt. 392; 1 Moore, 100); *Walker v. Reeve*, (3 Doug. 19; 2 Doug. 461 n.)

It is well observed by his Honour in the above judgment, that "if the executors had assigned to a beggar without communicating with the lessor, it would have been a wrongful act;" but this observation of his Honour applies only morally, and not legally, as is most satisfactorily shewn by the conclusion of the sentence.

GRAFFETT v. HUMPAGE.—Nov. 8.

Husband and Wife.—Construction of the words "executors and administrators" as words of limitation.

Lord LANGDALE delivered his judgment in this case. The question was, whether 2,000*l.*, part of a sum of 4,000*l.*, bequeathed by the will of Abraham Hull, belonged to the next of kin of Mrs. Humpage, or to the next of

kin of her husband, Thomas Humpage, deceased. Abraham Hull, by his will, dated the 3rd of October, 1793, gave 4,000*l.* to trustees, upon trust, to pay the interest to his wife and to his daughter (afterwards Mrs. Humpage), share and share alike, and to the survivor, and after the death of the survivor, to apply the interest to the maintenance of the and children of his daughter until twenty-one, then the capital was to be transferred to them, but in case his daughter died without children, one moiety of the 4,000*l.* was to go the testator's brother, John Hall, and the other moiety to such persons as his daughter should by deed or will appoint, and in default of appointment, to her executors or administrators. The daughter afterwards married Howell, who died without leaving issue, and afterwards, in 1800, the testator died. Mrs. Howell, the daughter, was then entitled to the interest of one moiety of the 4,000*l.* in possession, and to the interest of the other moiety upon the death of her mother. Also to a sum in the consols., and to 4,500*l.* vested in securities in her own name. Previous to her subsequent marriage with Thomas Humpage, a settlement was executed, in which it was agreed that the three several sums and any future fortune that might come to Mrs. Howell should be settled, and that the transfer had been made to the trustees. It was declared that they should stand possessed in trust, after the marriage, to pay the interest to Mrs. Howell for her separate use during the coverture, and, after the decease of either the husband or wife, to pay the interest to the survivor for life, and, afterwards, in trust for all the children of the marriage; but if no children, then, in trust, after the death of the husband, to transfer to such persons as the wife should appoint, and, in default of appointment, the trust premises were to go to the next of kin of the wife according to the statute of distributions. Mrs. Hall, the mother, died in 1817, and Mrs. Humpage became entitled to the interest of the other moiety of the 4,000*l.* for her life. In September, 1832, Mrs. Humpage died without issue, and without making any appointment of the moiety of the 4,000*l.*, leaving her husband, Thomas Humpage, then surviving. His Lordship thought, that from the care the testator took to limit the 4,000*l.*, it was probable that his intent was to exclude any husband of his daughter. The words "executors and administrators" had been construed to mean next of kin. It appeared to his Lordship, that the 2,000*l.* in question belonged to the next of kin of Mrs. Humpage.

QUEEN'S BENCH.

CANNON v. YOUNG.—New Trial.—Nov. 2.

Personal Liabilities of Attorneys for Expenses of Witnesses.

The defendant in this case was an attorney, and the plaintiff a person who had been called as

a witness for plaintiff in another action which the present defendant had conducted; in which damages had been recovered, and the present defendant) had received the costs, including an allowance for the expenses of the present plaintiff. The present action had been tried before the under-sheriff of Middlesex, and Mr. Ryland at the trial had submitted that the plaintiff ought to be nonsuited, as an attorney was not personally liable to a witness for the expenses of the witness's attendance at a trial which was conducted by the attorney. The under-sheriff agreed with Mr. Ryland upon the question of law. The plaintiff had, however, refused to submit to a nonsuit, and the jury found a verdict for him.

Ryland now contended that the verdict was against law, on the ground already stated, and in support of his argument he cited the case of *Robins v. Bridge*, (3 M. & W. 114), in which the doctrine for which he contended was expressly decided. He therefore prayed for a rule to shew cause why the verdict should not be entered for the defendant, as a new trial might not only lead to a repetition of what had happened before the sheriff, and there was no power in the Court to compel the plaintiff to submit to a nonsuit.

—Rule refused.

LAW EXAMINERS.—Nov. 3.

Notice required to be given by Articled Clerks.

Kelly moved, on behalf of a gentleman who was desirous to be admitted an attorney, for an order upon the Court of Examiners to examine the applicant as to his fitness for admission. He stated that the applicant had last term given a regular notice of his intention to apply for admission, and had been examined under that notice. His passing was then postponed on account of his inability to answer questions on one particular point with which he had since made himself thoroughly acquainted. He now sought to be again examined, but was informed that he must give three days' notice at the commencement of term, in other words, that he must give a regular term's notice for the purpose. If the rule requiring this notice was not relaxed in the present case, the applicant would lose both the present and the ensuing term. He submitted that the first notice ought to be held sufficient for the purposes of this second examination.

The Court thought that there must be a fresh notice, in the same way as if nothing whatever had taken place on the subject.—*Application refused.*

THOMPSON v. BRIND.

Abolition of Imprisonment for Debt Bill.

Hance moved to discharge the defendant in this suit from custody, and to enter a common appearance, under the provisions of the 7th section of 1 & 2 Vict. c. 110, by which it is provided that, in all cases where a defendant should be in custody at the pass-

ing of the act, and should not have filed his petition to be discharged under the Insolvent Act he should be entitled to be discharged on entering a common appearance. In this case, however, the defendant had presented his petition, but the learned Commissioner having decided that the defendant had no *locus standi* in his Court, it was forthwith dismissed. The learned gentleman now put it to the Court, that the mere filing of a petition which was unsuccessful might be looked upon as a nullity, and that the defendant was still within the scope of the act.

Rule granted as prayed.

BURRARD v. BOUSFIELD.

Section 15, of the same Act.

Kelly moved to discharge the defendant out of custody, on the ground that the plaintiff had not declared against him within the time prescribed by the rule of Court. It appeared that the defendant being in custody had petitioned the Insolvent Court, by the adjudication of which he had been discharged as to all his debts save two (one of which was the subject-matter of the present suit), and with regard to them he had been remanded for sixteen months. At that time there was no suit in existence at the instance of Burrard, his debt having been simply inserted in the schedule, but immediately after the decision of the Court upon the petition, a detainer was lodged against him at the suit of Burrard, as was customary; since then no further proceedings had been taken, and as the detainer bore date in May last, it was now submitted, that the adjudication of the Court, that the prisoner should remain in custody as to this debt for sixteen months, did not militate against the rule of Court which rendered it necessary for plaintiffs to proceed, and that, no declaration having been filed, the defendant was supersedable and entitled to his discharge.

After a lengthened discussion, however, the Court was unanimously of opinion that there was no ground for the application, it being observed by Alderson, B., that if the plaintiff had proceeded to take any further steps, there might then have been good ground for the Court to check his proceedings. As it was, however, the 15th section of the Insolvent Debtors' Act strictly applied, and the defendant was not entitled to his *supersedesas*.—*Rule refused.*

NEW RULE OF COURT.

MICHAELMAS TERM.—2 VICT.

(*Sittings in Banco.*)

Admission of Attorneys.

“Whereas it is provided by the Act of the 1st and 2nd of her present Majesty, c. 46, sect. 3, that after the 1st day of November, 1838, any person entitled to be admitted an attorney of any of the superior courts of common law at Westminster, shall, after being sworn in and admitted as an attorney of any

one of the said courts, be entitled to practise in any other of the said courts upon signing the roll of such court, and not otherwise, in like manner as if he had been sworn in and admitted an attorney of such court, provided that no additional fee besides those payable under an act of the first year of the reign of her present Majesty, c. 56, shall be demanded or paid; and that the fees payable for such admission shall be apportioned in such manner as the judges of the said courts, or any eight of them, shall by any rule or order made in term or vacation direct and appoint:

"We, therefore, direct and appoint, that the fees payable by virtue of the said last-mentioned act for the judge's fiat be received in the first instance by the clerk of the judge granting the fiat, and paid over by him to the Clerk of the Chief Justice or Chief Baron of the Court, as the case may be, and the day after each term all the fees so received shall be divided into 15 portions, one of which shall be paid to the clerk or clerks of each judge; and further, that the fees payable by virtue of the said act to the ushers shall be received in the first instance by one of the ushers of the Court in which the admission shall take place, and shall on the day after each term be divided into three equal portions, one of which shall be paid to the ushers of each court.

"DENMAN, "J. B. BOSANQUET,
"N. C. TINDAL, "E. H. ALDERSON,
"ABINGER, "J. PATTESON,
"J. A. PARK, "J. GURNEY,
"J. LITTLEDALE, "J. WILLIAMS,
"J. VAUGHAN, "J. T. COLERIDGE,
"J. PARKE, "T. COLTMAN."

BUSINESS OF THE COURT.—Nov. 6.

Lord Denman stated, that to-morrow and Thursday the Court would take the peremptory paper, and that after those days the regular business would be proceeded with, that is, the Court taking the different papers on the usual days.

CRESWELL v. NORTON.

Attorneys not admitted in Chancery—whether entitled to Costs for practising in the latter Court.

In this case the plaintiff, an attorney, brought this action to recover the amount of his bill of costs for services he had performed as an attorney in the country. To this the defendant pleaded that the plaintiff had transacted the business as a solicitor in Chancery, though at the time he was not a solicitor in Chancery, but it was admitted he was an attorney. It was therefore contended that the present action could not be maintained. The jury found a verdict for the defendant.

Bingham, on an early day that term, moved for a rule to shew cause why this verdict should not be set aside, and a verdict entered for the plaintiff, contending that the statute

1 Vict. c. 56, s. 4, would cure the defect, if their Lordships considered the act had a retrospective operation.

Lord DENMAN now said, that the act could not be considered as having a retrospective operation.—*Rule refused.*

BAIL COURT.

First Day of Term.

BILL FOR ABOLISHING IMPRISONMENT FOR DEBT.

Hodges applied for a rule for an attachment against the sheriff for not bringing in the body.

LITTLEDALE. J.—There is no bringing in the body now.

Hodges.—But the default was committed before the passing of the late act, and in circumstances which would, as I think, entitle us to have the attachment as a security.

LITTLEDALE, J.—All that would of course have depended upon the circumstances of the case. But as the bringing in of the body is abolished, all the consequences of that practice must be abolished with it.

Hodges was proceeding to shew that the case would be a case of hardship on his client, but

LITTLEDALE, J., refused to enter into any consideration of the circumstances of the case, but gave the counsel permission to apply to the full court.

Theobald applied in a similar case, and with the same result.

In another case

A. S. Dowling later in the day asked for a rule nisi for the purpose of allowing the question to be argued, but the Court refused to grant even a conditional rule.

A. S. Dowling this morning made his motion to the Court, when Lord DENMAN, C.J. granted the Rule.—Nov. 4.

ATTORNEYS' APPRENTICES.

Interruption of Service by the act of God.

Ex parte Hodges.

John Bailey applied, on the part of Mr. Hodge, for liberty to go before the examiners, notwithstanding that he had been prevented by ill health from attending to the business during the last year of his articles. The illness was of a serious character, and threatened to end in a pulmonary consumption. The clerk, under the advice of his medical attendants, was obliged to go to Italy for more than twelve months.

The Court granted the application after some hesitation, relying principally upon the authority of *ex parte Matthews*, (1 B. & Ald.), and upon the fact that the sufficiency of the clerk must be tested by an examination before he can be admitted to practise.

WELLS v. DAY.—Nov. 3.

Distress—on the Right of a Landlord to distrain Goods removed, where Rent not actually due.

This action was brought by Mr. Wells, who was formerly clerk to one of the judges of the Common Pleas, against the defendant, who carried on the business of a house-agent in Bishopsgate-street, to recover damages for a wanton and oppressive trespass. In the early part of last year Mr. Wells took of Mr. Day the house, 19, Westmoreland-place, City-road, for a year, the rent to be paid quarterly. The rent for the first three quarters was paid, though not with the punctuality that Mr. Day required. On the 22nd of March, Mr. Wells removed with his family to Upper Park-place, Islington-road. On the 29th, the defendant (the son of the landlord) went to the house and saw Mr. Wells, and stated that he had come for the rent. Mr. Wells told him that he should have it on the following day. Mr. Day said, "No; he must either have the rent or the goods." Mr. Wells desired him to wait until he tried to get the rent; but he refused, and went up stairs and seized the best bed, and also a table, desiring a porter, named Hall, to walk off with them. Mr. Wells at last procured the money, and paid 5*l.* 17*s.* 6*d.*, the rent being 5*l.* 15*s.*, and half-a-crown being paid to Hall, who was represented to be a broker. Now, he (Mr. *Platt*) submitted that these goods were never liable to be distrained or followed, unless at the time of their removal rent was due; but Mr. Day, who was well acquainted with the technicalities of the law, chose to assert a pretended right to distrain the goods, which he really did not possess. This was not the mode in which a man ought to assert his rights, and Mr. Day's object was evidently to annoy Mr. Wells. This was the trespass complained of, and the defendant had pleaded not guilty. He would now proceed to prove the circumstances in evidence; and when that was done, he was confident the jury could have no difficulty in giving a verdict for the sum extorted, and such damages as they thought would compensate Mr. Wells for the improper act of Mr. Day.

Witnesses were then called to prove the facts.

The Attorney-General contended that a mere trumpery action had never been brought into a court of justice, and that no real grievance had been sustained; for it was quite clear that there was a debt of 5*l.* 15*s.* due, and that a palpable attempt had been made by Mr. Wells to defraud Mr. Day, by a clandestine removal of his goods, for the purpose of evading a distress.

Platt said his learned friend had not put that on the record.

The Attorney-General did not know that it was necessary, even if he wished to adopt it as a substantial defence.

LITTLEDALE, J., said, it had been decided in two or three cases that it was necessary it should be put on the record. But these goods were removed before the rent was due.

The Attorney-General said, that at all events he had a clear right to urge this topic to the jury in mitigation.

LITTLEDALE, J.: Undoubtedly.

The learned gentleman then proceeded with his address, commenting on the evidence at considerable length, contending that there had clearly been a removal to avoid a distress. It would be for his Lordship to say whether, as the rent had not actually become due at the time of the removal—although it was in contemplation of the rent becoming due, and to prevent the distress, that these goods were removed—whether this was a case within the statute. If a tenant might remove his goods to avoid a distress, then, in strict law, the proceeding of Mr. Day could not be justified; but he trusted, if that should be his Lordship's opinion, that the jury would give only nominal damages.

LITTLEDALE, J., said, that in his opinion, in point of law, the act of the 11th Geo. 2, did not apply to a case of removal where the rent had not become due; and if it did apply, it ought to have been pleaded and put upon the record. The question for the jury to decide was, what, under all the circumstances of the case, was the proper amount to be given in damages.

The jury, after deliberating eight or ten minutes, found for the plaintiff—Damages Twenty Pounds.

Platt and Lee for the plaintiff.

The Attorney-General for the defendant.
(Before Mr. Justice LITTLEDALE.)

ABOLITION OF IMPRISONMENT FOR DEBT BILL, SECT. 7.—Nov. 6.

Humphrey applied to the Court for a rule, calling upon a plaintiff to shew cause why the bail given in this case should not be exonerated upon the defendant entering a common appearance. The application was founded upon the equity of the 7th section of the Act for Abolishing Imprisonment for Debt, which provided that every person who should be in custody on mesne process at the passing of the act, and who should not have filed a petition in the Insolvent Debtors' Court, may be discharged out of custody on filing a common appearance to the action. The learned counsel observed, that since the passing of the act a multitude of commentators had published their opinions upon the subject, but that they were all unanimous in saying that the section in question applied to the cases of persons out on bail as well as those in actual custody; for as it was in the power of the bail to render the prisoner in their own discharge, and as the prisoner, when so rendered, would be unquestionably entitled to his discharge under the section, as he would then be in custody, it would be absurd and useless to put him to the trouble and expense of causing himself to be placed in custody for the mere purpose of thereby entitling himself to be discharged. He hoped, therefore, that the Court would be of opinion that he was entitled to the rule,

although the class of persons to which his client belonged were not expressly mentioned in the section.

Littledale, J., said, that he agreed in opinion with Mr. *Humphrey*, and that from some conversation which he had had with the other judges on the point, he thought that their opinions were the same as his own, and he had been about to act in accordance with it in a case which occurred before him at chambers. One of the parties in that case had, however, brought him a newspaper containing a report of a case which arose in the Court of Common Pleas, and in which the judges of that Court were represented to have expressed an opinion that the section did not apply to any defendants except those who were in actual custody. Upon the authority of this case he had held back his decisions for the present.

Humphrey said, that the Court of Common Pleas had merely expressed an opinion that the question was one which ought to be discussed, and that they had therefore granted in the case before them a rule nisi for that purpose.

His Lordship then granted a conditional rule in the present case.

COMMON PLEAS.

BATEMAN v. DUNN.—Nov. 2.

Abolition of Arrest for Debt Bill, Sect. 6.

Wilde, S., applied to set aside an order of *Coltman, J.*, for cancelling the bail-bond, and entering an *exoneratur*. The learned serjeant observed, that there arose in this case a point of general importance, in the construction of the Act for Abolishing Imprisonment for Debt. It appeared, that the defendant was a native of Ireland, and generally resided in that country. Having come over to England, he was arrested at the suit of the plaintiff. The act of 1 & 2 Vict. for Abolishing Imprisonment for Debt on Mesne Process having come into operation on the 1st of October, an application was subsequently made to *Coltman, J.*, under the 6th clause of that act, which empowers the Court or a judge to order the discharge of any person in custody on mesne process. The application was opposed upon an affidavit, stating that the defendant was about to return to Ireland immediately. The learned judge, however, granted an order to exonerate the bail, and the learned serjeant now moved to discharge that order. He contended that the words of the clause only applied to a defendant actually in custody, and not a party who was at large upon bail, and that, at all events, even if the equity of the statute should be held to apply to the exoneration of bail, this was not a case in which the court or a judge should exercise their discretion in favour of such an application, when it appeared that the defendant was about immediately withdrawing to another country, where it might be impossible to find him after judgment should be recovered against him. He urged that it was extremely important to the great

trading classes of this commercial country that the provisions of an act, which was at present merely speculative, should not be extended at the outset beyond their strict and reasonable import.

The COURT granted a rule to shew cause.

ATTWOOD v. SMALL and Others.—Nov. 5.

Sir *W. Follett* moved for a rule to shew cause why the verdict found for the plaintiff for 2,063*l.* should not be set aside, and a verdict entered for the defendant. The cause was tried before Lord *Abinger* at the last Stafford assizes. It was an action on a special contract to recover eleven years and a half interest on certain instalments of 375,000*l.*, at five per cent., from October 1, 1832, to April 1, 1833. The amount of the interest claimed on the instalments was 89,375*l.*, and there was a further sum of 13,614*l.* claimed as interest due upon each half year's interest that fell due on such instalments. On the question respecting this latter sum, which was the only question left to the jury, they found a verdict for the defendant; but with respect to the 2,063*l.* there was nothing left to the jury, his Lordship deciding that it turned altogether upon a matter of law; 87,312*l.* had been paid into court; therefore, if the question as to the 2,063*l.* were decided in favour of the defendants, they would be entitled to a verdict in their favour on the whole of the case. Now the right to the sum of 2,063*l.* depended upon the question whether the plaintiff was entitled to 4*l.* 10*s.* or 5*l.* per cent. on a sum of 75,000*l.* The first contract took place between the parties in the month of May, 1825, by which the plaintiff agreed to sell certain mines to the defendants for 600,000*l.*, of which 25,000*l.* was deposited in the hands of a third party to be paid over to the plaintiff on the execution of the contract. 200,000*l.* was to be paid to him on the 1st of October following; three other sums of 100,000*l.* each at three different subsequent dates, and the remaining 75,000*l.* on the 15th of October, 1827; together with interest upon the said several instalments of 5*l.* per cent. per annum. On the 1st of October, 1825, the plaintiff was not in a condition to make out a complete title; and consequently, on the 4th of November, a new contract was entered into, varying the terms of the former one, and providing, amongst other things, by way of a security against a defective title, that the 75,000*l.* should remain by way of mortgage on the property at 4*l* per cent. interest for 14 years from the 15th of October, 1827, and that the defendants were not to be personally liable for payment of the same, but only for the interest. The plaintiff, also, by that contract agreed to abandon 50,000*l.* of the purchase-money. A bill was afterwards filed in the court of the Exchequer by the defendants, charging the plaintiff with fraudulent misrepresentation as to the value of the property, and Lord Lyndhurst decided that the contract was void on that ground. The plaintiff appealed from that de-

cision, and his Lordship's judgment was reversed by the House of Lords. The present action was then brought to recover the arrears of interest due, and the sum of £7,312*l.*, as before stated, paid into court. It was contended by the defendants that, according to the terms of the contract, they were only liable to pay 4*l.* 10*s.* per cent. on the £75,000*l.*; but they were met by a technical objection raised by the plaintiff—namely, that as only so much of the contract as stated the interest to be at the rate of 5*l.* per cent. was set out in the declaration, and the defendant had paid money into court upon that declaration, he was not at liberty to give the contract in evidence, for the purpose of varying the purport of that set out in the declaration. The learned counsel contended that the state of the pleadings did not preclude the defendants from giving the whole of the contract in evidence, to shew that they were only liable to pay the smaller rate of interest, and that consequently the verdict ought to be entered in their favour.

The COURT granted a rule to shew cause.

Nov. 6.

Wilde, S., made a cross-motion for a rule to shew cause why the verdict found for the defendant as to the claim of £13,000*l.*, and odd should not be set aside, and a new trial had. The learned counsel referred to the application of the preceding day for a general outline of the case. When the case went down for trial, from £80,000*l.* to £90,000*l.* was paid into court. The injunction was put in on the part of the plaintiff to shew that the delay had been occasioned by the act of the defendants, and not of him. An objection was taken, that he must put in the bill and answer; but although this, he contended, was not necessary, yet the defendants had obviated the objection by causing the answer to be read for another purpose. The learned Judge reserved the point, as to whether or not the case came within the act 4 & 5 Will. 4, for the opinion of this court, and then directed the jury to say, whether or not, supposing it came within the act, they thought the plaintiff entitled to interest on the instalments. The plaintiff's counsel contended, that the defendants having obtained possession of the estate, and retained the purchase-money, they should pay interest upon the instalments from the time they fell due, especially as they were relieved from all personal liability in respect of the principal, and were only responsible for the half-yearly payment of interest on certain specified days. The act of parliament gave the power to allow interest on sums of money payable on a day certain, and even if not payable on a day certain, after demand made. In this case the interest was a distinct debt from the principal, payable on certain days, which were specified, but redeemable by the voluntary payment of the principal sums. The plaintiff had commenced actions for their recovery, but the defendants had filed a bill evidently for the purpose of delay, and obtained an injunction. Yet Lord Abinger told the jury that they

were to dismiss from their minds all consideration in respect of such bill, as they must suppose it had been filed *bona fide*, and the injunction therefore was the act of the court. The learned counsel contended Lord Abinger had clearly misdirected the jury in this respect, inasmuch as the defendants having filed a bill without any justifiable grounds, and thereby obtained an injunction, they were the cause of the delay, and consequently ought to pay interest for the use of the money. He submitted, therefore, that the noble and learned judge having thus misdirected the jury, the plaintiff was entitled to a new trial.

THE COURT granted a rule to shew cause.

COURT OF EXCHEQUER.

REYNOLDS v. SIMMONDS.—Nov. 2.

Abolition of Arrest Bill.

W. H. Watson moved to stay the proceedings against the prisoner, who was about to be charged in execution, on the ground, that under the recent Act for the Abolition of Arrest on Meane Process, such a step could not be taken under the particular circumstances of the case. He stated that the prisoner being in custody at the suit of another person, was now brought up under a writ of *habeas corpus*, and it was contended that, as all power of arrest was abolished by the 1st and 2nd Victoria, the present proceeding was not one which could be adopted.

The COURT, however, was decidedly of opinion that there was no ground for the application. The proper, and indeed the only, course to charge a man in execution at the suit of one creditor, when he was already in custody at the suit of another, was by writ of *habeas corpus*, for the sheriff could not take him by a common writ; and the new act was not meant to deprive a creditor of any rights which he might claim by virtue of assignment against his debtor. The point indeed was so clear, as not to admit of any doubt, and the application must be refused.

SITTING IN BANCO.—*Nov. 5.*

The *peremptory paper* of last term was called on and wholly disposed of, and the Court proceeded to take motions for New Trials. No cases of practical interest occurred.

INSOLVENT DEBTORS' COURT.

In Re THOMAS FORD.—Nov. 3.

First application under the 119th Sect. of the New Act.

This was a case of an application on the part of a creditor under the compulsory clause of the new Act for the Abolition of Arrest on Meane Process.

Mr. Charles Wright applied to be appointed assignee of this estate. Ford was a prisoner in Whitecross-street prison. He had been confined some years. On the 26th of last

month, Mr. Wright obtained from the Court a vesting order under the 36th section, (the compulsory clause) of the new act. Mr. Wright now made application to the Court, under the 45th section of the same act, to be appointed assignee.

A long affidavit was read, containing a statement of facts on which the application was made, and by which it appeared that Mr. C. Wright had proceeded against the prisoner under the statute called the Lords' Act. No schedule had been filed as ordered by that act, neither had Ford been indicted. Mr. Wright believed that Ford did not mean to file a schedule, and also that he was possessed of freehold and other property, and that his debts were not of a large amount. Mr. Wright therefore prayed the Court to appoint him assignee, in order that he might obtain payment of his claim.

The learned Commissioner Bowes granted the prayer, and Mr. C. Wright was appointed assignee.

It is stated to have been said by *high authority*, that there is *no penalty for disobedience of an order of the Court* under this sect. (119), of the new act; and certainly, upon strictly looking into the act, such would appear to be the fact. The 66th section is, however, open to construction. It enacts, that in case any assignee, or *other person*, shall disobey any rule or order of the Court, *for enforcing the purposes* and provisions of the act, the Court may order *the person* so offending to be arrested and committed as for a contempt. Now, the question arises upon this section, whether the words, "*or other person*" shall apply to *prisoners*, or is to be confined to *assignees, or other persons*, who may be under any order of the Court, for carrying into effect the purposes of the act. The latter appears to be the sound construction of the section, as the term, *prisoner*, is applied to the insolvent through the Act.—*Error.*

CENTRAL CRIMINAL COURT.

Nov. 2.

This day the Judges met at the Sessions-house, Old Bailey, to fix the times for holding the Central Criminal Courts during the ensuing mayoralty. Chief Justice Denman submitted an important motion to the Court, there being present Judges Tindal, J. A. Park, Vaughan, Baron Parke, Alderson, Gurney, Patteson, Williams, Coleridge, and Coltman. It was, that a clerk should be appointed to marshal the witnesses and to aid the grand jury in the same way as is done in the Court of Queen's Bench. The motion was agreed to, and the Judges unanimously appointed Mr. John Clark, the clerk of the Court, to attend on the grand jury. One effect of the change will be to shorten the sessions by one

day, as on the first two days of the session the Courts are frequently waiting for bills from the grand jury. But the more important result will be the check to perjury, for which the secrecy of the grand jury-room furnished opportunities, where an offender could afford to corrupt the witnesses to make statements utterly at variance with those on which the prisoners were committed for trial.

The following days were fixed for the sessions:—

1838: November 26, December 17, December 31.—1839: February 4, March 4, April 8, May 13, June 17, July 8, August 12, September 16, October 21.

The Court was adjourned until Monday, Nov. 26.

Business in the Courts.

SPECIAL PAPER.

Monday, the 12th day of November, 1838.

REMANETS FROM TRINITY TERM, 1838.

STANDING FOR JUDGMENT.

Rivis v. Watson, demurrer.

Heard 17th January, 1838.

FOR ARGUMENT.

Alderman and Wife v. Neale and others—Special case.

Carrell v. Cattell—Do.

Thicknesse v. The Lancaster Canal Company—Do.

Tobin v. Crawford—Do.

NEW CASES ENTERED.

Michaelmas Term, 1838.

FOR ARGUMENT.

Gann v. Oakes—Demurrer.

Hopkins v. The Mayor, and Aldermen, and Burgesses of the Borough of Swansea—Do.

Morrall v. Lodge—Do.

Collingbourne v. Mantell—Do.

Wood and another, assignees, &c. v. Smith—Do.

Ulph and another v. Mann and others—Do.

Wallis v. Harrison and others—Do.

Duckworth v. Harrison—Do.

Boydell v. Jones—Do.

Raleigh and others v. Atkinson—Do.

Johnson and others, assignees v. Williams—Do.

The old Cause List is disposed of.

QUEEN'S BENCH.

MIDDLESEX.

Lewis v. Hawker

REMANETS AFTER TERM.

Henniker v. Ashby

Dane v. Kirkwall

NEW CAUSES.

Second Sitting after Term.

Briggs v. Aynsworth.

COURT OF CHANCERY.

WESTMINSTER.

For Judgment.

Byfield v. Previs—Rehearing

Wedderburn v. Wedderburn—Appeal

Appeals.

Saumarez v. Saumarez—Part heard

Melford v. Peters

Ball v. Harris—Rehearing

Harrison v. Wiltshire

Attorney-General v. Corporation of East Retford

VICE-CHANCELLOR'S COURT.

WESTMINSTER.
Short Causes.

- Hancock v. Taylor
Rundell v. Lord Rivers
Gingell v. Gingell
Clapton v. Bulmer
Markby v. Markby
Barnes v. Barnes
Nicol v. Richardson
Lumley v. Scarborough
Gee v. Cottle
Tulloch v. Wellings—Further directions and costs
Fardon v. Hartwell—Do.
Slade v. Tooke—Do. and petition
Weston v. Weston
Lowden v. Baker
Nanny v. Wynne
Clegg v. Whitley
Durning v. Durning

Unopposed Petitions.

- Clayton v. Gresham
Walton v. Brooke
Isaacson v. Cross
Cockran v. Robinson
Tomlinson v. Bolton
Boulger v. Blandy
Trevor v. Trevor
In re Thomas
Jervoise v. Clarke
In re Dickens
Ex parte Edwards
Howell v. Tate
Wright v. Borradale
Attorney-General v. Christchurch
In re Oxford Canal Navigation Act
Donovan v. Donovan
Gilbert v. Royds
Barker v. Okey
Benson v. Jopson
Ex parte Wells

To be spoke to.

- Farquharson v. Balfour
Motions by Order.

- Taylor v. Salmon
Turner v. Trelawney
Butterworth v. Bamford

Adjourned Cause Petitions.

- Soame v. Stoughton—By order
Russell v. Buchanan
Locke v. Colman
Farrar v. Bennett
Brandon v. Brandon
Healey v. Healey
Freeman v. Fairlie—Two petitions
M'Leod v. Phelps
Russell v. Buchanan
The same v. The same—Rehearing by order
Brown v. Pearse
Glasscott v. Bridges
Neale v. Pestlethwaite
White v. Sayer—Two petitions
Waters v. Taylor
Tulloch v. Simpson.

ROLLS COURT.
WESTMINSTER.

Motions continued.—After the Motions.

- Slater v. Willis—Part heard
Hartwell v. Colvin—Demurrer
Du Hourmelin v. Sheldon, (2), Exceptions, further directions, and costs.

ORDER.

Short and consent Causes, and consent Petitions every Tuesday at the sitting of the Court.

COURT OF QUEEN'S BENCH.

WESTMINSTER.
Sittings in Banco.

COURT OF COMMON PLEAS.

WESTMINSTER.
Sittings in Banco.

COURT OF EXCHEQUER.

WESTMINSTER.
Sittings in Banco.

COURT OF REVIEW.

WESTMINSTER.

The Court of Review will not sit to-day.

We are very sorry that our Publishers should suffer any loss, or be put to any inconvenience by party and private malignity, through their being employed by us in publishing this Periodical. In our prospectus, “we declared that we had no intention of interfering with our contemporaries,” being satisfied to let our own Periodical stand upon its own merits. It is, therefore, with surprise as well as pain, that we have just received the following letter from our Publishers, signed *avowedly* by the Secretary to the Law Society, but emanating in fact from the Proprietors of a contemporary Periodical, for whom we felt, and do feel, every respect:—

Law Society's Hall, 8th Nov., 1838.

Gentlemen,—I am authorised by the Committee of Management to inform you, that they have appointed another Bookseller to supply the Society with Books, and your account to the present time will be paid on your sending a receipt.

I am, &c.

R. MAUGHAM, *Secretary.*

Messrs. Richards and Co.

We advise these gentlemen to take care (in time) in what manner they throw stones at our windows. We know how to mend them.

TO CORRESPONDENTS.

W. G.—We have inserted his solution of our Problem No. I, and we recommend him to study it still further. We will reply.

LONDON : W. M'DOWALL, PRINTER, PEMBERTON ROW, GOUGH SQUARE.

The Legal Guide.

SATURDAY, NOVEMBER 17, 1838.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 18.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4, c. 27.

WE have already shewn (*a*) within what time an *ejectment* must now be brought; and that a possession of twenty years without payment of rent, or *any written acknowledgment of a tenancy*, is a bar to an *Ejectment* under this New Statute; and it now becomes necessary to look at the meaning of the required *written acknowledgment of a tenancy*, that shall take a case out of this Statute; sect. 14 enacts, that when any *acknowledgment* of the title of the person entitled to any land or rent, shall have been given to him or *his agent in writing*, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of the act, to have been the possession or receipt of or by the person to whom, or to whose agent such acknowledgment shall have been given at the time of giving the same; and

the right of such last mentioned person or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment or the last of such acknowledgments, if more than one, was given.

Parol declarations are therefore no longer admissible as evidence of possession. See *Doe dem. Roffey v. Harborough*, (1 Nev. & M. 422).

To this section we must add the 28th and 42nd sections of the new act; the former of which enacts, that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the mean time an acknowledgment of the title of the mortgagor, or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, *or to the agent* of such mortgagor or person, in writing, signed by the mortgagee, or the person claiming through him, and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than

(*a*) *Ante*, p. 2.

one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid; and the person or persons claiming any part of the mortgage money, or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land or rent, and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

The latter section (42), enacts, that after the said 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages, in respect of such arrears of rent or interest shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after

an acknowledgment of the same, in writing, shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee, or other incumbrancer, shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage, or other incumbrance, on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

These are the three sections requiring *acknowledgments in writing* to take a case out of the statute, and these sections must be looked at with reference to Lord Tenterden's Act, 9 Geo. 4, c. 14, and to the 3 & 4 Will. 4, c. 42, s. 5. The *difference* of language in these sections must be particularly observed: the 14th section requires that the *acknowledgment* of the title of the person entitled must be *given to him or his agent in writing*; the 28th section requires, that to take a case out of the statute and let in a right to redeem, after twenty years' possession by a mortgagee, an acknowledgment of the title of the mortgagor, or of his right of redemption, must be given to the mortgagor, or some person claiming under him, or to the agent of such mortgagor or person in writing.

The 40th and 42nd sections, however, extend to the agents of both parties—the hand to receive and the hand to pay. By the former section, in order to claim money charged upon land and legacies after the end of twenty years, some part of the principle or interest must be paid, or some acknowledgment of right have been given, in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled, or his agent. The latter section, in order to recover rent

after six years from its becoming due, the acknowledgment from which the six years shall run must be in writing, given to the person entitled, or his agent, by the person by whom the same is payable, or his agent. This section (42) contains no saving in favour of persons under disabilities; consequently, persons so situated must be great sufferers. Sir Edward Sugden has added as note, in his *Vendors and Purchasers*, Vol. 1, 411, wherein he says, "This clause should be modified without loss of time, or the grossest injustice will be committed upon the just rights of legatees and others, particularly infant legatees."

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM I.

What are the changes made in the law by stat. 1 Vict. c. 26, "An Act for the Amendment of the Law with respect to Wills."

The first alteration worthy of notice, after the repeal of the stat. of wills, 32 Hen. 8, c. 1, and various other statutes, is contained in sect. 3, whereby it is enacted, that all property of which a testator shall be possessed up to the time of his death, extending to customary freeholds and copyholds, estates *pur autre vie*, contingent interests and rights of entry, and property acquired after the execution of the will, may be bequeathed (a).

By Sect. 7, it is enacted, that no will of a person under 21 years of age shall be valid.

The next alteration, and which is the leading feature of this statute, is of very great importance; instead of a will of real property requiring, as heretofore, to be attested and published in the presence of three witnesses on the one hand, and that a will of personalty merely should, on the other, be valid, without in fact being actually signed, much less attested (b), it is now

rendered equally necessary in both cases that a will should be executed in the presence of two witnesses, who must attest the execution at the same time. See *Bligh's Case*, reported in 1 Legal Guide, p. 7. It may be remarked here, that according to Regan's case, reported *ib.*, it is not necessary that the witnesses should actually see the testator sign his name; it will be sufficient that he *acknowledged* it before a competent number of witnesses, not less than two being present at the same time.

It is very much to be feared that before this enactment can have had time to be understood among that class of will-makers who are principally affected by it, viz. persons in low circumstances and possessed of a little personalty only, and who employ a friend to make their wills, it will be found that, instead of having simplified the mystery of will-making, it will have caused many wills, which would have been valid under the old law, to be declared void for want of two witnesses (c).

The next alteration also concerns the execution of wills, and effects a very great change in the law. Hitherto, lawyers have been accustomed to consider that any appointment in execution of a power, whether by deed or will, in order to its validity, must conform in all its parts to the directions contained in the deed creating the power, which directions or stipulations were in the nature of conditions precedent, and, without their having been first attended to, there could have been no valid execution of the power, no appointment could have been made; and on no point were the courts more strict than this, as to the execution and attestation of the deed or will whereby it was intended to execute the power. But now, by the 10th section, all appointments by will are to be executed like other wills, the same are declared to be valid, although the other solemnities required by the deed creating the power are not observed; hence, in all cases of appointments by will, it is not any longer necessary that attention should be had to the formalities required by the deed creating the power, but

(a) Our correspondent has not extended his inquiries to tenants in tail.—ED.

(b) Wentw. c. 1, p. 15, 14th Edit.

that the will should always be attested in the presence of *two* witnesses, and this, whether it be expressed that the power shall only be executed by a will attested by *three* or more witnesses on the one hand, or by a single witness, or without any witness at all on the other (*a*).

This statute may, perhaps, have simplified the forms of attestation, inasmuch as the sole requisite now in all cases seems to be the presence of two witnesses, publication in any other manner being no longer necessary.

By Sect. 14, if any person who shall attest the execution of a will be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be rendered invalid. It may be remarked, that this section is carefully worded in the singular number, and it may be doubted whether or not the validity of a will would or would not be affected in case both the attesting witnesses shall be incompetent: the interpretation clause says, that every word denoting the singular number only shall be understood to mean the plural; this case, however, seems to admit of a reasonable doubt.

Gifts to attesting witnesses are declared void (*b*). All wills of men and women are revoked by their marriage (*c*); and the birth of a child is not now requisite. And again, no will shall now be revoked by any presumed intention on the ground of a change of circumstances; this can hardly be said to be an alteration, for the courts always dealt most strictly with such presumption of an intended revocation. See *Swinb. part 7, s.15, pl. 2, sect. 3.*

(*a*) The statute has abolished all the great variety of rules that heretofore existed for making a valid will, that should dispose of all descriptions of property, and has established *one settled rule* (Sect. 9), in their place, and thus worked a great good.—Ed.

(*b*) This is enacted by Sect. 15; the previous section, however, declares, that *a will* shall not be void on account of the incompetency of the attesting witness; and by Sect. 16 and 17, *creditors* and *executors* may be witnesses.—Ed.

(*c*) Our correspondent has neglected the exception in this section (18).—Ed.

The remaining methods by which a will may be revoked are the publication of another will or codicil, or by some writing declaring the intention, or by "otherwise destroying:" and as to what sort of destruction will come under the term "otherwise destroying," see *Hobbs v. Knight*, 1 Leg. Guide, 6, where cutting off the signature was held to be within the meaning of this clause; also *Scruby v. Fordham*, 1 Add. 78; *Moore v. Moore*, 1 Phillim. 375; and see *Grantley v. Garthwaite*, 2 Russ. Chanc. Rep. 90, for an instance of erasure which does not amount to a cancellation.

By Sect. 21, no *obliteration*, interlineation, or other alteration, made in a will after the execution thereof, shall be valid or have any effect, except so far as the same shall be necessary for the correction of any clerical error, unless executed in like manner as the will itself. And it ought to be observed, that the mere initials of the subscribing witnesses in the margin will scarcely be a sufficient compliance with this enactment; but the names of the testator and witnesses should all be written in the margin, or the same may be noticed in a special attestation as heretofore.

But so far as regards the alteration effected by the introduction of the word "obliteration" into this statute, I am at a loss to know how it would operate in the following case:—Suppose A. makes his will, bequeathing his estate to B. and C., and the same is duly executed, and A. afterwards strikes his pen through the name of C., without having such obliteration properly executed, would or would not this be a valid revocation, *pro tanto*, notwithstanding this sect. (21), seems to be strict in its terms? Certainly, it appears to me, (in the absence of any proof that the *animus revocandi pro tanto* were wanting, when such obliteration was made), that a court could not refuse to notice the obliteration, and consequently, that C. would be excluded the benefit of the bequest to him as before the statute. The cases of *Larkins v. Larkins*, 3 Bos. & Pull. 16, and *Short v. Smith*, 4 East, 419, which are in point, shew how the law stood before the new statute.

The foregoing are, I think, the principal alterations contained in this statute; the remaining clauses which, however, it will be necessary to notice, are, with one or two exceptions, declaratory of the law on points which hitherto either remained in some doubt, or have only been agreed to by a sort of tacit consent.

A will is to be construed to speak from the death of the testator; and residuary devises shall include both lapsed and void devises.

By Sect. 28, a devise of any real estate, without words of limitation, shall be construed to pass the fee or other the whole estate of the testator, unless a contrary intention appears on the face of the will.

Devises of estates tail shall not lapse when a devisee, who died in the lifetime of the testator, shall leave issue, which would have been inheritable under such entail, but such issue shall take the estate of his father.

And again, gifts to children or other issue of the testator, who die in his lifetime, leaving issue, shall not lapse. This was generally felt to be a desideratum, and will, doubtless, give satisfaction.

The act is to operate on all wills after the 1st of January, 1838.

In conclusion, I may be allowed to state, that the principal alterations of the law contained in this statute, will be found in Sects. 1, 2, 3, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 20, 21, 23, 24, 25, 28, 32 and 33; and to which the attention of students and practitioners ought chiefly to be directed; and he might also observe, that in the construction of wills made after the 1st January, 1838, this statute must always be consulted, for even the last edition (1838), of that very excellent work, "Williams on Executors and Administrators," does not, it is submitted, sufficiently explain the effects of this statute.

A STUDENT.

ANSWER TO PROBLEM II. in No. 2.

TO THE EDITOR OF THE LEGAL GUIDE.

EQUITY is a judicial interpretation of laws, which, presupposing the legislator to

have intended what is just and right, pursues and effectuates such intention. The Aristotelian definition runs thus:—"The nature of *Equity* is the correction of the law where it is defective, by reason of its universality." The thought is very sagacious, and worthy of its great author; but is capable of more elucidation than he stops to give it. By universality, there is meant that the law deals in general expressions; at least so far general, as to include some cases within the words which are not within the reason or spirit of its coercion, and to omit other cases, which required the like provisional institution. For it is impossible that any premeditation should discover, or ever so voluminous a code express, that endless series of complicated occurrences which may vary the moral fitness of applying positive ordinances. In these instances, the law (or rather the words of it) is defective; that is, in the original language of the definition, it leaves out something which it is the province of equity to supply.

Here, then, a judge ought to interrogate himself, what the lawgiver, as an upright man, would have decreed, if the case in question had fallen within his foresight and contemplation. Equity, therefore, regarding the intent and act scrupulously, fettered by the letter of the law, has to this end a twofold operation: sometimes abridging the comprehensiveness of the text, and sometimes extending the words so far as to include other cases within parity of reason (a).

R. F. L.

(a) Grotius defines *Equity* as being "the correction of that wherein the law (by reason of its universality) is deficient; for, since in laws, all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit sed arbitrio boni viri permittit*"—Western's Commentaries, B. i., c. 11. The student will find much useful information in these Commentaries; the chapters upon the Administration of Justice embrace the entire "New Legal Constitution," as at present established.—ED.

PROBLEM III.

WHAT IS THE DIFFERENCE BETWEEN
LAW AND EQUITY?

TULLETT v. ARMSTRONG.

Review of the Judgment of the Master of the Rolls, (continued from p. 22).—By the EDITOR.

Having shewn the first introduction of restraints upon alienation placed upon property settled to the separate use of married women, by which a husband is bound to maintain his wife and to pay her debts, whilst a wife is not bound to bring any part of her separate property into the common stock for the mutual benefit, and having entered upon an investigation of the judgment delivered by the present Master of the Rolls in this case last week, we propose continuing that investigation, not by *prosily* working our way through a large space of time after the doctrine was established and acted upon in the Courts of Equity, but at once to pass on to modern times, to look at the opinions of modern judges, and see the view that is now taken of this restriction.

We will for the purpose look at what was the settled doctrine in Lord Eldon's time, and we find that a married woman had a right to dispose of her separate property in equity, except where *restraints were imposed upon the gift itself*: see *Hulm v. Tenant*, (1 Bro. C. C. 16), and the decision of Sir William Grant, M. R., in *Essex v. Atkins*, (14 Ves. 542).

It was observed by Lord Eldon, in *Jackson v. Hobhouse*, (2 Mer. 483, quoted by Lord Langdale) that for many years after he entered into the profession *no such thing was known as a clause of restraint* upon the alienation of a wife's separate property by way of anticipation; and after shewing its progress from Lord Thurlow's time, Lord Eldon made this observation, that *it was then too late to contend against the validity of a clause in restraint of anticipation*.

We have shewn in our last number the opinion of the Master of the Rolls delivered in the present case. In the case of *Wood-*

meston v. Walker, (2 Russ. & M. 208), cited by his Lordship, it was decided that a gift to the separate use of a woman who was *unmarried* at the date of the will and at the death of the testator, gave the legatee an absolute interest, and that a clause restraining her from disposing of the gift by anticipation was *inoperative*: see *Stanton v. Hale*, (2 Russ. & M. 210); *Tyler v. Lake*, (4 Sim. 144, 2 Russ. & M. 183); *Newton v. Reid*, (4 Sim. 141). The appeal case of *Brown v. Pocock*, (2 Russ. & M. 210), was also cited by his Lordship, in which Sir John Leach had held (*ib.*, 189) that upon a gift to a female for life, and in case she married, then for her separate use, without power of anticipation, that the intention of the testatrix was, that if the daughter married, the interest given for her sole and separate use should *not* be defeated by anticipation, but *which doctrine was reversed on appeal*.

The case of *Massey v. Parker*, (2 Myne & K. 674), decided by the present Lord Chancellor when Master of the Rolls, was that of a gift to two *unmarried* women, which was required to be under their *sole control*; one of them married, the husband became insolvent, and the question was, whether the gift passed to his assignees, or whether it was a *separate estate* in the wife.

There was much ambiguity on the face of the will; *Ex parte Ray*, (1 Madd. 199), was cited as evidence, that the words *sole control* would give a *separate estate*. In that case, Sir Thomas Plumer observed upon the word *sole*, that it meant "*solely hers—for her sole benefit*", and that it was an emphatic and operative word."

His Lordship was of opinion, that the will *did not* give the interest separate from the husband, observing, that the cases required very distinct and unequivocal expressions to create a separate interest in the wife, and cited *Tyler v. Lake*, (2 Russ. & M. 183; 4 Sim. 144); *Stanton v. Hall*, (2 Russ. & M. 175), in neither of which, did the claim of the wife prevail. But (his Lordship continued), the more important question was, whether the intention to give the income for the separate use, *if suffi-*

ciently expressed, could, under the circumstances, have effect given to it, so as to deprive the husband of his ordinary right to the property. The objection was, that the legatee being *unmarried* at the time of the testatrix's death, the intended restriction was *inconsistent* with the nature of the interest given, and, therefore, *inoperative*. That an attempt so to fetter the interests of a male legatee, cannot succeed, was decided in *Brandon v. Robinson*, (18 Ves. 429); and that the same rule applies to an *unmarried female* is established by *Wood-merton v. Walker*, and *Brown v. Pocock*.

His Lordship then referred to the only modern case *apparently* inconsistent with these decisions, (— v. *Lynn*, 1 Younge, 562), and observed that the judgment in that case proceeded altogether upon the *supposed intention*, without reference to the *rule of law* as established in the other cases, and further observed, it had also been decided that such fettters, though binding upon a married female legatee during her coverture, *cease upon her becoming discovert*, (*Barton v. Briscoe*, Jacob, 603), in which case the restriction was *confined* to existing coverture, but in *Jones v. Salter* (also cited by Lord Langdale), (2 Russ. & M. 208), a *subsequent marriage* was in terms *provided against*, and yet Sir William Grant held that *after the death of the first husband the legatee had the absolute power over the fund*. The only question, therefore, was, whether, when such fettters are attempted to be imposed upon an *unmarried female legatee*, and she marries without obtaining payment of the fund, such fettters are to operate during the coverture. Why were they (continues his Lordship) *inoperative before her marriage?* Because they were *inconsistent with the nature of her estate*. Her estate and interest were therefore *absolute before marriage*, and the trustee held the legacy for her *absolutely*; she might have taken it herself, or have given it to any one, and why may she not by the act of marriage give it to her husband? "Upon principle, therefore," his Lordship said, "I should not have had any doubt of the right of the husband." But this very point was

decided in *Newton v. Reed*, (4 Sim. 141), and that case was alluded to without any expression of disapprobation by the *then* Lord Chancellor in *Brown v. Pocock*; I must, therefore, consider the point as settled.

The decree was, that the husband *did obtain an interest in his wife's legacy*.

(*To be continued.*)

EXAMINATION OF ARTICLED CLERKS.

Questions put by the Examiners.

We have to thank "An Articled Clerk" for some sets of Questions. We have very little faith in these examinations; seeing, however, that they promote industry and research, we have inserted them. It is necessary, however, to observe that the Questions must necessarily be varied in some shape every examination; and, therefore, it behoves gentlemen who intend to be examined, that they should pursue a course of study that may enable them to answer *simples* at least; and this paper will be always open to them for aid in need. Our second Problem we presume to be a matter of course question at every examination.

TRINITY TERM LAST.

Where did you serve your clerkship?

State the particular branch or branches of the law to which you have principally applied yourself during your clerkship.

Mention some of the principal law books you have read and studied.

COMMON AND STATUTE LAW AND PRACTICE OF THE COURTS.

Before and after action brought how must the affidavits be entitled?

What persons are privileged from arrest?

How is bail above put in where the defendant resides in the country?

State the different methods by which a defendant may obtain his discharge upon arrest on mesne process.

Where several actions are brought upon the same policy of insurance, what course should be pursued to avoid the heavy costs attendant thereon?

In what cases must you join husband and wife in an action?

In cases where a defendant cannot be arrested, or is out of the kingdom, state the best mode to proceed against him.

Questions put by the Examiners.

In what cases may you compel a plaintiff to give security for costs, and what is the mode of proceeding?

State a few instances of what are called special pleas.

What proceedings would you take in order to enforce a judgment against the heirs, executors, or administrators of a defendant?

In a guarantee on behalf of a third party, must any consideration be stated, and how and of what kind should it be?

In what cases will the court direct the bail bond to stand as a security?

Can parol evidence in any and what cases be admitted in contradiction or explanation of a written contract?

Where several actions are brought on a bill of exchange or promissory note, upon what terms can the acceptor of the bill of exchange or the drawer of the promissory note now stay the proceedings?

Has an attorney any lien upon a judgment? and if so, of what nature?

CONVEYANCING.

State the distinction between real and personal property.

What is a fee simple estate in land, and how does it differ from a base fee?

What are the denominations and qualities of other estates in land less than fee simple?

What are the general rules as to descent of freehold lands of inheritance?

What are copyhold estates and their most common incidents?

What is a mortgage?

What are the requisites for a will to pass real estate?

What is livery of seisin?

Can a conveyance of real estate be made by deed, without livery of seisin or enrolment, and what are the principal parts of such a deed, and what forms are requisite for its validity?

By what means can a married woman convey or charge a real estate, of which she is seized in fee simple or fee tail?

What are the principal parts of a lease for years of land or houses at rack rent, and what are the covenants usually entered into by lessors and lessees in such leases?

If a man, seized in fee of land, contract with another for the sale of it, and both parties die before the sale is completed, does the contract continue in force, and what is the consequence as regards the title to the land, and also as regards the title to the purchase-money?

Can a trustee for sale become a purchaser of his trust estate?

In cases where the title deeds cannot be delivered up to a purchaser, what is he entitled to require?

By what persons and by what means may guardians of infants be appointed?

EQUITY, AND PRACTICE OF THE COURTS.

What should be indorsed upon a subpoena to appear and answer?

What time is allowed to a defendant to ap-

pear, after he has been served with a subpoena?

What is the course for enforcing an appearance against a defendant who will not appear?

What time is given to a defendant, after appearance, for demurring to a bill?

When will an answer be deemed sufficient?

In what way is a special injunction to be obtained, and in what cases may it be obtained without notice?

When and how can a defendant apply to dissolve a special injunction?

Can infants or married women consent to any order?

What must be done on the part of a plaintiff, to put a cause at issue against defendants?

To whom must a party apply for an order to enlarge publication?

On whom should the subpoena to hear judgment be served?

On what day, after service of an order nisi to confirm a report, can the order absolute be moved for?

Will a court of equity give any and what relief to a creditor or purchaser for a valuable consideration, who disputes the title of a party claiming under a voluntary settlement or conveyance?

Will a court of equity give relief where a person claims a benefit under a will, and insists, at the same time, on claiming, under a different title, property which the testator treated as his own, and disposed of otherwise by the same will? and what is the nature of such relief?

Will a court of equity enforce a trust for an unmarried woman, so as to secure property for her from the control, disposition, or intermeddling of an after-taken husband or his creditors?

BANKRUPTCY, AND PRACTICE OF THE COURTS.

State the proceedings necessary to be taken to obtain a town fiat.

The like as to a country fiat.

State the proceedings necessary to obtain an adjudication of bankruptcy on a fiat.

Where the evidence of a person in custody is required, state the proceedings necessary to procure his attendance before the commissioners.

What particulars are necessary to be stated in an affidavit or deposition, to prove a debt under a fiat?

Is a surety for the bankrupt entitled to prove under the fiat, in any and what cases?

By whom are assignees of the bankrupt's estate chosen?

What steps are necessary to perfect the appointment of assignees in a country fiat?

Can the appointment of assignees, by creditors, be rejected, and by whom?

Can the messenger, under a warrant of seizure, break open doors of premises not belonging to the bankrupt, to obtain possession of goods of the bankrupt, supposed to be concealed?

After a bankrupt has passed his examination

and obtained his certificate, can he afterwards be subjected to examination, and how is it to be accomplished?

What number and description of creditors are required to sign a bankrupt's certificate?

If the bankrupt be in custody on civil process on obtaining his certificate, state the proceedings necessary to obtain his discharge?

Can any and what number of creditors, and how, bind the rest to accept a composition offered by the bankrupt?

If a certificate be signed by the creditors and the commissioners, and confirmed by the Lord Chancellor, can it be recalled, in any cases and by what means?

In case a bankrupt shall have entered into an agreement for the sale of an estate or interest in land, what course must the vendor pursue to obtain the performance or abandonment of such agreement?

Under what circumstances are persons paying to the assignees of a bankrupt any debt claimed by them, or delivering up any real or personal property to such assignees without proceedings against them, discharged from all future claim in respect thereof?

In what mode are all matters for the determination of the Court of Review to be brought on before the court?

Is there any and what appeal from the decisions of the Court of Review?

CRIMINAL LAW.

To which of the four superior courts is the jurisdiction over crimes and misdemeanors confined? and by what different proceedings is the jurisdiction chiefly put in motion?

What is the crime of homicide? and state its different kinds. Give an instance of each kind.

By whom is the warrant for an arrest, in criminal cases, usually issued?

Who may arrest without warrant, and under what circumstances?

What steps must be taken by the party who makes an arrest?

In what class of offences does the crime of picking pockets technically rank—and what distinction is created by its being accompanied by force, or putting a party in fear?

If husband and wife commit felony together, what distinction is made as to their guilt?

At what age can an infant commit a felony?

What is necessary to constitute perjury?

What number of witnesses is necessary to obtain a conviction for perjury, and why? Does the number vary; and under what circumstances?

Have the rules of evidence in regard to the testimony of Quakers in criminal cases, been recently varied in any and what respect?

Can husband and wife be witnesses for or against each other in criminal cases? and are there any and what exceptions to the rule?

What is the proper test for determining the competency of a child to give evidence?

Is forgery now punishable with death, in

any and what case? and specify the chief offences now so punishable?

In what manner is legal protection to be obtained against apprehended violence?

For what offences will an action lie as well as an indictment?

Is there any and what recent alteration in the punishment of accessories, either before or after the fact.

What means of communication must there be between a dwelling-house and an adjoining building, in which a burglary can be committed.

Law Reports.

COURT OF CHANCERY.

SAUNDERSON v. BAILEY.—Nov. 12.

Appeal from the Vice-Chancellor.

Construction of the Class of Persons termed "First Cousins or Cousins-German."

THE LORD CHANCELLOR.—The point to be decided was, what class of persons were interested in a bequest to "first cousins or cousins-german." His Honour had interpreted the words of the testator to include *first cousins and their descendants*; but in this opinion his Lordship could not concur. The will did not specifically settle the class to be benefitted; it was therefore necessary to examine the meaning of the word. In *Chambers's Johnson's Dictionary*, in *Ainsworth*, and a French Dictionary, which he had consulted, *first cousins* were uniformly described as *the children of brothers and sisters*. There were no decisions exactly in point, but there were authorities from which general principles might be collected. It had been determined that "nephews" did not include great nephews, *Shelley v. Bryer*, 1 Jac. 208, and where a class of persons were pointed out by the will, the Court would not extend the meaning of the term. If second cousins could take under the bequest in question, then the third degree ought to be admitted, and so on indefinitely. The decree of the Vice-Chancellor, admitting the descendants of first cousins, ordered to be varied.

See upon this subject, *Charge v. Good-year*, 3 Russ. 140; *Mayott v. Mayott*, 2 Bro. C. C. 125; and *Humphreys v. Humphreys*, 2 Cox, 187.—ED.

BARBER v. BARBER.

Appeal from the Master of the Rolls.

Construction of a Will.—Executor residuary Legatee by name refusing to act.—Whether he takes the Legacy.

A person named Macintosh, by his will, dated in 1817, bequeathed a sum sufficient to produce an annuity of fifty pounds a year to John Shears, and directed that at the death of

Shears the principal money was to be paid over to his own son and daughter, provided that they attained the age of 21. The testator gave the residue of his property to the same children, and, if they did not attain the age of 21, then he desired that it might be divided among four persons whom he named as his executors. Three of these four persons proved the will and acted as executors; the fourth declined to interfere; and the children having died before they came of age, two questions arose—First, whether the principal money of the annuity became after the death of the annuitant subject to the same trusts as the other property; and, secondly, whether the fourth person named as executor, but who did not act, took his fourth share of the residuary gift, they being specified by name as tenants in common, or whether his fourth share passed as a lapsed legacy to the next of kin of the testator. On the first point, the Master of the Rolls was of opinion, that the executors did not take any thing but the property specifically mentioned; and on the second point he held, that the fourth executor could not take by reason of his declining to qualify himself to share in the gift.

The LORD CHANCELLOR, in giving judgment, concurred with the Master of the Rolls in his decision on the subject of the principal money of the annuity. His Lordship also concurred in that part of the decision of the Master of the Rolls which refused to give the fourth person named as executor, but who refused to act, any part of the residuary gift, because it was given to him by name on the condition that he was to assist in the discharge of certain duties connected with the testator's estate. With respect, however, to the question of whether this fourth part went to the other executors, or to the next of kin, his Lordship differed from the Master of the Rolls, being of opinion that it ought to go to the next of kin. The point, as the Master of the Rolls observed, was undoubtedly one of some nicety and difficulty, but on a careful review of the authorities and cases cited, his Lordship had no doubt that the executors could not take the other share.

ROLLS' COURT.

COUNT DE HOUVELIN v. SHELDON.—Nov. 10.
Devise of Land to an Alien.

Pemberton—this was an exception to the Master's report, finding that a good title could be made to an estate ordered to be sold, and purchased by the Earl of Radnor, his Lordship objecting to complete under the authority of Sir John Leach's judgment, that the Crown has the right to all real property devised to aliens.

Kindersley, for Lord Radnor, stated, that Mrs. Sheldon, by her will, left her large estates to trustees for the purpose of selling them, and investing the produce in the public funds; one-sixth of the produce to be in trust for each of her daughters, the first married to John Webb Weston, Esq., the second to the

Count du Houmelin, the third to the Count du Maiselle, and the fourth and fifth to other French noblemen, the youngest remaining single, with benefit of survivorship, and secured over to the husband of each daughter if he survived her, and to her children in succession. The will was dated in 1824, and on the case coming before the court, it was referred to the Master, who found that the title was good, and made a decree of sale. Lord Radnor purchased the estate, called Lint Manor Farm, for nearly 14,000*l.*, but he objects to purchase, unless the Attorney-General appear in behalf of the Crown to assent to the decree, the devisees being aliens, and the Crown consequently having the right to all lands devised to aliens. There is but one case upon this important subject, namely, *Foudron v. Cowdry*, 3 Milne and Keene, 383; in which Sir John Leach held that the property, consisting of freehold houses in Wardour-street, left by the will of an alien, afterwards receiving letters of denization, to his brothers and sisters, aliens, residing in France, was not good, and that the Crown had acquired the sole right to the property. Under these circumstances, he claimed the right of the Earl of Radnor to have the Attorney-General a defendant to the suit.

Pemberton, in support of the Master's order, contended that this being a very highly important question, it should be decided in such a manner that the general interests of thousands of persons should be protected, for the honour of England, and in accordance with the views of policy of the nineteenth century. If the principles argued for by Mr. *Kindersley* were once admitted, then no merchant could charge his real estate for the payment of his debts, as a portion of his creditors were aliens, and such is the case with every merchant in England; then the debts due to them would fall in to the Crown. In the same manner, if the estate were ordered to be sold by trustees, and the money distributed in legacies, a legacy of 500*l.*, ordered to be paid in money, could not be received by an alien, because the funds proceed from real property. But in this case the facts in every particular differ from that of *Foudron v. Cowdry*; here the persons to take are all denizens, British-born subjects, and the reversion to the alien plaintiffs may never take effect. If this monstrous proposition could be held, every claim on estates by foreign creditors may be defeated, and the attorney would put in the claim of the Crown to their debts, to the destruction of all international credit. The Crown has not the power of defeating any one of the bequests to the daughters, and it is a well-known axiom in law, that the Crown cannot be made a trustee for any purpose. Under these circumstances, he trusted the court would over-rule the objections.

Kindersley replied, insisting on the right of the earl to have the Attorney-General a party, as the ultimate right of the Crown to claim the property was undoubted.

Lord LANGDALE, M. R., said, that this case differed much from *Foudron v. Cowdry*, in as-

much as the party leaving the estate, and those who, in the first instance, are to take under the devisee, are all natives of Great Britain : he would look into the case before he gave judgment.

COMMON PLEAS.

BATEMAN v. DUNN.

Abolition of Arrest for Debt Bill.—Rule to shew cause (a).

Sir F. Pollock shewed cause against this rule. His client had made an affidavit, in which he admitted he had no domicile in this country, but stated that he had no present intention of leaving England. Now, he (Sir F. Pollock) considered that the latter words did not materially alter the case in favour of the defendant, as they might mean that he did not intend to leave England before to-morrow, or before this rule was disposed of. The case must stand therefore on the plaintiff's affidavit, and it would turn upon the question, would or would not a judge upon that affidavit order the defendant to be held to bail? Because, if he would, then this was not a case in which he would exercise his discretion in ordering the defendant to be discharged, or his bail to be exonerated; but, if he would not, then there was nothing in the case to deprive the defendant of the benefit of this act of parliament. Now, although he (Sir F. Pollock) objected to the use of the terms "liberally" and "strictly," as applied to the construction of acts of parliament, and thought that there ought to be only one kind of construction for statutes, namely, the true one; still, as far as these familiar terms were to be applied at all to this act, it being an act in favour of the liberty of the subject (he said nothing on its policy), its general provisions ought to receive a liberal construction, and the exceptions in it a limited and strict interpretation. By the 7th section it was enacted, "that every prisoner who at the time appointed for the commencement of this act shall be in custody upon mesne process, and shall not have filed a petition to be discharged under the laws in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action; provided nevertheless, that every such prisoner shall be liable to be detained by virtue of any such special order as aforesaid." It was quite clear that under this section, where a party, although not in actual custody at the commencement, was out upon bail, the court or a judge had the power to exonerate the bail, because they might at any moment render the defendant, and so place him in actual custody. That being so, was there any thing in the case to bring it within the 3rd section of the act? That section enacted that a judge might by a special order direct a defendant to be held to bail where it was shewn by affidavit, to the satisfaction of such

judge, that there was probable cause for believing that the defendant was about to quit England unless he were forthwith apprehended. Now, in this case, the plaintiff did not state his own belief that the defendant was about to quit England forthwith, nor disclose any circumstances from which the court could be satisfied that such was the case. It might appear probable that the defendant would soon return to Ireland, but that was not what the legislature meant when they used the word "forthwith"; from which it was manifest that they meant to allow a party his liberty to the last possible moment. Under these circumstances, he submitted that the learned judge's order ought to be upheld, and consequently the present rule discharged.

Wilde, S., in support of the rule, argued that the plaintiff's affidavit, taken together with that of the defendant, brought the case fully within the provisions of the third section of the act. What did that section require? Why, a statement of circumstances from which a judge would be satisfied that there was probable cause that the defendant was about to leave England unless forthwith apprehended. Here, then, was a gentleman practising at the bar in Ireland, with his domicile in Dublin, having no permanent residence in England, and stated to be about to return to Ireland, at the time of the year, too, when the term was approaching—surely, there was here abundant probable cause that he was about to quit England unless forthwith apprehended. But his learned friend (Sir Frederick Pollock) had required that the affidavit should be drawn up in the words of the act. Now, before he exacted such critical nicety in the plaintiff's case, he had better bring his own case within the act of parliament. His client was neither in actual custody, nor was it stated that his bail even intended to render him. The act only applied the remedy to cases where the party was in custody when it came into operation; and, surely, this could not be said to be a *casus omissus*, because the legislature had expressly provided for cases in which parties had been arrested before the act came into operation. Why, then, if they meant to relieve the bail of such parties as were not in actual custody, should they have omitted to say so? He submitted, therefore, that as the defendant had not brought his case within the words of the 7th section, and as the affidavits did bring it substantially within those of the 3rd section, the plaintiff was entitled to retain his rights as against the defendant's bail, and that the rule for discharging the learned judge's order ought, therefore, to be made absolute.

The Court decided, that inasmuch as a defendant who was out on bail was considered in the eye of the law to be in the custody of such bail, who might render him at any moment they pleased, such a case came clearly within the meaning of the 7th clause of the act, which directed the court or a judge to discharge him; and consequently the Court was empowered to relieve his bail; otherwise the bail would be

under the necessity of rendering him when he would then be in actual custody and so be in a situation to be discharged; and the only effect of that would be to incur some additional expense and inconvenience, without improving the condition of the plaintiff. Then the next question was, did the affidavits bring the case within the exception provided for by the third section of the act? The Court thought that the plaintiff was bound to state his own belief that the defendant was about to quit England, unless he were forthwith apprehended, and then to disclose such circumstances as were calculated to satisfy the mind of a judge that there was a reasonable probability of such being the case. In the present instance the plaintiff had omitted to do so, and consequently did not bring the case within the 3rd section, so as to deprive the defendant of the benefit of this act. Although the Court had nothing to do with the policy or impolicy of an act of parliament, but was merely to administer the law as it stood, yet courts were always in the habit of putting a liberal construction upon remedial statutes, and this was one of that description. Under all the circumstances, therefore, their Lordships decided that the defendant's bail were entitled to be relieved from their liability, and that the present rule must be discharged; but as it was a question arising upon a new and important act of parliament, the rule must be discharged with costs.

BAIL COURT.

Before LITTLEDALE, J.—Nov. 12.

Stamp, on Certificate of Attorney, unintentional Default, cured by Payment of Duties and Penalties.

Humphrey applied to the court, that an attorney be re-admitted in the following circumstances. He had taken out his certificate upon his admission in 1823, and had continued to do so with uninterrupted regularity ever since. For the first three years after enrolment the stamp duty was 6*l.*, and for the subsequent years it was 12*l.* The applicant's name had been enrolled two days after his admission, and it became necessary for him to commence taking out the 12*l.* stamp in 1825. In that and the following year he gave a clerk 12*l.* in each year to take out the stamp, but he lately discovered that only a 6*l.* stamp had been taken out. Upon making the discovery he went to the Stamp Office, and stating the circumstances of the case, he offered to pay the difference of the duty and the penalties which he had incurred, and the officers of stamps had expressed their willingness to accept the offer, but said that they were afraid to do so without the sanction of the court. The applicant made a most explicit and positive affidavit that he paid the whole money to the clerk, and had never heard of the matter until two or three days ago, when it was urged before the taxing Master, to prevent the applicant from recovering costs for busi-

ness done during the years in question. The learned counsel cited the case of *James Weston*, reported in 8 Taunton, 129, where the application which he now made was granted in similar circumstances, on producing the Attorney-General's consent.

LITTLEDALE, J., after consulting the officers of the court, said, that in the case in Taunton, as well as in that now before the court, the parties ought to have looked at the certificate to see that it bore the stamp for which they paid, and which the law required. He, however, granted the application on payment of the difference of the duty, the amount of the penalties, and a fine of twenty shillings.

PARKER v. COOPER.

Substituting Service of Declaration—Diligent Inquiry.

Knowles, on a former day, had applied for a rule to shew cause why the plaintiff should not be at liberty to stick up a declaration in the office, on the ground that "diligent inquiry" had been made for the defendant's residence, and that it could not be found.

LITTLEDALE, J., on that occasion, said, that different persons may have different notions as to what constitutes a "diligent inquiry," he, therefore, directed that the application should stand over until the production of an affidavit containing a more particular account of the diligence which had been used.

Knowles now produced an affidavit, in which the deponent stated, that he inquired at the defendant's last known place of residence, and at all the houses of the tradesmen in the neighbourhood, including butchers, bakers, grocers, and publicans.

LITTLEDALE, J.—You might have inquired of the Two-penny postman; but I think you have done enough to entitle you to the rule.

BINGHAM v. ISHERWOOD.

Abolition of Arrest for Debt Bill—Exonerating Bail.

Upon a former occasion Humphrey applied for a rule to shew cause why, upon entering a common appearance, an *exoneretur* should not be entered upon the bail piece, under the seventh section of the act for Imprisonment for Debt (*a*). When the original motion was made, some doubt existed as to whether the section in question which *expressly* mentioned only persons in actual custody, could be said to include those who were out on bail. Since that time the court of Common Pleas had decided that question in the affirmative, and—

V. Lee, who now appeared for the plaintiff, consented to the rule being made absolute, but submitted that the defendant ought to pay the costs.

Humphrey opposed this, and,

LITTLEDALE, J., said, that he should direct the Master to inquire what decision had been

(a) See Legal Guide, p. 28.

come to upon that point by the court of Common Pleas, and should regulate his own decision thereby.

MACINULTY v. LOYD.

Effect of a Plea of Payment in Assumpsit.

This was an action of assumpsit.—The declaration contained a count for 20*l.* for work and labour, and a count for 20*l.* on an account stated ; the declaration concluding generally to the damage of the plaintiff of 20*l.* There was a plea in bar of the further maintenance of the action, of 4*l. 4s.*, in satisfaction of the damages and costs, and the replication took issue upon the plea in the words of the plea.

At the trial it had been proved, as a matter of fact, that after the commencement of the action the parties had met together, and that the plaintiff agreed to accept, and that he did receive, the 4*l. 4s.* in full satisfaction, as well of the costs as of damages, and the jury upon that evidence found for the defendant.

Jervis, upon a former day, had obtained a rule calling upon the defendant to shew cause why, notwithstanding the finding of the jury, a verdict should not be entered for the plaintiff for nominal damages, and the ground of the application was, that the plea, which alleged payment of a part in satisfaction of the whole, was void, and good for nothing : that the plea ought to have alleged, as to the sum of 4*l. 4s.*, parcel, &c., payment, and as to the remainder, non assumpsit.

Peacock now appeared to oppose the rule, and submitted, in the first place, that the rule itself had been inaccurately drawn up, as it was drawn up on reading an affidavit, whereas it ought to have been drawn up on reading the record. Every rule ought to refer to the grounds upon which it rested, and as the foundation of the rule here was not any matter of fact which may be stated in evidence, but a matter stated on the record, the rule ought to have been drawn up in reference to that.

LITTLEDALE, J., observed, that rules were never drawn up on reading the record, as the Court always took cognisance of the record without being referred to it at all. In moving in arrest of judgment, the Court proceeded upon matters apparent upon the record, but the record was never referred to in the rule.

Peacock then went on to the second question, namely, whether the plea in its present form was a good answer to the declaration. He admitted that it would not be so if the action was in debt, as a plea of payment in that case would admit that the whole sum demanded had been originally due. In assumpsit, however, the case is different, as there the plea of payment does not confess the amount, but only that something was due. If nothing had been pleaded, the plaintiff could only have a general judgment, and must have assessed the damages by a writ of inquiry, and the defendant by pleading is in no other situation

than if he had allowed judgment to go by default, and the jury were to assess the damages. The plea only admits that something was due for work and labour, and something on the account stated. He then referred to *Cousins v. Padden*, 2 C. M. & R. 547 and 560, in which *Parke*, B., in delivering judgment, had laid it down that a plea of payment was divisible as the demand was divisible, and as several contracts may be included in one sum. The same learned Judge stated in the same place, that in assumpsit the plea of payment did not admit any sum to have been originally due, though the same plea did amount to such admission in debt. In *Saunders v. Nicholl, Holt*, C.J., delivered the same opinion ; and in *Wilkinson v. Byers*, 1 A. & E. 106, it was decided that payment by defendant of a sum of money in satisfaction of the debt and damages, was a good consideration for a promise on the part of the plaintiff to stay proceedings, and pay his own costs. If the agreement was a good consideration for the promise, the payment ought to be good as a plea to the action. At any rate, the present was not a case for a judgment *non obstante veredicto*, as that judgment was interlocutory, and the case would have to go to a jury to assess the damages, and they would possibly decide that he was only entitled to a shilling, and that he had been already overpaid. If the plea was bad, the proper course would be a repleader, as the plaintiff, instead of demurring, had thought proper to take an immaterial issue by traversing the plea. The learned counsel here read from Stephen on Pleading, page 98, a description of the case to which a repleader is appropriate, and submitted that the present case belonged to that class. If the plea, therefore, did not admit the sum demanded to be due, there was no foundation for the rule, and if it did not, the appropriate remedy was a repleader. He further cited the case of *Fisher v. Dary*, 4 M. & W., where in assumpsit a plea as to all except 5*l.*, was held to be an admission only that something not exceeding 5*l.* was due, and not to be an admission to the extent of 5*l.* He further referred to *Corbet v. Swinburn*, in the 7th volume of the Law Journal, page 215, which was exactly the same as the present case. There the plea was of payment after action brought, and *Platt* had moved to enter judgment *non obstante veredicto*, on the ground that a payment after action could not be pleaded in bar of the action. But there, as here, the plea was in bar of the further maintenance of the action, and the rule was referred.

Jervis, in support of the rule, relied principally upon the forms given in the new rules of pleading, of Hilary Term, 4 Will. 4, which stated how much was due, and how much paid, and contained an additional allegation that no more than the sum paid was due. *Wilkinson v. Byers* was a case in which the general issue was pleaded, and in the other cases no discussion took place as to the form of the plea.

LITTLEDALE, J., referred to *Cumber v. Way*, in Strange, and *Peacock* referred to *Jourdain v. Johnson*, 2 C. M. & R. 569, after which his Lordship said he would look into the cases.

Ex parte DOLMAN.—Nov. 13.

Articled Clerks and the Law Society.

By a private regulation of the Incorporated Law Society, all persons (clerks) going in for examination are bound to leave with the secretary of the Society, within the first seven days of the term, their articles of clerkship, together with the answers of the clerk and his master to the questions addressed to them on the part of the Society. The applicant in the present case had served his articles to Mr. Henry Richardson of York, and left that place in September for London, where he has been employed since his arrival in preparing for his examination. The questions were transmitted to him, addressed to Mr. Richardson's office, and were by Mr. R. handed over to the applicant's brother only on the 10th instant, by whom they were forwarded to the applicant himself, who received them in London on the 12th, on which day he took them to the secretary, who refused to receive them without the order of this Court.

Addison applied now to the Court for a rule directing the Secretary to receive them, and produced an affidavit of Mr. Dolman, who, in addition to what has been already mentioned, deposed that he had fully relied that Mr. Richardson, on receiving the documents would transmit them to Mr. Dolman in London without delay, and that at the first moment when he found reason to believe that they would not be sent after him, he wrote to Mr. R. to request that he would forward the documents. He further stated, that if the application were not granted, he could not go in for examination until Easter Term.

LITTLEDALE, J., after consulting the Master, thought, in the circumstances of the case, that the motion ought to be granted, and the clerk will accordingly be able to go in for his examination on Monday next.

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COURT OF EXCHEQUER.

Sitting in Banco.

ROBINSON v. PETRCE.

Abolition of Arrest for Debt Bill,
Sect. 12 & 14.

Martin applied to the court to attach a sum of money under the provisions of the 14th sect. of 1 & 2 Vict. c. 110. This sum in question was the purchase-money of a lot of ground, sold by the defendant to a railway company, and it being uncertain whether it still remained in their hands or had been paid over, to a trustee for the use of the defendant, it was submitted, that, construing the 12th & 14th sections conjointly, the court would interfere to enforce the judgment obtained in this case against this sum, wherever it might be.

Sed per CURIAM.—This is within neither of the sections alluded to.

It is not within the 14th, for it is not part of the company's funds; and it is not within the 12th, for that contemplates money in the hands of the defendant, or of an agent for him.—*Rule refused.*

WHITE v. DEVERELL.

Illegal and excessive Distress.—Stamp on Agreement.

This was an action for an illegal and excessive distress, and in the course of the trial before PARKE, B., at Winchester, the plaintiff's counsel proposed to put in a letter from the landlord to the tenant, containing a proposal for the lease of the premises, which being rejected,—

Crowder now moved for a new trial, on the ground that this document was improperly rejected, contending that it was not an agreement for a lease, but merely a proposal.

Sed per CURIAM.—This letter was properly rejected. It seems that it was at first only meant as a proposal, yet inasmuch as the tenant entered under it and held the land according to its terms, it becomes an agreement for a lease, and as such, requires a stamp. The rule, therefore, must be refused.—*Rule refused.*

COPPOCH v. BOWEN.

Admissibility of Unstamped Paper in Evidence.

Debt on an I O U for 500*l.*—Pleas: 1. *Nunquam indebitatus*; 2. That the I O U was given in pursuance of a certain illegal and corrupt agreement, touching the withdrawal of the plaintiff's petition against the return of a member of Parliament on the ground of bribery; 3. Fraud and covin; 4. Breach of agreement above set out. On the trial certain documents were offered in evidence by the defendant as proof of the second plea, which purported to constitute altogether the corrupt agreement therein set out. Objections being made to them, they were admitted by Patteson, J., and the cause going to the jury, a verdict was found for the defendant on the second plea, affirming, therefore, the corrupt nature of the agreement, and for the plaintiff upon the other three pleas.

The Hon. C. E. Law, now moved to enter the verdict for the plaintiff on the second plea, and contended that the papers were not good evidence of the agreement, as they were not stamped, and so if they were, then that this agreement was not of a nature to make it void for illegality.

These papers were offered in direct proof of the alleged illegal agreement, not as collateral evidence, in which point of view alone could they be evidence for that purpose. But this is a distinct evidence of an agreement produced by a party seeking to avoid its obligation, and, therefore, must be stamped.

In the next place, however, the contract was not corrupt or illegal, for a man is at liberty to present and withdraw a petition as he pleases, and another may enter into any terms he can secure for the withdrawal thereof, without committing himself to any thing illegal. What was done was for the mutual benefit of each party, and it was only a short way of arriving at a conclusion of an investigation, which in all probability, must have had a termination still more unfavourable to the defendant's friends.

Lord ABINGER, C. B.—There is no doubt at all of the principle of law, as to the admissibility of unstamped papers to prove the illegality of an agreement. Where a party seeks to enforce an agreement, there a stamp is necessary; but where the papers are produced to prove that the alleged agreement is in fact illegal, and one which cannot be enforced, then they are admissible without any stamp, just as a paper containing the proposed terms of a division of plunder would be evidence of a conspiracy to commit a burglary.

These papers, therefore, being admissible, for that purpose, I also think that they make out their object, for the agreeing to withdraw such a petition is illegal, if done for a consideration of a pecuniary nature. The right of petition is a public one, and no petition can be compromised for money. The contract, therefore, was illegal and corrupt, and the verdict must stand for the defendant.—*Rule refused.*

LARCHIN v. WILLAN.

Abolition of Imprisonment for Debt Bill, Sect. 3.

Bull applied to the Court for a rule to shew cause why an order of *Gurney*, B., for the arrest of the defendant in this case, should not be reconsidered, and why the bail-bond given should not be discharged, and the expenses attendant upon the arrest be borne by the plaintiff. It was an application under the provisions of the third section of the act 110th of Victoria, which provides that where it is apprehended that the defendant will quit England, unless he is arrested, a judge may grant an order for that purpose. It seems that the defendant had been arrested upon an affidavit, stating that he was lately a captain in the Fusilier Guards, but had sold out, and was now captain in the 17th Foot; and that the defendant believed it was the intention of the defendant to sell out again, and leave the country. The defendant swore that he had no intention of selling out; that he was now absent from his regiment on leave, but was about to join it in Ireland; and that it was not likely to be sent abroad for some time, having just returned home. The regiment was under orders for Ireland, and his intention to join being known to the plaintiff, the provisions of the third section had been enforced, and he had been arrested.

Bull now moved to rescind the order in

question, on the ground that this was not such a "quitting England" as was contemplated by the act. The defendant was only obeying the orders of his superior officer, and it was unjust to suppose that he was about to practise a fraud upon his creditors by joining his regiment in Ireland.

The COURT, however, was distinctly of opinion that the circumstances of this case did come within the meaning of the act, since no process from a court in England could reach the defendant when in Ireland. The object of the third section was to secure to the creditor the only hold he has now upon his debtor by the execution, and if it is made to appear to the Court that the absence of the debtor from England may very possibly extend to a period of time which would have the effect of depriving his judgment creditor of the means of enforcing his judgment, then the judges are bound to grant him the privilege of arresting his debtor on mesne process, and thus to make the debtor find some security for his debt. Then *non constat* but that the defendant's regiment might stay in Ireland two years, and after that go abroad; and if so, what chance would there be of the plaintiff's reaping the fruits of a verdict if he should obtain one?—*Rule refused.*

Exoneretur on filing a Common Appearance.

J. Jervis applied for a rule to shew cause why an *exoneretur* should not be entered upon a bail-piece on filing a common appearance.

LITTLEDALE, J., said, that it was now settled that the application ought to be granted, and had been so decided in the court of Common Pleas.

Whether an Action is commenced by the suing out of the Writ, or the Time of Service.

Platt applied to the Court for a rule to shew cause why an order made by *Patterson*, J., should not be rescinded. The question was, whether an action commenced by the suing out of the writ, or the service of it.

LITTLEDALE, J., said, that he should have thought it commenced by the suing out.

Platt said, he thought such the general opinion. *Patterson*, J., however, in deciding upon the application, had refused to give *Platt's* client his costs, the obtaining which was the object of the present application.—*Rule nisi granted.*

PREROGATIVE COURT.

In the Goods of WILLIAM MILWARD.—Nov. 6. *New Law of Wills*—sect. 9.

In this case the testator had written his will on two sides of paper, but he and the attesting witnesses signed it only on one side that not being the concluding side; consequently, the will was not "signed at the foot or end thereof," as required by the 9th section of the new Will Act. The COURT refused probate.

IN THE GOODS OF JAMES AYLING, DECEASED.
New Will Act.—Sect. 9.

The will on the face of it was duly executed and attested by two witnesses. But it appeared from an affidavit, which is required by a rule laid down by the Court in cases where the attestation clause does not expressly declare that the testator signed the will in the presence of both the witnesses, they being present at the same time, and subscribing their names in the presence of the testator, that the instrument was not so executed, and was accordingly invalid under the 9th section of the act.

Sir H. Jenner observed that this case shewed the prudence of the rule.

Dr. Robertson moved the Court to pronounce the instrument invalid, and decree administration to the widow of the deceased.

Sir H. Jenner could do no more than pronounce that the paper was not entitled to probate under the act; he could not decree administration unless it was regularly pronounced. There might be collusion in such cases (though there was none in the present case), and other parties might be prejudiced. These cases under the new act (the learned judge remarked) were important, and the Court must be very much upon its guard as to what it does, since it is impossible to foresee what consequences might follow.

INSOLVENT DEBTORS' COURT.

*in Re THOMAS FORD (a).—Nov. 12.
 Right of Assignee to search a Prisoner's Room.*

Charles Wright had obtained a vesting order under the compulsory clause, and was named assignee, in order to recover property to pay his debt; Wright now made an application to search the prisoner's room. It appeared from his affidavit, that he had applied to the deputy-governor of the prison to search the room, but had been refused, and he now came to the court for assistance.

Commissioner Bowen said, perhaps the governor of the prison was not aware that Wright on his appointment was an officer of the court, and in the same condition to make search for property as the provisional assignee, which was expressly mentioned in the act; he would therefore grant an authority on the keeper of the prison to permit the search for property. The court issued an Order.

ERRATA IN No. 2.

*Page 18—for sect. 22 & 24 read 22 & 23.
 — 22—for 2 Merr. p. 188 read p. 483.*

Business in the Courts.

COURT OF CHANCERY.
Causes.

Miller v. Morgan, Part heard—Bowes v. Fernie, Exceptions—Freak v. Cranefeldt, Exceptions and further directions—Schoolfield v. Ingham—Bigood v. Walker—Brown v. Williams—Hall v. Newton—Roberts v. Williams—Gwyer v. Cambridge—Dent v. Bennet—Morris v. Palmer—Carr v. Collins.

(a) See Legal Guide, p. 30.

VICE-CHANCELLOR'S COURT.
Short Causes—Unopposed Petitions—Motions.

ROLLS COURT.

General Paper.

COURT OF QUEEN'S BENCH.

Sittings in Banco.

COURT OF COMMON PLEAS.

Sittings in Banco.—Second Sitting, Nov. 21.

Fallows v. Dawson—Butterworth v. Lees.

COURT OF EXCHEQUER.

Sittings in Banco.—New Trials.

EQUITY EXCHEQUER.

Petitions—Motions.

TO CORRESPONDENTS.

"*A Student*" has taken a comprehensive and intelligent view of Problem No. II. proposed in our Second Number;—his accompanying letter is in the very spirit of our preface and intentions: the object of this paper is *usefulness*, and these Problems we consider as a mode of attaining that end, by promoting a spirit of useful and practical research among students, and the best reply (in our opinion) that shall be sent us, we will publish, and assist the writers as occasion may require.

W. G.—Problem II.—We have already advised this gentleman to closer study, and we will now add research;—his short quotation from *Blackstone* is not the sort of answer required to so important a problem.

W.'s reply to Problem II has merit.

F. W. F.—We have a basket full of replies to Problem II. and we had made our selection before this reached us.

N. B.—Our review of the judgment of the Master of the Rolls in *Rowley v. Adams*, extended not only to the point at issue, but by implication to the converse position put by N. B. If a man enters into a covenant, nothing will discharge him from it to its full extent but a release. N. B. is therefore *wrong* in his proposition. It was in consequence of the state of the law as shewn by us in our last Number, that it became usual and necessary in all assignments to introduce a covenant of indemnity from the assignee to the assignor, for payment of rent and performance of covenants. See Lord Eldon's observations in *Staines v. Morris*, (1 Ves. & B. 11), which indemnity *the assignee does not get rid of by assigning over*.

TO OUR COUNTRY CORRESPONDENTS.

It is our intention to issue a stamped Edition of this paper for the country, at the extra price of the stamp only. Orders may, therefore, be sent to our Publishers, (post paid).

LONDON : W. M'DOWALL, PRINTER, PEMBERTON ROW, COUGH SQUARE.

The Legal Guide.

SATURDAY, NOVEMBER 24, 1838.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 35.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

WE have drawn particular attention to the three sections of this statute, requiring *acknowledgments in writing* to take cases out of its operation, (a) in regard to the variance in the language of those sections, and with reference to the language of Lord Tenterden's Act, 9 Geo. 4. c. 14, and to the 5th section of the 3 & 4 W. 4. c. 42, in relation to the same subject, which increases that variance, and leaves the interpretation open to construction. By section 5 of the statute last named, the acknowledgment to be made for taking a case out of that statute must be either by writing, signed by the party liable or his agent, or by part payment. By Lord Tenterden's Act the acknowledgment must be made or contained by or in some writing, to be signed by the party chargeable. (See Whippy and another v. Hilling, 9 Bing. 399.) As these variances, however, relate more to the law of debtor and creditor than to that of vendor and purchaser, to which this essay is confined, it is sufficient that we draw attention to them in commenting upon the new

Statute of Limitations, having previously shewn what is a sufficient acknowledgment of title to take a case out of this statute. We will therefore proceed to the law of *Entry*. Before the passing of this Act a person might make an entry upon land immediately before the 20 years had run out, and bring his ejectment within a year afterwards, (b) for he might make what was termed *continual claim* to take his case out of the statute. Section 10 of this statute enacts, that no person shall be deemed to have been in possession of any land within the meaning of the Act, merely by reason of his having made an early entry thereon; and section 11 enacts, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action. Section 3 enacts, that in the construction of this Act, the right to make entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at first time as thereafter is mentioned, (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall in respect of the estate or interest claimed have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such

(a) *Ante* p. 34.

(b) See 10 Barn. & C., 848.

profits or rent were or was so received ; and when the person claiming such land or rent shall claim the estate or interest of some person deceased, who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death, and when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument, and when the estate or instrument claimed shall have been an estate or interest in reversion, or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession ; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken. And by section 4 it is provided, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered

by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

The right of a *Reversioner to make an entry* is declared by section 5, which enacts, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent, shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

This section brings to our mind the observation made by Sir Edward Sugden, (a) that cases must frequently arise where it will be necessary to call for an earlier title, even after the lapse of time shall have reduced the proper period from 60 years to 40 years.

In illustration of our own opinion, (b) and in reference to this section, we will suppose a case :—a term of 99 years or more to be created for raising money for any purpose out of a fee simple estate, and the term is sold with the estate ; the purchaser takes possession, and the owner of the fee-simple becomes a reversioner-expectant upon the determination of that term. Suppose 80 years of the term to have run out, and the reversioner sells the fee-simple subject to the term, what title should the purchaser require ? He must have a title exceeding 80 years, to such an extent as shall shew a seizin in the party through whom he claims. There are many titles

(a) Ante p. 17.

(b) Ante p. 2.

thus situated, and although *ultimately* the Act will tend to shorten titles, yet in cases of this nature the title will depend upon its circumstances. The same observations apply to cases of long leaseholds, where the reversioner wishes to sell his expectant interest.

(*To be continued.*)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM III.

SIR,

In the first place, it is well known to be the prerogative of the courts of equity to judge without the intervention of a jury. In other respects, then, our courts of equity at present differ from those of law more in exterior matters of practice than in principle, and more in the mode of relief than in determining the essential merits of the cause. The judgments of the common law are uniform, simple, and invariable, according to the nature of the action; but equity modifies the relief to answer all the particular exigencies of the cause, fully and circumstantially, makes binding and authoritative declarations concerning the rights alleged, directs many things to be eventually done and suffered, and chalks out the conduct to be respectively observed by the several parties to the suit, who are frequently very numerous, and sustain various relations; some of the nominal defendants, perhaps, having the like interest and object as the plaintiff, and this alone creating a wide difference from actions at law. For instance, if a covenant be broken, the plaintiff at common law can only recover the stipulated penalty for its non-performance or damages, to be assessed by a verdict. These remedies are inadequate, for the non-observance of some agreements can hardly be compensated by pecuniary considerations, and conscience obliges us not only to make satisfaction where we cannot specifically fulfil our contracts, but actually to fulfil them when it is in our power. The power of modifying its decrees, unlike the stated conciseness and traditional forms of legal judgments, is manifestly essential to equity, and perhaps the most fruitful source of the business of those courts. Hence it

decrees an average or contribution to be made in such proportions as any loss or burthen ought to be sustained, as where the goods of one merchant are thrown overboard in a storm for the security of the other owners; or where two estates are encumbered with a joint charge, and the devisee of one pays the whole demand, it assists in the more easy partition of estates where the rights of the parties are complicated, and difficulties might arise at common law; in the recovery of simple contract debts, where judgment creditors have swept away the personal effects; in the taking of accounts, and in other instances in which the purposes of justice could not be readily or effectually answered by a formal judgment at law. So a prohibitory writ called an injunction is more expeditiously and specifically remedial in preventing waste of estates than redress by actions at law. Injunctions are with equal reason granted to inhibit the sudden dissolution of a commercial partnership, to stay proceedings at law, and in general to restrain any injury or mischief not easy to be repaired. Another important difference in equity is, that a defendant is bound to make a discovery upon oath of the matters in litigation. The common law forbids any man to be sworn in his own cause, because it will administer temptation to perjury; and even in equity certain bounds are set out.

R. F. L.

An explanation of the difference between Law and Equity, will be found in Sir Edward Sugden's "Letters to a Man of Property."

In Western's Commentaries, B. i. c. 11. p. 168, we find the following:—

"Though proceedings in Equity were said to be *secundum discretionem boni viri*, yet when it is asked *vir bonus est quis?* the answer is *qui consulta patrum qui leges juraque servat*. As it is said in Coke's Case, (5 Rep. 996) that discretion is a science not to act arbitrarily according to men's will and private affection, so the discretion which is to be executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its

turn to be subservient to the other. This discretion in some cases follows the law implicitly; in others, assists and advances the remedy; in others again it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds and principles thereof, as has been sometimes ignorantly imputed to the Court of Equity. This is a discretionary power which neither that nor any other Court, not even the highest acting in a judicial capacity, is by the constitution entrusted with." Again we find in the same chapter, p. 189. "One material difference between a Court of Equity and a Court of Law, is as to the mode of proof. A defendant in a Court of Equity, has the protection arising from his own conscience in a degree in which the law does not affect to give him protection. If he positively, plainly, and precisely denies the assertion, and one witness only proves it as positively, clearly, and precisely as it is denied, and there is no circumstance attaching credit to the assertion overbalancing the credit due to the denial as a positive denial, a Court of Equity will not act upon the testimony of that witness:—not so at law; there the defendant is not heard—one witness proves the case, and however strongly the defendant may be inclined to deny it upon oath, there must be a recovery against him."

The learned commentator then observes that to establish the origin of any branch of *legal* or *equitable jurisdiction* is always difficult and *seldom necessary*, provided the exercise of such jurisdiction is found to be conducive to the ends of substantial justice; and proceeds to describe the *jurisdiction* of the Court.—EDITOR.

JOINT STOCK COMPANIES.

(Continued from p. 20.)

LIABILITIES OF SUBSCRIBERS TO SCRIP COMPANIES.

We call attention to our report of the case in this number which refers to an *Incorporated Company without funds*, (a) and

(a) *Harrison v. Timmons, supra.*

we apprehend that there are other Joint Stock bubbles in the same melancholy situation, if their treasuries were investigated; and yet we find persons daily embarking their capital in some new scheme, planned perhaps by a set of needy adventurers without even the idea that liability followed the undertaking—that the adventurers, would get out with what subscriptions they could lay hold of, and that the subscribers would be left to pay the liabilities of the concern and lose their subscriptions into the bargain. And these same persons are the cautious fearful money-would-be-getting sort of people, who will not engage in commercial pursuits, because they *do* happen to have heard something of the liabilities of partners for their joint debts and engagements, but they have *never heard* of any law that would make them liable if they subscribed to a company's adventure.

In pursuing this subject we will look into the principles that govern the law in the cases before referred to.

The *Roman Lawyers* say, that for a man to enter into a partnership, so as to have neither the gain nor the loss in common, is a part that so affects the essence of the contract, as utterly to change the form of it.

Puffendorff describes partnership as a contract, by which two or more join together their money, goods, or labour, upon an agreement that the gain or loss shall be divided proportionably between them. And here, if every man contributes equally, each must receive an equal share in the gain or loss; but if they contribute unequally their shares must be adjusted according to the laws of *geometrical proportion*.—Lib. 5, c. 8, s. 1.

When we perform towards another, actions falling under *commerce*, or such as transfer any thing on another, to which he had *perfect right*, this is called *particular justice*.

"Now this *perfect* right accrues either to single persons by a covenant (tacit or express) made with some society, in order to those being admitted members of it, or to a society by a covenant made with 'single persons, in order to the receiving them into the same community. Or, lastly, from pacts made be-

tween any parties concerning things or actions falling under commerce. When we pay those things which are due upon the pact of a society with a member or of a member with a society upon the accounts just now specified, we are said to exercise *distributive justice*. For whosoever a man is received into a society, a pact is either expressly or at least tacitly made between the *society* and the *member* now to be introduced, by which the *society* engageth to give him a just share and proportion of the *goods* which it enjoys as a common body; and the *member* promiseth that he will bear his proper and equal part of those *burdens* which conduce to the preservation of the *society* considered *as such*. The exact determination of the proper share of goods to be assigned to the member is made according to the rule and value of the pains or charges employed by him towards preserving the common society, in proportion to the pains or charges contributed by the other members. On the other hand, the determination of the proper share of *burthens* to be laid on the member, is made according to the value of the benefits received by him from the society, considered in proportion to the advantages which the rest of the members enjoy. Hence, since it generally happens that one member contributes more towards the preservation of the society than another, and that one likewise exceeds in deriving advantage from it; the reason is very apparent why, upon the support of many persons, and of this inequality amongst them, we ought, in the exercise of *distributive justice*, to observe a *comparative equality*, which consists in this—that what proportion the merits of one person bear to the merits of another, such proportion shall his reward bear to the other's reward. For as Philo Jud. de Monarchia, l. 3, p. 640, ed. Genev. observes, 'tis high inequality to give honour to those who are not equal in merit. Arrian Epictet. l. 3. c. 17, *This is a settled law of nature, that he who is excellent should on that very account have a larger share of good things than he who is less.* Thus for instance, if six things of the same value are to be distributed amongst *Caius*, *Seius* and *Titius*, upon supposition that *Titius* exceeds *Caius* in a triple proportion, and *Seius* in a double, *Titius* shall have three, *Seius* two, and *Caius* one. Nor is it requisite to this equality that the reward fully answer and come up to the merits of the person, but 'tis sufficient that what proportion the service of the one bears to the service of the other the same proportion there should be between three shares of the common benefits. And the same rule must be followed in distributive burthens."—Puffendorff, lib. l. c. 7. s. 9.

To enlarge upon these principles will be going beyond the limits to which we are necessarily confined; suffice it to say that it is now a clear and well established principle of law, that whoever has a right to share in

the profits of an adventure, or has a specific interest in the profits themselves, becomes chargeable as a partner to third persons, in respect of transactions arising out of the adventure. The reason for thus clothing a person, by implication and operation of law, with the character of a partner, is thus given by Chief Justice DR GREY, in *Grace v. Smith*, 2 Blackstone 1000, "Every man who has the share of the profits of a trade, ought also to bear his share of the loss; and if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment."

We will give one other illustration to our former observations:—

In *Teague v. Hubbard*, 8 Barn. and Cress. 345. Teague was a shareholder, and managing director of the *Cornish Tin Smelting Company*: Hubbard was a shareholder, and agent for the company in the sale of tin, receiving a commission upon sales. Hubbard, as such agent, sold tin, and drew upon the purchaser a Bill of Exchange in his own name for the value. *Hubbard indorsed this bill to Mears, the actuary of the company*, who indorsed it to Teague: Teague purchased tin for the company, and when the bill was so indorsed to him the company were indebted to him in a sum beyond the amount. The acceptor of the bill became insolvent: Hubbard received ten shillings in the pound upon the bill.

Teague brought his action against Hubbard, as drawer of the bill, for money had and received. The Court held, first, that the indorser (Teague) being a member of the company, could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company, and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him, in his character as a member of the company, and not on his own account. Lord TENTERDEN observed, if Teague could recover, it would be a recovery by one joint contractor against another, and then Hubbard would have a right to call upon Teague for contribution.

But (as in *Attwood v. Small*, 1 Man. &

R. 246) where the directors of a projected joint stock bank company contracted in their own names with a shareholder for the purchase of a mine, and after the formation of the company entered into further agreements with him respecting the purchase, with a clause exempting them from personal liability upon certain parts of the contract, it was held that the directors might be sued by the shareholders upon those parts of the contract to which the exemption did not apply.

(To be continued.)

PROBLEM IV.

WHAT ARE THE CHANGES MADE IN THE LAW BY THE STATUTE 1 & 2 VICT., CAP. 110.—An Act for abolishing arrest on mesne process in civil actions, for extending the remedies of creditors against the properties of debtors, and for amending the laws for the relief of insolvent debtors in England?

Law Reports.

COURT OF CHANCERY.

PRICE v. DEWHURST.—Nov. 19.

*Appeal from the Vice-Chancellor.
Lex loci domicili.*

In this case the VICE CHANCELLOR had decreed that the plaintiff was entitled to money in the hands of the defendant, an executor, which had formerly been invested upon mortgage of real estate, in the Island of St. Croix, by his testators, who had been since domiciled in England.

The mortgagee, after living a short time in St. Kitt's, went to St. Croix, where he lent money on mortgage, and returned to England with his wife, where they both died, the evidence shewed them to have been domiciled in this country. The defendant was one of the executors appointed under a joint will, executed according to the Danish forms by both husband and wife, and claimed to be entitled to control over the property by taking out probate in St. Croix. It had been contended, that as money lent on land it followed the nature of land, but *Danish advocates* had shown that, as in this country, it must be considered personality. During their residence in England, the survivor made a second will, under which the plaintiff claimed, and which was intended to supersede the former. It was quite clear that *probate must follow the domicile*, and that the property must be dealt with

according to the law of the country where it was situate. He thought the Vice-Chancellor right in his decree that the defendants held the property they had obtained possession of, as trustees for the plaintiffs.—*Appeal dismissed with costs.*

Lex Loci Domicilii.

This is a law which is very imperfectly understood by the profession, and a knowledge of which is as little sought for; until a case appears, it remains, as it were, a dead letter. We scarcely ever hear of it, and yet from our present connection with foreign countries, by marriage, and other circumstances, how greatly will this law come into operation, perhaps even now almost daily. As *usefulness* is the professed object of this paper, the *Editor* will write an essay upon the subject in some future numbers.

Nov. 22.

Legacy—Time joined to the substance of the Legacy.

ROBERTS v. WILLIAMS.

A minor appeared as plaintiff by his next friend against the executors of a testator, who had by his will given a sum of 500*l.* to the infant *when* he attained the age of twenty-five, and prayed that the executors be directed to set apart the sum of 500*l.* out of the testator's estate, and that the interest of that sum might be paid in the mean time towards the support of the infant, for whom the testator had appointed a *trustee*.

Mr. *Wakefield* and Mr. *Koe* argued that the nomination of a trustee clearly proved it to be the intention of the testator to give the minor the interest of the fund, although there was no direct expression to that effect in the will.

Mr. *Wigram* and Mr. *Richards*, for the defendants, said the estate of the testator was already vested in Government stock, and therefore amply secured, but the minor could not be entitled to the interest of the legacy until the legacy itself became due.

The LORN CHANCELLOR was of opinion that interest could not be paid, and that the bill must be dismissed with costs. The minor's friend must for the present pay those costs, and get them repaid out of the legacy when it became due.

QUEENS' BENCH. Nov. 16.

Attorneys allowing unauthorized persons to practise in their names.

THE LAW SOCIETY, and WILLIS, AND ALLEN.

Mr. *Jardine*, for the Law Society, applied for a rule calling upon an attorney, named William Willis, to show cause why he should not be struck off the roll of attorneys, and upon

a person, named William Allen, to show cause why he should not be committed to the prison of the Court for the space of a year. The application was made under the 22d of George II. c. 46. s. 11, which recited that, "whereas divers persons who had not been examined and sworn, or admitted as attorneys or solicitors in any court of law or equity, had, in conjunction with, or by the assistance and connivance of, certain sworn attorneys and solicitors, and by various subtle contrivances, intruded themselves into the practice of the law, to the great prejudice and loss of the subjects of the realm, and the great scandal of the profession of the law." The section then proceeded to enact, "that if any sworn attorney should thereafter act as agent for any person not qualified, or allowed his name to be used by such unqualified person, or sent any process to him to enable him to appear and act as an attorney, such attorney so offending should be liable, on a summary application to the Court, to have his name struck off the roll, and be disabled from practising the remainder of his life, and such unqualified person so acting, as aforesaid, should be liable to be committed to the prison of the court for a period not exceeding twelve months.

The present application was founded upon the affidavits of the town-clerk of Banbury, and of several attorneys and solicitors practising in that town. They all stated, that in the summer of 1837, Allen first came to Banbury, and set up in business as an accountant and law-stationer, and that he had his name and employment painted over the door of his house or shop, and that he subsequently commenced practising as an agent in the county court of Oxford; that in "innumerable instances" he had been acting as an attorney, and that in all those cases the applications for the payment of accounts were signed with his name, and the writs endorsed in the name of Willis, Sloane-street, London; that the matter having excited a great deal of conversation in the place, he took down the original inscription from over his door, and wrote up instead "Mr. Willis, solicitor—Mr. Allen;" that the name of Willis was unknown as that of anybody residing at Banbury; that the actions and proceedings in question were all conducted for the joint benefit of the two parties, as was evident by the fact that when the proceedings were conducted by Allen, the bills of costs were furnished by Willis, and that one of those actions was in the Queen's Bench, which circumstance was expressly stated in the affidavit, in order to lay a formal foundation for the jurisdiction of the Court.

His LORDSHIP granted the rule.

HARRISON v. TIMMINS.

Joint Stock Companies (a)—Liability of Directors.

Mr. Cresswell showed cause against a rule which had been obtained by the Attorney-General, calling upon the defendant to show cause why he should not pay the damages and

costs of this action, or why execution should not be levied against his goods.

This was an action for work and labour done as the servant of the West Cork Mining Company, and the action was brought against the defendant, one of the directors, under the provisions of the act of incorporation, 4 & 5 of William IV. c. 6, by which it is enacted that all suits may be brought against one of that body as the nominal defendant, and that the "reserved fund" of the company should be answerable for all damages and costs upon contracts which set forth upon their face to have been entered into by any one of the directors for the benefit of the company at large, and not for his own private gain. Subsequently there was another act passed in the first year of her present Majesty's reign to explain that portion of the old act, and by that it was provided that the powers of the former should extend over parole as well as written contracts, and that the general property, as well as the reserved fund of the company, should be liable, in the event of defeat in any action brought thereon. Such being the case and the position of the parties, it was now contended that the only remedy for the plaintiff was against the goods of the company, and that the defendant, who was only sued under the statute as the nominal representative, was not liable personally for any of the contracts entered into with them, and in support of this view the case of "Bartlett v. Pentland," 1 Barn & Adolp. 704. was cited.

The *Attorney-General* submitted that a gross injustice would be perpetrated if this and other copartnerships, for such it was, were to be allowed to evade their creditors' claims. *The company had no reserved fund nor any other property at all*, and the Court would do its utmost to assist the plaintiff in enforcing his demand against the defendant, who had made no affidavit, and did not dare to deny that he was a shareholder at the time of the performance of those services, for which the plaintiff now sought compensation. There was nothing in the first or second act to limit the individual responsibility of the members of this company, and each was liable, on the failure of the joint funds, to pay all demands against them *in solido*, like all other partnerships. Though this in form was an action against the defendant, as the nominal party, yet it was in fact an action against him and against every other member personally: each and all were liable for the debt and costs, and the Court would not construe too rigidly these statutes, which could not be said expressly to have limited the liability of the shareholders. If such a clause had been proposed in one of the houses of Parliament, Lord Shaftesbury would have scouted it, for that noble lord kept too sharp a look-out upon these private acts, and it could never have been allowed that the shareholders should limit their personal responsibility.

Mr. BARON ALDERSON.—It would be desirable I think, instead of watching a bill, to see that it does not contain any such clause, that it

should be a rule to insert clauses of the exactly opposite tendency.

The Attorney-General.—Perhaps it might; but there is no necessity for a rule, it was submitted, as the common law declares that each member of such a partnership is liable until there is shown to be some express enactment to the contrary. For these reasons it was confidently submitted that the rule must be made absolute.

By the Court.—This is a case of some importance, and we will take time to consider its bearings before we give our judgment.

In the case *Bartlett v. Pentland*, above cited, the statute of incorporation of the St. Patrick Assurance Company directed all actions to be prosecuted against the secretary for the time being, or against any member of the company, as a nominal defendant, and that execution might issue against any member, and in case such execution should be ineffectual, the execution creditor might, with leave of the Court, issue execution against any person who was a member when the debt was contracted. Here a judgment had been obtained against the secretary, and the Court held that execution could not lawfully issue against another member of the company without having previously, by leave of the Court, suggested on the record facts to shew that the party was liable as a member of the Company.—ED.

COMMON PLEAS.—Nov. 15.

LAW EXAMINERS.

Power of the Court to make an order upon them.

Mr. Kelly applied to the Court for a rule directing the examiners to proceed with the examination of a gentleman who was desirous of being admitted an attorney. It appeared that the applicant had served his full clerkship of five years under two masters, his articles having been assigned from the one to the other. But after the agreement to assign the articles had taken place, a period of about a fortnight intervened before the assignment was executed, and the applicant having served the second master during that fortnight, the examiners objected that such service was not under either of the original articles, nor under the assignment, and that, therefore, there was not the full five years' due service to entitle the applicant to be admitted. But he (*Mr. Kelly*) submitted, that

as a fortnight's service had taken place after the agreement to assign, although before the assignment was actually executed, it was substantially a service under the assignment.

The Court, after some discussion as to whether or not they had the power to make an order on the examiners, directed that they should proceed with the examination *de bene esse*, and when the applicant applied to be admitted, the objection as to want of due service might be raised if necessary.

CONSISTORY COURT.

DORMER falsely calling herself WILLIAMS v. WILLIAMS. Nov. 16.

Illegality of Licence for Marriage—where parties not cognizant of that fact, marriage not void.—First case under the Marriage Act. 4 Geo. 4. c. 76.

In this case Maria Teresa Dormer, otherwise Williams, who is proceeding against Mr. Henry William Williams. In December, 1826, Mr. Williams being then 21, and Miss Dormer a minor of 19 (an orphan having no guardian), agreed to effect a clandestine marriage (the relatives being averse to it), and for that purpose Mr. Williams undertook to procure a license for the marriage at Swinnerton, in Stafford, in the diocese of Lichfield and Coventry (where Miss Dormer resided); but he procured it from a surrogate of the diocese of St. Asaph, the license being nevertheless as for a marriage to be celebrated at Swinnerton. Finding the license to be null, but fearing the consequences of delay, he induced the lady to consent to the marriage at the parochial chapel of Halston, in Salop, and the diocese of St. Asaph, provided he could procure a clergyman to perform the ceremony by virtue of the license. Mr. Williams obtained the consent of the Rev. Joseph Fish, of Ellesmere, to celebrate the marriage, which was accordingly solemnized by him at Halston on the 23d of December, 1826. The original license having been destroyed, the warrant or affidavit to lead the license was exhibited.

Dr. Burnaby (with whom was Dr. Haggard) contended that the facts pleaded in the libel, if proved, would not support a case of nullity under the present law, which required that both parties should knowingly and wilfully intermarry without publication of bans, or a license from a person having authority to grant the same. There had been a *mistake*, but it did not appear that both parties were cognizant of and meditated a fraud.

The Queen's Advocate (with whom was Dr. Addam) observed, that the libel pleaded that the nullity of the license was known to both parties; that the violation of the law was settled and arranged between them, and if this was not a void marriage on this ground, it would be difficult to know what could be. Halston was, in fact, a peculiar.

Dr. LUSHINGTON said, it had been decided by the Judicial Committee, with respect to

the publication of bans, that in order to render a marriage null and void under the 22d section of the Marriage Act, both parties must have acted knowingly and wilfully, with an intention to defeat the law. The words of the section with respect to license might be construed to mean either "having authority to grant the particular license," or "any license at all." He would assume, however, that Mr. Williams knowingly and wilfully procured a license from a person having no authority to grant such a license as was requisite on the present occasion. Now the facts pleaded in the libel must be such as would authorize this Court to entitle Mr. Williams, as well as Mrs. Williams, to a sentence declaratory of nullity, and if there were issue (there being none in this case), to bastardize and deprive them of any property they might otherwise be entitled to. It must therefore have been the intention of the Legislature that the facts pleaded in the libel must be perfectly conducive to show a guilty knowledge in both parties, and a guilty intention to violate the law. Was he to suppose that Mr. Williams, being cognizant of the law, intentionally went to an authority not competent to grant the license? Presuming he did so, he (the learned Judge) must also presume that the surrogate who granted the license was ignorant or neglectful of his duty; and there was a clergyman of the church of England, who must have used the license, and who was alleged to have celebrated the marriage by virtue of an authority which on the face of it was no authority at all. The libel nowhere pleaded that Mrs. Williams was cognizant of the illegality of the license, and unless the facts stated in the libel fully established the guilty knowledge of the parties, he could not declare a marriage null and void. He was of opinion that they did not do so, and therefore he must reject the libel.

COURT OF EXCHEQUER.

SITTINGS IN BANCO.—Nov. 15.

Abolition of Imprisonment for Debt Bill. Sec. 7.

Roxborough v. Brind.

As to the discharge of prisoners in custody on mesne process, and having petitioned the Court. *Home* had obtained a rule on the part of the defendant, calling upon the plaintiff to show cause why the defendant should not be discharged from custody and a common appearance entered, under the provisions of the 7th section of 1 and 2 Vict. c. 110, by which it is provided that all prisoners under mesne process at the passing of the act shall be discharged, provided they have not petitioned for their discharge in the Insolvent Court. The point raised by the motion was, whether the defendant came within the spirit of the act, inasmuch as he had petitioned the Court, and it was contended by *Mr. Home*, on moving in the first instance, that his petition having

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been discharged by the Commissioner, that step was to be taken as a mere nullity, and he was to be looked upon as a prisoner who had not in fact petitioned.

Mr. KELLY shewed cause, when it was suggested by the Court, that as there was now a rule pending in the Insolvent Court touching this very point, the present motion had better stand over. Acceded to. The rule was accordingly enlarged.

NIAS v. MILTON.

Construction of 1 & 2 Vict. c. 110, Abolition of Imprisonment for Debt Bill.

W. H. Watson was instructed to apply to the Court, on the equitable construction which had been put upon the provisions of the recent act under the following state of facts. The defendant had been arrested on mesne process on the 29th of May, but made his escape from the bailiff's follower on the following day. Upon this an escape warrant was issued against him, which was not put into execution till the 13th of this month, only a few days before this motion; and it was urged that the case was within the spirit of those decisions by which the Courts had extended the strict letter of the act, and had included within its spirit many persons who were not in arrest at all.

Sed per Curiam.—This is carrying that feeling too far to call upon the Court to say that a man who actually had made his escape from arrest, was in actual custody by a fiction of law at the same time. The rule cannot be granted. Rule refused accordingly.

HARRIS v. DICKINSON.—Nov. 15.

Construction of 1 & 2 Vict. c. 110, Abolition of Imprisonment for Debt Bill, by the Court.

Petersdorff shewed cause against a rule of *Corrie*, which had for its object the taking out of Court a sum of money deposited by the defendant in lieu of bail under the provisions of the 1 & 2 Vic. c. 110. This was a case founded upon the recent decision in the C. B. but was one which sought to carry out the fiction of law, employed there to a limit for which no reason could be assigned. In the first place in order to entitle the defendant to make such an application, he ought to shew to the Court by his affidavits, that he is within the terms of the act; with this view he ought to shew that he was in custody at the passing of the act, that he has not entered an appearance to the action, and that he has not petitioned the Insolvent Court for his discharge, all which are conditions imposed by the act on persons seeking to take the benefit of its enactments. The defendant, however, has not shewn any of these things to the Court, and notice moreover is necessary to enable a defendant to take money out of Court. The substantial ground of opposition is however, that he has not been in custody at all, and it is submitted that he ought to have been in actual physical control of some body, even

under the meaning of *Bateman v. Dunn*, (a) in the C. B., where a man was held to have been in the *quasi* custody of his bail. Here, however, there is no such thing; for a man cannot be said to be in the custody of his own money.

Corrie being called on to support his rule, put the case as one for the equitable construction of the act, and argued that it was not requisite that a man should have been in custody on the 1st of October, but that any subsequent detainer was such a state of arrest as would justify the interference of the Court. The case is to be argued as though we had put in bail, and had rendered after the 1st of October, and it is submitted that the defendant is entitled to the relief prayed.

PARKE B.—This is an embarrassing point, which has arisen from the Court's departing from the strict purport of the words of the act. We must consider our judgment.

C. a. v.

JACKSON v. COOPER.

This was also a case under the same act, though the facts were different—and *Shee* having obtained a rule for the entry of an *exoneretur* on the bail bond, *Gurney* now shewed cause.

The defendant, it seemed, was arrested, and released on putting in bail; since that time a final judgment has been entered in the suit against him, and it was argued that he was not within the spirit of the act on that account. All the previous cases had gone only to this length, namely, that the bail might be relieved when it appeared that they were thereby saved a circuitous mode of proceeding to a point at which the parties must ultimately come. Here, however, it is not known what might be the result of the defendant's render, and the Court will not therefore give him an opportunity of escaping altogether from the plaintiff.

Shee then, in support of his rule, contended most strongly that he was entitled to the relief prayed, putting it on the ground that mesne process continued up to the time of putting into execution final process. Here, though a final judgment has been filed, yet it is at present quite inoperative, as the defendant has not been secured; and he would therefore be in custody on mesne process as soon as he is rendered. To avoid this unnecessary step, as he would then be clearly entitled to his discharge, the Court will at once exonerate the bail.

The COURT having also taken time to consider its judgment in this case, afterwards Mr. BARON PARKE delivered the following JUDGMENT:

These two cases stood over to enable us to confer with the Judges of the Common Pleas, upon the nature of their decision in *Bateman v. Dunn*; and we are of opinion that the act in question ought to be construed according

to the plain and literal import of its words in the 1st and 7th sections, and not that the arrest may be one which is suffered after the 1st of October—but that the party seeking relief must have been in arrest on mesne process on that day. The two cases before us differ in their facts, and in the case before the Common Pleas, that Court has put a liberal construction upon the act, by which we should be bound in deciding an ordinary case, and have held that there need not be an actual custody, but that the fictitious custody of the bail is sufficient: with this we are bound to agree. But when a case comes before us like that of *Harris v. Dickinson*, where a man is said to be in the custody of his own money, we cannot bring ourselves to say that it is within the terms of the act, or the equity of that decision; neither do we think that the defendant is entitled to make his rule absolute in *Jackson v. Cooper*. We cannot relieve his bail *per saltum* according to the case in the C. B. because we do not know whether he will ever appear at all if we do; and if he did, we cannot tell but that the plaintiff may charge him in execution within an hour after he has appeared.

For these reasons the rules in both cases must be discharged.

LEWIS v. FORD.—Nov. 21.

Abolition of Imprisonment for Debt Bill. Archbold had obtained a Rule to enter an *exoneretur* on the bail bond given by the defendant, who was arrested before the 1st of October, and to enter a common appearance.

Humphrey showed cause against the rule, and contended that it must be discharged. It appeared that the defendant, immediately after his release, went abroad, and had been residing at Paris ever since, and that it was not his intention to come back to England; it was submitted that enough had been made out to discharge the rule.

Archbold submitted that the rule ought at any rate to be enlarged, so that the defendant's bail might have an opportunity of answering the matters in the affidavit, for it was a great assumption to say that the defendant never meant to surrender.

By the COURT.—If that be not true, then your best answer will be to render him, and then he can apply for his discharge, when he will be clearly within the equity of all the decisions. As it is, however, he is out of our jurisdiction, and we will not interfere in the matter.

Rule discharged.

BAIL COURT.—Nov. 15.

Abolition of Imprisonment for Debt Bill—does not extend to the Courts of Common Pleas at Durham and Lancaster.

CURL v. ELLIOTT.

Mr. Alexander, Q.C., applied on the part of the defendant for a rule calling upon the plaintiff

to show cause why a writ of attachment (called a *pone per radios*), which had issued out of the Court of Common Pleas of the county Palatine of Durham, should not be set aside, as well as all the subsequent proceedings which had been taken therein by the plaintiffs, upon the defendant's entering a common appearance, in pursuance of the act for abolishing imprisonment on mesne process for debt. It appeared from the affidavit of the defendant, that he was a gentleman of large property, residing at Berrington, in the county of Durham, and that he cultivated land to a considerable extent. In the latter end of the last year he had occasion to go abroad, and it becoming necessary in his absence to manure one of his farms, the plaintiff applied to Mr. Elliott's brother to request that he might be employed to do so. The request was complied with, and 300 or 400 loads of lime were laid out by him on the farm. For this he furnished an account of 260*l.* to Mr. Elliott's brother, from whom he claimed payment of the money, and upon his refusal to comply, the writ of *pone* in question was issued, and executed against the property of Mr. Elliott. The matters in controversy between the parties were subsequently submitted to the decision of an arbitrator, who adjudicated upon the question in October last, and proceedings are now going on in a court of equity, for the purpose of setting aside that arbitration on the ground of corruption.

Mr. Justice LITTLEDALE interposed at this part of the statement, and said that he did not see how the Court of Queen's Bench could set aside a writ of attachment issued by the Court of Common Pleas at Durham.

Mr. Alexander said that he hoped to show his Lordship that this Court had jurisdiction over the case. The goods which had been seized under the attachment, and the value of which was of ten times the amount claimed by the plaintiff, would be sold in four days, unless this Court should interfere.

Mr. Justice LITTLEDALE said that he thought the best course of proceeding would be to apply to a court of equity for an injunction to restrain the plaintiff from proceeding to a sale. For himself, he did not think he had the power to do what was asked.

Mr. Alexander said that the attachment was in fact equivalent to an arrest, and that as the Legislature had abolished the power of arresting, he thought that the Court had authority to prevent the issuing of what was in fact an equivalent process.

Mr. Justice LITTLEDALE, alluding to some cases which have been lately decided in the Court, said that the provisions of the statute of the 1st and 2nd of Victoria, chapter 110, had been extended from the case of persons in actual custody to those who were out upon bail, although the latter had not been expressly mentioned in the act. But that extension proceeded upon the ground that a man out upon bail was considered as in the custody of the bail; and that, at any rate, it was in the power of the bail at any time to place him in

custody in their own discharge; after which he would be entitled to the benefit of the act, as he would be then literally within its provisions. But saying nothing, for the present, of other difficulties, how could a person be said to be placed even in constructive custody by a proceeding which only affected his goods?

Mr. Alexander said, that his application was to the discretion of the Court under the equity of the statute, and was founded upon the fact, that if attachments were allowed to issue in such circumstances as the present, the power of arresting on mesne process for debt, which was supposed to have been universally abolished, might be effected indirectly through the means of the *pone*, and in the whole extent of the jurisdiction over which it issued. The writ went on the application of the plaintiff, not for any sum which had been previously found or acknowledged to be due, but for whatever sum the plaintiff himself thought proper to swear to. In order to get rid of the writ, it was indispensable either to surrender personally into custody or to give bail for appearance; and as the plaintiff had the naming of the sum for which the attachment was to issue, the defendant might be unable to procure bail, and his only means of releasing his goods would be by parting with his liberty. The process of attachment against the goods, therefore, was in substance an arrest on mesne process, and he therefore thought that it was within the evil intended to be remedied by statute, which recited that "the power of arresting persons on mesne process for debt was unnecessarily expensive and severe, and ought to be relaxed." The statute accordingly declared, that after the passing of it no person whatever should be arrested for debt in any inferior court, nor in any superior court, except in some cases mentioned in the act.

Mr. Justice LITTLEDALE observed, that the Court of Common Pleas in Durham was not an inferior court, but a superior one, and as much so as the Court of Common Pleas at Westminster.

Mr. Alexander said, that he had felt some difficulty on the question as to his Lordship's jurisdiction over the case.

Mr. Justice LITTLEDALE.—My doubt is not whether I have any jurisdiction over it, but whether anybody has. His Lordship then referred to the act, and after looking into it, said that the Courts of Common Pleas at Durham and Lancaster were not mentioned in it at all.

Mr. Alexander said, that if its provisions could not be extended to those courts, they would have a power of arresting, which no other court in the country possessed.

Nov. 19.

Application to take Money out of Court paid in lieu of Bail.

Mr. Justice LITTLEDALE,—in answer to an application made by Mr. Cleasby to show cause against a Rule that had been obtained by Mr. Bramwell, to show cause why money

paid into Court in lieu of bail should not be paid out—observed that it was unnecessary for Mr. Cleasby to do so, as the Court of Exchequer had decided (*a*) that the granting of such a rule would be extending the construction of the late statute further than could be warranted by reason or law. It was natural enough to extend its provisions so far as to exonerate bail upon entering an appearance, because the defendant was, in law, supposed to be in the custody of his bail. That a defendant who had paid money to prevent the necessity of giving bail, could not, without too great a violence of construction, be supposed within the meaning of an act which in its terms applied only to persons in actual custody. In these circumstances, the rule would be discharged, but without costs, as all the questions which had arisen upon the statute were sufficiently doubtful to entitle the parties to bring them into discussion for the opinion of the Court.

THE LAW EXAMINERS.—*In Re Mr. JOHNSTON.*
Objection to admission upon the Rule of Attorneys.

The Attorney-General applied for a rule calling upon the Examiners to admit Mr. Johnston's name to be placed on the roll of attorneys. It appeared that Mr. Johnston had been originally articled to a gentleman named Wynne, who was in partnership with a Mr. Jackson. Mr. Wynne died nine months before the five years of Mr. Johnston's service were expired, but Mr. Johnston continued, without interruption, to serve Mr. Jackson, and after the termination of the five years, he served still nine months longer, at the end of which time his articles of clerkship were assigned to Mr. Jackson by the executors of Mr. Wynne. The *Examiners*, however, objected that during the interval which took place between the death of Mr. Wynne and the assignment, Mr. Johnston was not under any articles at all, and that the service which took place during that time was nugatory. If this kind of objection, which he (the Attorney-General) considered a very captious one, were allowed to prevail, it would render some of the most respectable attorneys in England liable to be struck off the roll.

Mr. Justice LITTLEDALE said, that there were at present several cases similarly situated under the consideration of the judges. He should grant the rule, and the Examiners would proceed with the examination in the mean time. Some general rule would be laid down upon the subject in a few days.

BODDINGTON v. WOODLEY.

Abolition of Imprisonment for Debt Bill.—Sect. 3, 6 & 7 First Case.—Detainder.

Sir W. Follett applied for a rule calling upon the plaintiff to show cause why an order, made by Mr. Justice Coltman authorising the

detention of the defendant in custody until he should have given bail for 300*l.* should not be rescinded. By the third section of the Act 1 & 2 Victoria, chap. 110, it is provided, that if it shall at any time be made apparent to the satisfaction of any of the judges of the superior courts at Westminster, that the plaintiff has a cause action to the amount of 20*l.* and upwards against any defendant, and that there is probable cause that the defendant will quit England unless he shall be forthwith apprehended, it shall be lawful for such judge to direct such defendant to be holden to bail for such sum as the judge shall think fit, not exceeding the amount of the debt or damages claimed by the plaintiff, and thereupon it should be lawful for the plaintiff to issue against such defendant a *capias*, in the form contained in the schedule to the act. The sixth section authorizes any defendant so arrested to apply to a judge for his discharge; and the seventh section enacts that every person who at the commencement of the act should be in custody on mesne process, and who should not have filed a petition to be discharged under the Insolvent Debtors' Act, should be entitled to his discharge from custody, on entering an appearance to the action, provided that every such prisoner should be liable to be detained by virtue of any such order as that previously described in the third section. It appeared that the plaintiffs were mortgagees and consignees of a West India estate, the property of the defendant, and that as the proceeds for some time had only paid the interest of the debt, the plaintiffs had caused the defendant to be arrested. From that arrest he was discharged, from a defect in the affidavit to hold to bail, after which he was arrested a second time, and again discharged; after which he was again taken a third time in August last, and was in actual custody under the last arrest on the day of the coming of the statute into effect. The sum for which he had been so arrested was 900*l.*, but after several proceedings and applications in the case, Mr. Justice Coltman made an order directing him to be detained until he gave bail for 300*l.* Sir W. Follett proceeded to contend that Mr. Justice Coltman had no authority to make the order in question, for although the statute authorised the judges to detain prisoners in certain circumstances in custody, yet it was impossible to suppose that the detainer mentioned in that statute could be the same sort of thing known under the same name in the Uniformity of Process Act, as the statute itself had expressly provided that the defendant should be taken by the form of *capias* given in the schedule. That writ was addressed to the sheriff of the county, and the defendant was in the custody of the warden of the Fleet, who had no power to receive a writ addressed to another officer, whilst that other could not of course execute the writ according to its exigency by taking the defendant and keeping him in the sheriff's own prison, at a time when he was in the actual keeping of the warden of the Fleet.

Mr. Justice LITTLEDALE said, that in order

(a) *Harris v. Dickinson, ante.*

to set the power of a judge in motion in such a case, it was necessary that somebody should swear that the defendant would immediately quit England unless he should be taken into custody. He could not understand how anybody could make any such statement in reference to a person who was an actual prisoner at the time, and who could not obtain his discharge without a notice to the party at whose suit he had been arrested.

Sir W. Follett said he was equally unable to understand how it could be done, and he went on to submit that the order of Mr. Justice Coltman ought to have recited (which it did not) that it appeared to the satisfaction of the learned judge that the defendant owed 20*l.* and upwards to the plaintiff, and that it had been proved to the satisfaction of the judge himself that the defendant would go out of the country unless he were apprehended. Mr. Woodley had made an affidavit, in which he expressly stated that he was residing upon his own estate in Surrey, and that he had not been out of England, and did not intend to go.

Mr. Justice LITTLEDALE said, that in his judgment there was nothing in it to authorise such a detainer as that which existed under the Uniformity of Process Act. He knew, however, that there was a difference of opinion among the judges upon the subject of the meaning of the term "detainer," in the act; he should bring the point under their consideration: *rule nisi* granted.

Nov. 23.

Abolition of Imprisonment for Debt Bill—Discharge of Bail after Interlocutory Judgment.

Mr. Stammers applied for a rule calling upon a plaintiff to show cause why an *exoneretur* should not be entered upon the bail piece. It appeared that a defendant had been arrested before the new Act came into force, that special bail had been given, and interlocutory judgment had been subsequently signed.

Mr. Justice LITTLEDALE said that the Court of Exchequer had refused to extend the equity of the statute to a case where judgment had been signed before the application.

Mr. Stammers said, that in the case which had been decided in the Exchequer the judgment had been final.

The learned JUDGE granted a rule *nisi*, but in consequence of some want of entire uniformity in the decisions, directed cause to be shown before the full Court.

Business in the Courts.

COURT OF CHANCERY.

Lunatic petition, by order.—In re Battams.

Causes.

Swain v. Pratt—Orton v. Pratt, Exceptions and further directions—Mathias v. Brown—Perkins v. Underwood—Underwood v. Perkins—Curtis v. Lloyd—Pulsford v. Bickham—

Collett v. Hover—Attorney-General v. Barker—Salmon v. Sadgrove—McCullum v. Blewitt—Rigg v. Wall—Attorney-General v. Ward—Lloyd v. Jones.

VICE-CHANCELLOR'S COURT.

Short Causes.

Lacey v. Philcox—Sherwood v. Docker—Parker v. Bott—Templar v. Fortescue—Barnes v. Barnes—Maddison v. Hollis—May v. Gladstones, further directions and costs—Willis v. Brown, ditto—Exton v. Scott, ditto and petition—Macdonald v. Bruce, ditto—Ledgard v. Ridout, ditto—Whalley v. Whalley, ditto—Clowes v. Clowes—Daniel v. Usticke—Watkins v. Winkworth—Attorney-General v. Heap—Paterson v. Barnard.

Unopposed Petitions.

Macdonald v. Bruce—In re Allnutt—In re Hare's will—In re Hawkins—Barlow v. Powler—Price v. Anderson—Graves v. Dolphin—In re Wilson's estate—Lynn v. Sheath—Blindsight v. Goron—Johnson v. Johnson—Ex parte Burfords—Thwaytes v. Hawkins—Bettle v. Walker—In re Darleston Bond—De warris v. Dewarris—Bengough v. Edridge—Sparrow v. Davis—In re Chesborough—In re Gathorne—In re Calloway—Pearse v. Pearse—Bourke v. Parker—In re Edwards' Estate Act—Marquis of Bute v. Farman—In re Cole—Mawley v. Wakefield—Knocker v. Hurry—Hargreaves v. Liddell—Wise v. Steere, by order—Yates v. Pullmer, by order.

After the Unopposed Petitions.

River Dunn Company v. North Railway Company, part heard—Oldaker v. Lavenu, to be spoke to.

Adjourned Cause Petitions.

Healey v. Healey—Neale v. Postlethwaite—White v. Sayer (2)—Waters v. Taylor—Tulloch v. Simpson (2)—Field v. Field—In re Sutton's Charity—Belgrave v. Massiah—Gurney v. Cosway—Dawson v. Dawson.

ROLLS COURT.

For Judgment.

Humphrey v. Vivian.

General Paper.

Hindle v. Nicholson, further directions and costs, by order—Hartwell v. Colvin, demurrer—Kinder v. Lord Ashburton, ditto—Fearey v. Stephenson—Broadbent v. Broom—Frost v. Brewer—Lawson v. Gover—Orme v. Wright—Wells v. Malins—Baring v. Sinclair—Noble v. Elgie—Campbell v. Campbell.

COURT OF QUEEN'S BENCH.

Sittings in Banco.

BAIL COURT (QUEEN'S BENCH.)

Middlesex Undefended Causes.

Verity v. Andrews—Reeve v. Brett—Doe demise Bellamy v. Lewinton—Gaitskell and another v. King—Dry and another J. v. Waller—Holme and another v. Dellar—Johnstone v. Thomas—Atkinson v. Jones

Dunn v. Jones—Doe demise of Perry and others v. Desborough and others—Debuce v. Bowyer—Wilshire v. Belben—Mazzinghi v. Innes—Finney v. Youle—Yates v. Nixon—Thompson v. Samuel and Joseph Nye—Crompton v. Smith and another—Pearson v. Buckle and another—Stone v. Joy—Smith v. Taylor—South v. Tomlins—Peake v. Dudman—Doe demise of Taylor v. Hamer—Braham v. Hill—Christ v. Whillock—Neck v. Pasmore—Harvey v. Richardson.

COURT OF COMMON PLEAS.

Sittings in Banco.

COURT OF EXCHEQUER.

Sittings in Banco.

EQUITY EXCHEQUER.

Waters v. Meredith, petition to be spoke to—Hart v. Cunliffe, exceptions—Thomas v. Tyler, demurrer—Times v. Negus, further directions—Fyson v. Pole, demurrer—Mason v. Brooks, further directions—Johnston v. Nisbett, cause by order.

APPEALS COURT, DOCTORS COMMONS.

Third Session in Michaelmas Term.

QUESTIONS

AT THE EXAMINATION,

Michaelmas Term, 1838.

Where did you serve your clerkship?

State the particular branch or branches of the law to which you have principally applied yourself during your clerkship?

Mention some of the principal law books you have read and studied.

CONVEYANCING.

What is the difference between real and personal estate?

What are proper words for creating an estate in fee simple, by deed or will?

What are proper words for creating an estate in tail?

Can personal property be entailed?

When two persons, not being partners, purchase an estate out of their own money, in equal shares, and take a conveyance of the estate simply to themselves in fee, what is the effect of this conveyance at law and in equity?

What difference would it make either at law or in equity if the purchase money had been contributed in unequal shares?

When an estate in fee simple descends to two sisters, what is it called?

How can the dower of a woman married before the late Dower Act came into operation, be now defeated; and how can the dower of a woman, married subsequent to that act, be defeated?

When money is directed by a deed or will to be laid out in the purchase of lands directed to be entailed, may a tenant in tail, who would be entitled to the lands when so purchased, gain possession of the money without carrying such direction into effect; and if so, by what means?

When title deeds cannot be delivered up to the purchaser, what is he entitled to require?

As far as you can recollect from what you have generally seen in deeds, state the appurtenances of a manor, more particularly those which do not belong to an estate comprising lands, but without a manor.

If the executor of A. dies, who becomes A's personal representative?

If the administrator of A. dies, who becomes A's personal representative?

Can freehold lands be devised by will to charitable uses? or can money be bequeathed by will to be laid out in the purchase of land to be settled to charitable uses?

Of what denomination of property are leases for terms of years, and how are they transferred to a purchaser? And of what denomination of property are leases for lives and how are they transferred to a purchaser?

EQUITY AND PRACTICE OF THE COURTS.

State generally some of the peculiar objects of the jurisdiction of the Courts of Equity?

What is the first proceeding in a suit in Equity?

By what means is a defendant called upon to meet the plaintiff's demand?

If the defendant be a peer, having privilege of parliament—or be a member of the House of Commons—what is the process in each case to compel appearance and answer?

By what mode of proceeding are the testimonies of witnesses brought before the Court?

What proceedings at law are restrained by the common injunction when the latter is obtained before delivery of declaration?

What proceedings at law are restrained when the common injunction is obtained after delivery of declaration?

Does the marriage of a female plaintiff abate a suit?

Does the marriage of a female defendant abate a suit?

What is the course to be pursued to obtain the answer of an infant defendant?

How is the attendance of a witness to be enforced for the purpose of examining him, either before the examiners or commissioners?

Can maintenance of infants be allowed by the Court, without a suit in Court?

If a parent be of ability to maintain his children, can he have an allowance out of the interest of such childrens' fortunes?

Suppose a trust estate to devolve upon an

infant, how is such infant to convey for purposes of the trust?

If there be a trust sum standing in the name of a lunatic trustee, how is it to be obtained by a party entitled to it?

COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS.

When an action is to be brought against several persons for the same cause of action, should you insert all the names in one writ, or is there any number of names to which you are limited?

If the names of several defendants have been inserted in the same writ, can you afterwards proceed against any or either of them separately for any different cause of action?

When a defendant, in an action of assumpsit, suffers judgment by default, how should the plaintiff proceed to ascertain the amount due to him?

If the action should be in debt, what difference would that make in the proceeding?

How many days are necessary for a notice of trial in a town cause, and in a country cause, and how are the days calculated?

If a cause be made a remanet, is a new notice of trial necessary either in a town cause or a country cause?

Is it necessary to serve a witness with a copy of a subpoena personally, or would it be sufficient to leave it at the dwelling-house?

When a cause goes to trial and a juror is withdrawn, what is the effect of that, with respect to the expences incurred by the witness?

Suppose a plaintiff recovers a verdict against two joint defendants, should he issue execution against each defendant for half? or if he issue execution against one for the whole, would the other be thereby exonerated entirely?

Can a declaration in ejectment be served on the wife under any circumstances?

Can a declaration in ejectment be served on any other member of the family under any circumstances?

In what cases is it necessary that a cognovit should be stamped?

When a party is about to execute a cognovit or a warrant of attorney, are there any particular forms required, and has any difference been made in this respect of late?

An act has lately passed for the abolition of arrest; do you understand that the power of arrest at the commencement of an action is in all cases taken away; or is there any excepted case?

Has the act made any alteration as to execution after judgment obtained?

BANKRUPTCY, AND PRACTICE OF THE COURTS.

What steps are necessary to obtain a fiat in bankruptcy?

What amount of petitioning creditors' debt is necessary to support a fiat, where the

docquet is struck by one creditor, or by two creditors, or three or more creditors, not being partners?

Has the act passed in the last session for Abolishing Imprisonment for debt in certain cases, effected any and what change in the acts of bankruptcy to support a fiat?

Are any and what members of parliament liable to the bankrupt laws; and if so, in what manner should they be proceeded against?

Can an insolvent trader take any, and if any, what steps to make himself bankrupt?

What are the remedies of an individual, improperly declared bankrupt, against the party improperly suing out the fiat against him?

By what proportion of the creditors in number and value must a bankrupt's certificate of conformity be signed to render it available?

Name some particular acts which will render a bankrupt's certificate void?

Under what circumstances are the depositions taken under the fiat, as to the petitioning creditor's debt, trading, and act of bankruptcy, conclusive evidence of all the matters stated therein, in an action by the assignees to recover a debt?

What is the course of proceeding by a creditor where there is an equitable mortgage, in order to render it available, and prove for the deficiency?

In what mode are all matters for the determination of the Court of Review to be brought under the consideration of the Court?

Suppose a bankrupt to have carried on the business of a factor, and to have in his possession at the time of his bankruptcy, stock placed in his hands for sale, what are the rights of the assignees in respect of such property?

If a bankrupt be holder of leasehold premises, which are not likely to be beneficial to the estate, are there any, and what steps which the assignees can take to rid themselves of the responsibilities of the lease?

If goods be actually seized under an execution before an act of bankruptcy, may they be sold after the bankruptcy to satisfy the judgment?

What effect has the appointment of assignees on the rights of the crown?

CRIMINAL LAW.

What is the distinction between felony and misdemeanor?

Where a felony has been committed, can a constable, without a warrant, arrest on probable suspicion, and break open the outer door of a house, where the party accused is known or suspected to be concealed?

Can a private person, without a warrant, in any and what case arrest a felon?

If a warrant is granted by a magistrate of the county of A., can it be executed in the county of B., without any thing being previously done; or is any and what further step necessary to be taken, before the arrest can be

made; and before a magistrate of which county must the prisoner, when arrested, be taken?

Before whom and to whom is bail given in a criminal case in the country?

Where a party is in gaol in the country, for an offence which is not bailable before a justice of the peace, and he is desirous of giving bail, to whom and how is the application to be made?

What is a forcible entry and detainer, and how punished?

Before what court are offences committed at sea to be tried?

What offences can be tried at quarter sessions?

Are attorneys or bankers liable to be proceeded against criminally, for mis-applying money or bills entrusted to them for a special purpose, or only by civil process, for a breach of trust?

If a person be indicted for an offence, and on trial acquitted, or if the indictment be quashed before verdict, can he in both, or either and which of the cases, be indicted again for the same offence, and if not, what is the defence to the second indictment?

TO CORRESPONDENTS.

LEGAL DISCUSSION SOCIETY, LYONS INN HALL.

We wish to draw attention to an advertisement upon our wrapper, announcing the formation of this useful Society. We have seen a list of the members, many of whom are known to us, and are of high respectability.

LECTURES ON ENGLISH LAW AND JURISPRUDENCE.

Our Publishers are instructed to open a Book on Monday next for *Pupils* to enter their names for a course of *Lectures on English Law and Jurisprudence*, by a Gentleman duly qualified.

We are very glad to see such a *University course of Education*, opened to Students at large.

From the many enquiries made at our publishers', as to the intention of having a fixed price to this periodical, we think it right thus early to pledge ourselves, that no weekly number shall ever exceed the price of sixpence.

We also think it right to acquaint our subscribers, that the monthly parts of this periodical will be ready for delivery with the magazines on the 30th of this month.

Follett v. Armstrong.—We have been favoured, by the courtesy of a solicitor in this cause, with the papers for perusal, that we might get at the real facts, and we shall continue our review next week.

“Literary Notice.”—This is an advertisement.

“A Friend to the Guide.”—The grievance, as applied to law books in general, is admitted, and yet but few authors get paid for their heavy labours. We are open to any suggestions from our subscribers that shall tend to the general good, which shall receive every attention. Our publishers inform us that they have already printed a cheap edition of the statutes passed in the late and present reigns; but they have not met with sufficient encouragement to induce them to attempt printing those of anterior date.

“A Student.”—We think our Problem 1. embraces all that he wishes, inasmuch as all the Acts prior to the 1 Vict. c. 26. are repealed as regards wills made after the 1st January last. All the principles of law therefore are confined to the construction of that statute. It is a painful misfortune which this country labours under, that in her domestic concerns laws are made for the people which are unintelligible—that these laws are amended and re-amended, and at last the people, after great litigation and expense, are compelled to apply to the Judges to construe their meaning.

“F.” “R. G. S.” “J. S.” “A Student,” “J. E.” are all too late. We wish that our correspondents would “up and be stirring;” it is the only way to acquire knowledge. All communications should be left at our office, 194, Fleet-street, before Thursday morning.

We are sorry to find so little industry displayed in answering our last Problem. We do not write Problems for our own amusement, and however little “first principles” may be looked at, we assert, that without a knowledge of *Jurisprudence*, no man can be a sound *lawyer*.

ERRATA.

Page 47—for “the Act 110th Victoria,” read, 1 & 2 Vict. c. 110.

The two last cases in this page, before the Prerogative Court, should be under the title “Bail Court.”

The Legal Guide.

SATURDAY, DECEMBER 1, 1838.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 51.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

WE closed our last by putting a supposed case in illustration of our opinion (*a*) as to the title a purchaser may now require, and we will now shew a case that *has* occurred, and (there are many of the same nature) we mean that of *Drewe v. Corp.* (*b*) 9 Ves. J. 368. The vendor was entitled to an absolute term of 4,000 years in an estate, and also to a mortgage of the reversion in fee, which was forfeited but not foreclosed. It was decided that a purchaser, who had contracted for a fee, was not bound to take the term of years, nor was he compelled to take the title, on the ground of the vendor having a forfeited mortgage in fee of the reversion, although it was evidently highly improbable that any one would ever willingly redeem a forfeited mortgage of a dry reversion, expectant upon an absolute term of 4,000 years.

We will also instance the case of *Seaman v. Vawdrey*, 16 Ves. J. 390., where in 1704,

an estate was sold, reserving some salt works, with a right of entry, which, until 1761 had not been exercised, when the estate was again sold, without taking notice of the reservation, or the right of entry, at which the purchaser objected to the title, and it was held that *non user* did not in this case raise the inference, that the right was abandoned, and consequently the purchaser was entitled to the objection.

We will pursue the *Law of Entry* (*c*) contained in our last. Section 3 of the New Statute of Limitations, enacts that in the construction of this act, the right to make an entry, or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time, (as thereafter is mentioned) that is to say, when the person claiming such land, or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession, or receipt, then such right shall be deemed to have first accrued at the time of such dispossessment, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent, shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect to the same

(*a*) *Ante*, p. 2.

(*b*) *Lib. Reg.* 1803, fol. 290. The Register's Book appears to have been again referred to for this case, 1 Sim. & Stu. 201. n., and see 13 Ves. J. 78. *Segden's Vend. & Pur.* vol. 1, p. 298.

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(*c*) A right of entry may now be devised under the Statute of Wills, 1 Vic. c. 26.

estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted or appointed, or otherwise assured by any instrument, other than a will to him or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, came entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion, or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken. Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as

if no such forfeiture or breach of condition had happened.

Upon the 4th section it may be useful to observe here, that in all leases for years the *necessity of an entry* depends upon the wording of the condition annexed to it. If the words in the clause empower the lessor to re-enter upon a specific act being committed, there *must be an entry* to avoid the estate. But if the clause declares that the estate shall cease, and determine immediately upon a specific act being committed, then *no entry* is necessary, (see 12 East Rep. 448.) because in the *first case* the lease is only *voidable*, and the forfeiture may be avoided by acceptance of rent, or some other act of the lessor, provided he have notice of the breach. Co. Litt. 215. a. Cowp. 804. See Doe dem. Flower v. Peck, 1 Barn. & Ad. 428. In the *latter case* the lease becomes absolutely void upon a breach being committed, and cannot be again set up, even though the lessor accept rent after notice of the breach, or do any act to acknowledge the tenancy. See 1 Wms. Saunders, 287, c. n. 16.

The 8th Section of the act enacts, that when any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen.)

Sec. 9. enacts, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be received, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land, or rent in reversion immediately expectant on the determination of such lease, and no

payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent received by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Before this enactment, under an existing valid lease, the right of entry was preserved until its determination, although no rent had been received, *Orrell v. Maddox, Runn. Ej. App. No. 1*; and even the adverse receipt of rent for more than 20 years did not deprive a right of entry at the end of the lease. See *Doe v. Danvers*, 7 East Rep. 299; and *Bushby v. Dixon*, 3 Barn. & C. 298, 304, et seq.; but a term to attend the inheritance, or a void lease, did not prevent the Statute of Limitations running. *Taylor v. Horde*, 1 Burr. 69. See upon the subject of Entry, *Cholmondeley v. Clinton, Turn. & R. 197*.

Sec. 12. provides that the possession of one coparcener, joint tenant, or tenant in common, shall not be deemed to have been the possession of the others, and

Sec. 13. enacts, that when a younger brother, or other relation, of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

Sec. 24. confines all *suits* in Equity to the time allowed for actions at law; and upon this principle, Courts of Equity have always been guided. See *Cholmondeley v. Clinton, 2 Jac. & W. 175*. And by sec. 25. it is *provided*, that when any land or rent shall be vested in a trustee upon any express trust, the right of a *certui que* trust, or any person claiming through him to bring a suit against the trustee to recon-

ver such land or rent, shall be deemed to have first accrued, according to the meaning of the act, at, and not before, the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him; but by sec. 26. it is enacted, that in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered: *provided*, that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such land or rents, or for setting aside any conveyance of such land or rents on account of fraud, against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of such frauds, and who, at the time that he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed. And by sec. 27. it is *provided*, that nothing in the act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit may not be barred by virtue of the act.

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM III.

What is the difference between Law and Equity?

The difference between Law and Equity is, that law confines itself to the strict letter, without deviation, while equity, on the other hand, determines according to the spirit of the rule; and likewise does a court of law. Neither can add to or diminish the sense of the law to be propounded; and both equally profess to put the true construction. Equity, where there is a defect

or straitness in the law, or something that could not be foreseen, supplies that defect or straitness; for a case might come so near, but not up to the strict letter, although within the spirit or intention of that law. Equity then, may be defined to be, the soul and spirit of all law; whereby positive law is construed, and rational law made. Both law and equity are bound by the same intention of true construction; for, if otherwise, they would be in opposition to each other, and so end in no true rule. Equity means nothing more than a sound exposition of the law; and in many cases, perhaps where the word of that law may be too general or special, or perhaps inaccurate. Thus, then, equity modifies the law, by bringing it to a sound and true intent.

To illustrate what is meant by the foregoing, suppose the case of a copyholder for life having committed forfeiture by waste in cutting down timber trees, and so found by a verdict at law, and the lord entered for the forfeiture, and admitted the remainder man, against whom the copyholder exhibited his bill to be relieved against the forfeiture; offering, if it should appear to be waste, to make satisfaction: if it be found upon a directed issue, that it was not his primary intention to commit waste, he would be relieved in equity, and re-admitted; and the remainder-man would have to account for the mesne profits, although, in strict law, the estate of the tenant for life was forfeited—Thomas *v.* Porter, 1 Cha. Ca. 95. See also Nash *v.* Earl of Derby, 2 Vern. 537;—but not unless there really be equitable circumstances to warrant such relief, Cox *v.* Higford, 1 Ab. Eg. 121; Peachy *v.* Somerset, Prec. in Cha. 568.

Equity also will relieve a purchaser for a valuable consideration against the heir, in case of non-surrender of a copyhold estate, Barker *v.* Hill, 2 Cha. R. 218; and even in favour of a mortgagee, who is a purchaser *pro tanto*, against an after purchaser with notice; Jennings *v.* Moore, 2 Vern. 609. Blenkane *v.* Jennings, 2 Bro. P. C. 278. Patteson *v.* Thompson, Finch. 272. Equity will support a defective execution of a power (while law requires that it should strictly be fulfilled) in favour of a wife by her husband,

Clifford *v.* Burlington, cited 2 P. Wms. 229; in which case lands less in value had been settled upon the wife, than the husband's covenant intended; and there being other lands within the power, equity supplied the defect.—See also Fothergill *v.* Fothergill, 2 Freem. 256. Alford *v.* Alford, cited 2 P. Wms. 230. Coventry *v.* Coventry, 2 P. Wms. 122, in which last case a less portion had been allotted to the wife, by a settlement prepared in pursuance of articles entered into prior to marriage, than the articles intended, but which settlement was not executed by the husband; and after his death, equity held, that the husband's other lands were bound in consequence of the prior articles. See also Sargesson *v.* Sealy, 2 Atk. 412. In favour of children, also Smith *v.* Balfrey, Gilb. R. 166. Parker *v.* Parker, cited 10 Mod. 467. In favour of creditors, Bath and Montague's case, 3 Cha. Ca. 68. Pollard *v.* Greenwell, 1 Cha. Rep. 98:—and of purchasers for a valuable consideration; since it is a rule in equity, that what ought to have been done is considered as actually done.

Again, equity acts upon the person, and not upon the thing; and, although the rule is *equitas sequitur legem*, yet that does not restrain equity from putting a liberal construction upon the strict letter; that is, so explaining, and supposing the full and true effect, intended by the law, as if the same had been literally expressed, and which, if the law were a distinct act of the legislature, as for instance, in passing a statute, would be termed the equity of the statute: equity supposing such to have been the true intention of the legislature at the time of passing such statute. This might be illustrated, but doubtless it is known, not only to my fellow students, but to your readers at large, without.

J. E.

PROBLEM V.

WHAT ACTIONS HAVE BEEN AFFECTED BY THE STATUTE 3 & 4 WILL. IV. C. 42, AND IN WHAT MANNER?

Review of the Judgment of the Master of the Rolls in TULLETT v. ARMSTRONG, 3d Nov. 1838.

(Continued from page 39.)

In reviewing the Judgment of the present Master of the Rolls upon this important question, we have undertaken a task of no ordinary labour; the question, in itself a monstrous anomaly—the consequent conflicting opinions of Judges, and the length of time that this restraint upon alienation has been allowed, creates the difficulty in forming such a judgment as shall do justice. In order to arrive at the real facts attached to this case, we sought for and obtained a perusal of the papers, and from them we find, in addition to the facts before stated, (a) the testator directed that the devises and bequests made to his grand-daughters, Georgiana Pierpont and Mary Augusta Tilt, were so given and devised to them, free and clear, exonerated from, and not subject to the rights, control, interference, debts, contracts, and engagements of any husbands, and were to be taken and received by the said Georgiana Pierpont and Mary Augusta Tilt, as if they were sole and unmarried, and so to be holden and enjoyed by them respectively.

That Mrs. Armstrong, at the death of the testator, and at the date of the will of Ann Bradford, was a single woman.

From the Minutes of the Decree we find the MASTER OF THE ROLLS decreed, that Mrs. Armstrong was entitled, under the will of the testator, to the property he had devised for her sole and separate use for her life, without power to anticipate, charge, sell, assign, or dispose of the same during her cotterture; and that she was entitled, under the will of Ann Bradford, to an estate in Brighton, for her separate use for her life, without power to alienate, sell, charge, or incumber the same; but that the Plaintiff was entitled to stand as an incumbrancer in the remaining copyhold and leasehold estates.

We have already shown the opinion of the present Lord Chancellor, when Master of the Rolls, given in *Massey v. Parker*. (b)

It should be particularly observed, that the Judgment in that case was upon the construction to be placed upon the words of the will, whether they were sufficient to have the effect of depriving the husband of his ordinary right to the property, and which certainly were not; and in delivering his Judgment upon that case, his Lordship also delivered an *extra judicial opinion*, that the gift, if to the separate use, being to an unmarried woman, was void, and that she having married a man who became insolvent, his assignee was entitled to the fund.

This opinion is in direct opposition to *Anderson v. Anderson*, 2 Milne and K. 427, which came successively before Sir JOHN LEACH, V. C., Lord ELDON, and Lord LYNDHURST, C. B. In that case, a man gave some leasehold property to his daughter, for her own sole use, free of control of any present husband, or any husband to come. The daughter was single, and did not marry till after her father's death. Sir JOHN LEACH granted an injunction against the husband's interference, and Lord ELDON refused, with costs, a motion to discharge the order—afterwards a receiver was appointed, and upon the hearing of the cause, Sir JOHN LEACH established the gift for the wife's separate use. In —— v. Lyne, Yo. 562, Lord LYNDHURST treated such a gift as valid, and until lately the point was never doubted.

With reference to the opinion expressed by Lord COTTENHAM, in *Massey v. Parker*, we will turn to the case of *Davis v. Thorneycroft*, 6 Sim. 420, heard before the present VICE-CHANCELLOR, in which a testatrix gave to her niece (then unmarried), in case she survived her sister, to whom she had given a previous life estate in the interest, the sum of 600*l.* to and for her own sole and separate use, independent of any husband she might marry. And she directed that the receipts of her niece alone, whether covert or sole, should, from time to time, be good discharges; and in case of her death, unmarried, in the life-time of the person having the life-interest, the legacy was bequeathed over; but in case her niece should marry in the life-time of that person, and afterwards die in the life-time of such

(a) *ante*, p. 21.

(b) *Ante*, p. 38.

person; having a husband, or one or more child or children, and who should be living at the death of such person, then the niece had a power of appointment over the fund by deed or will.

The niece, after the bequest took effect, married without making any settlement or disposition of the legacy, and had several children. Her husband became bankrupt, and immediately *after the bankruptcy she executed an appointment of the legacy to the plaintiff, to secure a debt due from her husband.*

The plaintiff filed his bill to be paid his security out of the legacy, which was resisted, on the ground that the legatee being a *feme covert*, had no power to charge the legacy; and that the limitation in the will to her separate use was void and inoperative as against her husband.

The executor (defendant) put in a general demurrer, in support of which the before-noticed decision of Lord COTTFENHAM in *Massey v. Parker*, as also the cases of *Woodmeston v. Walker*, 2 Mylne & K. 174, particularly in p. 182; *Jones v. Salter*, and *Brown v. Pocock* (both before cited) were relied upon.

Sir L. SHADWELL, V. C., said, those cases proceeded on this, that the policy of the law being in favour of the power to assign, *the Courts will not permit that power to be restrained by a fetter which is to take place on a subsequent marriage*, and the cases of *Barton v. Briscoe*, and *Newton v. Reid*, (both before cited) proceeded on the same principle; (a) but this is a different case. In the present case his Honour said, "I have not the slightest doubt upon the question. I have always understood that it is lawful to give property to the separate use of a woman, married or unmarried, and the practice of the profession has been according to that opinion, without any variation;" (b) and although it is inferred, from some of the expressions used by *the present Lord Chancellor* when Master of the Rolls,

(a) The same doctrine was held by the Vice-Chancellor in *Johnson v. Frooth*, 2 Marsh, 1836; 6 Sim. 423. n.

(b) See Horsman's Precedents, 3 ed. vol. 1, p. 29, and vol. 2, p. 836, 1122, 1131, and 3 Wood's Conveyancing, 459, 821, 822.

in *Massey v. Parker*, that such was not his opinion, yet what was said in the case must not be taken as a decision on the question; for it was not necessary to enter into the point, and his Lordship seems rather to be addressing himself to the question, whether there can be a restraint on anticipation, than to the question, whether there can be a limitation to the separate use of a woman; the cases of *Newton v. Reid*, *Barton v. Briscoe*, *Jones v. Salter*, *Woodmeston v. Walker*, and *Brown v. Pocock*, are all cases in which the only question was, whether if the Court admits property to be settled to the separate use of a woman, it will also admit of her being restrained from disposing of it. When the Courts have decided that it is inconsistent with a disposition to her separate use that she should be restrained from disposing of the property, they have admitted that it may be given to her separate use. If besides the known practice of conveyancers (a) cases are required, the case of *Simson v. Jones* is decisive. There leaseholds were given for the separate use of a female infant absolutely in the event of her marriage. She married under age, and consequently the trust for her separate use became absolute. Upon her marriage a settlement was made with a power of sale to trustees. They made a contract to sell. The objection to the title under the settlement would have been futile if the property could not have been given to the separate use of the wife. In that case it would have been competent to the husband to assign the trust of his wife's term according to Sir E. Turner's case, (b) which case shewa, that so early as 23d Car. 2, the law of this Court was not only that the husband might assign the trust of his wife's term, but that a term might be assigned in trust for her separate use. In *Simson v. Jones* no question about the title could ever have arisen if no such thing could exist as a trust for the separate use of a woman who afterwards marries; therefore

(a) As far as that practice went, trusts like these had prevailed for more than a century. Sugden on Powers, vol. 1, p. 207, to which is appended a note that the learned author had been told his Honour had not altogether adhered to this opinion.

(b) 1 Vern. 7.

the decision that the title was bad, assumed as its foundation that there was a trust for the separate use of the wife, and that she after attaining 21 could have exercised the power of disposition, which is inherent in the very nature of separate property. His Honour proceeded to say, that he should be sorry to have it thought that he had any doubt on the question, and he wished it to be understood that he took as the foundation of his decision, the supposition that the Lord Chancellor had not decided otherwise.

(To be continued.)

Law Reports.

COURT OF CHANCERY.

Appeal from the Master of the Rolls.

HOLE v. ESCOTT.

Power of Appointment, whether destroyed by Bankruptcy.—Judgment.

In this case, by an Indenture, dated the 8th of October 1804, made on the marriage of Hugh Escott and Margaret his wife,—Hugh Escott conveyed certain real estates to James Newton and William Leigh, and their heirs, upon trust, after the solemnization of the marriage, to the use of Hugh Escott and assigns for his life, without impeachment of waste, with remainder to the use of the same trustees during the life of Hugh Escott, to preserve contingent remainders; and after the death of Hugh Escott to the use and intent that his wife might receive an annual rent-charge of 50*l.* during her life, and subject thereto, and to a term of 2,000 years for securing the same, to the use of such child and children of the marriage for such estates, and in such shares, and in such manner and form, and with, under, and subject to such provisos, conditions, restrictions, and limitations over, (such limitations over to be for the benefit of some or one of the children of the marriage,) as the husband and wife at any time or times during their joint-lives, by any deed or deeds, instrument or instruments in writing, with or without power of revocation in manner therein-mentioned should direct or appoint, and in default of any such direction or appointment, and until such estate and estates so directed or appointed should respectively end or determine; and as to such part or parts thereof whereof no such direction, limitation, or appointment should be made, to the use of such child and children of the marriage for such estates in such shares, and in such manner and form as the survivor of the husband and wife should, by deed or will, direct or appoint; and in default of such direction or appointment, to the use of all and every the sons and daughters of the marriage living at the decease of the

survivor of the husband and wife, and all and every the child or children also living at that period of such sons and daughters as should happen to die before the death of such survivor, (such children to take *per stirpes*) to be divided equally between them, share and share alike; and in default thereof, to the use of the right heirs of Hugh Escott for ever.

In 1825, Hugh Escott became Bankrupt, without having made any appointment, and his interest in the settled estates was sold and conveyed by the assignees by Indenture, dated 12th April, 1831, and by devise passed to the plaintiff.

After his bankruptcy, Hugh Escott and his wife, on the 25th May 1831, executed a Deed of Appointment, purporting to be a *joint appointment* in favour of their two children, John Escott and Jane Elizabeth Escott as tenants in common in fee, subject to a charge of 500*l.* for the benefit of their other children.

Hugh Escott died in March 1834, leaving his wife surviving; and upon his death John Escott claimed the property from the plaintiff on behalf of himself and his sister, and entered into possession.

The plaintiff then filed his Bill, insisting that the appointment by the bankrupt and his wife was void against the assignees under whom the plaintiff claimed, and that the contingent limitation in the settlement to the children, in default of appointment, was void for want of a particular estate of freehold to support it, and the plaintiff claimed to be entitled to the fee simple, subject only to the wife's jointure.

After the Bill was filed, Hugh Escott's widow executed a deed, purporting to be an appointment in favour of the same children.

The questions rose were—*First*, whether the joint power of appointment by the husband and wife was destroyed by the bankruptcy of the husband:—*Secondly*, whether the limitation to the children, in default of appointment, being *contingent*, and there being *no particular estate of freehold* upon the death of Hugh Escott to support it, the *separate power of appointment by the wife* was capable of being executed.

Lord LANGDALE, in delivering Judgment, said, “The husband had an estate for life, and if he had survived the wife, the settlement was so framed as to give effect to what may reasonably be supposed to have been the intention of making provision for the children on his death; upon the determination of the life-estate the children, either those designated by an appointment, or those described by the deed, would have immediately succeeded: they would have taken by way of remainder; and as, in this event, they would have taken by way of remainder, the deed is not to be so construed as to give estates by way of *springing use*; and as the wife survived the husband, and had no life estate limited to her, the limitation to the children living at the death of the survivor of the husband and wife failed, and *no appointment to be made by the wife alone could be valid.*”

"If there had been no bankruptcy, the joint appointment of the husband and wife would have taken effect, and considering that the contingent remainder limited to the children failed, in consequence of the determination of the particular estate before the limitation to the children took effect, the only question was, whether the joint power of appointment continued after the bankruptcy and the assignment to the assignees. The appointment could only take effect out of the ultimate remainder in fee vested in the husband, and if the power had been to be exercised by the husband alone, I am of opinion, that, upon the authority of *Badham v. Mee* (a) it would have been extinguished, and the question is therefore reduced to this, whether the husband, who could not exercise a separate power, could exercise a joint power of appointment vested in him and his wife.

"The estate for life in the husband, and the ultimate remainder in fee, were vested in the assignees by act of law, in this respect equivalent to a conveyance. If there had been a conveyance, the husband could not have derogated from his grant; and I am of opinion that he could not, by joining his wife, defeat the effect of the act of law to which his estate had become subject, and it appears to me, that his disqualification made it impossible that the joint power should be exercised."

From this judgment the defendants (the children) appealed; and on the 24th Nov. the *Lord Chancellor* delivered his judgment. On the first question, His Lordship said, if the estate for life and reversion passed to the assignees, the bankrupt could not afterwards execute the power.

On the second question, His Lordship said he was unable to find any principle or authority that the appointment made by the surviving wife was wrong.

The decree therefore was, that the joint appointment was bad, and that the separate appointment was good: that the Bill be dismissed, so far as an account was required, from the date of the second appointment without costs, and an account was ordered to be taken up to the date of the second appointment.—Further directions and costs were reserved.

This is a case of some importance; and the judgment upon the appeal will be reviewed in our next by the Editor.

COMMON PLEAS.—Nov. 26.

STONE & ANOTHER v. COMPTON.

Surety—Liability of, when principal dealt with unknown to him.

The Court delivered judgment in this case, which was heard on the 17th November.

(a) 7 Bing. 695. 1 Moore & Scott, 14.
1 Mylne & K. 32.

The action was brought against the defendant as maker of a promissory note for 2,600*l.*, to which the defendant pleaded that the note had been signed by him as surety for the repayment of a loan of 2,600*l.*, to be lent to two persons of the names of Cox and Chambers, but that only a portion of the money had been actually advanced, and there had been such a concealment from the defendant of the actual state of the transactions between the plaintiffs and those gentlemen as vitiated and rendered void the instrument in question as against the defendant. When the cause came on for trial, it was agreed to turn the facts into a special case, and it now came on for argument in that form. The leading circumstances appeared to be these:—The plaintiffs are bankers, with whom Messrs Cox and Chambers, who were wine merchants, had kept a banking account. Mr. Cox had also kept a private account of his own with them, and in the year 1825 they advanced him a sum of 800*l.* on the security of a policy of insurance for 1,500*l.* In the year 1830 the plaintiffs allowed him to receive a bonus from the insurance company of upwards of 700*l.* on the policy, and he then paid them 300*l.*, leaving a balance of 500*l.* due out of the 800*l.* In November, 1831, the private account of Mr. Cox was closed, he then owing the plaintiffs a balance of 600*l.* In the course of the same month the plaintiffs advanced a loan of 380*l.* to the firm of Cox and Chambers, and they subsequently agreed to lend them 2,600*l.*, upon an agreement that the whole of what was then due to the plaintiffs, both on the partnership account, and on Cox's private account, should be deducted therefrom, so as to clear off the bygone debt. As security for this sum, the policy of insurance was assigned, a mortgage deed executed, and a joint and several promissory note made. The defendant was only a party to the note, but the deed was previously read over in his presence, and its recital was silent as to the agreement to deduct the prior existing balances from the sum to be lent, of which circumstance the defendant was ignorant; neither was he apprized of the fact of Cox's having received the bonus of 700*l.* on the policy of insurance. In 1835 Cox and Chambers became bankrupt. The policy was sold for 800*l.*, and the plaintiffs received a dividend under the commission, which reduced their claim to 1,300*l.*, which was the sum now sought to be recovered from the defendant as surety on the note in question.

Mr. Serjeant *Wilde*, in support of the plaintiff's right to recover, contended that according to the facts found in the special case, there had been neither a failure of full consideration for the making of this note, nor the concealment or suppression of any fact material to be known by the defendant. Messrs. Cox and Chambers had the full benefit of the 2,600*l.*, no matter whether they applied a portion of it to the discharge of any existing balance or any other debt or purpose of theirs; neither was there any reason why there should be any specific communication made to the defendant that Cox had previously received a bonus on the

policy of insurance, it being a valid subsisting policy for 1,500*l.* at the time when the note was signed.

Sir *W. Follett*, for the defendant, contended that the withholding from the defendant information of the above particulars rendered the instrument signed by him as surely void, because it was most probable that he would not have become surety at all if he had known that the full sum of 2,600*l.* was not to be advanced to the firm to trade with, but only a portion of it; and that the policy of insurance was worth 700*l.* less than it otherwise would be if the bonus to that amount had not already been paid upon it.

The COURT were of opinion that the defendant having been induced by the belief that the full sum of 2,600*l.* was to be advanced to Messrs. Cox and Chambers, to become surety for the repayment of that amount, to sign the note as security for its repayment, was not liable in point of law, since only a portion of that amount was really to be advanced, the remainder being deducted on account of a private debt due from Cox. Upon this plea, therefore, the defendant was entitled to judgment; but upon the others, which by the decision on this issue were rendered immaterial, the jury should be discharged from finding any verdict.

BENN AND ANOTHER v. GREATWOOD.

Scire facias to revice.

In this case it appeared that in 1837 the plaintiffs held an acceptance of the defendants for 95*l.* which had been dishonoured, and this action brought, and after a rule to compute, the defendant gave a new acceptance for 95*l.* to the plaintiffs in settlement of the action, and in full discharge of all claims, as defendant considered. Some time afterwards the plaintiff's attorney sent the defendant a bill of costs amounting to 17*l.* 19*s.* 1*d.* which the defendant refused to pay, and thereupon a *scire facias* was issued.

Mr. Henderson, on the 14th November, obtained a rule to shew cause why the writ of *scire facias* should not be set aside with costs for irregularity, on the grounds, that as the suit had not abated by death, no *scire facias* would lie upon an interlocutory judgment, and that plaintiffs ought to have given a Term's notice to proceed by taking out a rule nisi and obtaining a rule to compute, as the old rule of 1837 was gone; and on the last day of Term, upon cause being shown, the rule was made absolute, but without costs.

COURT OF EXCHEQUER.

SITTINGS IN BANCO.—Nov. 23.

HARRISON v. TIMMINS (a).

Judgment—Joint Stock Companies—Liability of Directors in Incorporated Companies.

Mr. Baron PARKE delivered judgment in

this case. The plaintiff had applied for a rule to show cause why execution should not issue against the personal goods of the defendant. On the case being argued by the parties, the Court had taken time to consider their judgment. Having now done so, they were prepared to say that they could not grant such a rule where they had no authority to enforce an order. *The plaintiff might himself issue execution without leave of the Court, and on his own authority.* They were of opinion that the defendant could not be made personally liable under the act constituting the company (the 4 & 5 William IV., c. 69, s. 3.), which provided that all actions, suits, or other proceedings, either for or against the company, should be commenced in the name of the managing director, for the time being, or in that of some other director, as the nominal defendant only; and further that any such action, suit, or other proceeding should not be discontinued in consequence of the managing director disqualifying, or in consequence of any other act of his; but which even went farther, and said that no such action, suit, or proceeding should abate even in consequence of the death, resignation, removal, or disqualification of such managing director, or other director who should be such nominal defendant. Under such circumstances the Court were not disposed to think that the Legislature intended to make such nominal defendant liable for any judgment so to be obtained. The act referred to, explained and amended by 1 Victoria, c. 88, gave the plaintiff another remedy, one varying from that which he would have at common law, inasmuch as it directed that the judgment should be entered up and execution levied upon the reserved funds of the company, or any other property belonging to it (b). These acts formed the company into a sort of *quasi* corporation, and exempted the person whom they directed to be made nominal defendant from personal responsibility, and at the same time gave another and specified remedy. The Court held that the defendant was not personally liable to the judgment obtained against him, and the rule must, therefore, be discharged, but not with costs.

Rule discharged.

New Trials.—Nov. 26.

BARKER AND OTHERS v. GREENWOOD.

Trustees—Legal estate—Construction of the words "net rent."

This was an action of debt for use and occupation. The plaintiffs were trustees under the will of the late Rev. J. F. Barker, and at the trial a question of law arose as to their title to sue under the terms of the will, it being contended by the defendant that the true con-

(a) According to the statement made by the Attorney-General upon the argument (*id.*), the company has no reserved fund, nor any other property.—ED.

See upon the judgment delivered, *Cope v. Glyn, 3 Barn. & Ad. 801.* *Rex v. St. Katharine's Dock Company, 1 Nev. & M. 121.*—ED.

(a) *Ante*, p. 55.

struction thereof vested the legal estate in the widow of the testator alone, who was also one of the trustees, and not in the body of the trustees. A verdict, however, was taken for the plaintiffs, with the understanding that the Court would be moved upon this point, which having been done by Mr. Maule during this term,

Mr. Lumley now showed cause, and after reading the clause of the will in which the point arose, proceeded to argue that the testator both meant to vest the legal estate in the trustees, and had in fact succeeded in doing so. The trust was to the plaintiffs, they being Mrs. Barker the widow, Mrs. Rolfe the daughter, and Mr. Rolfe the son-in-law of the testator, to hold to themselves, on trust to suffer and permit Mrs. Barker to take and have the net rents and profits of the estate, subject to a rent-charge of 150*l.*, created in favour of the testator's daughter, Mrs. Rolfe, on her marriage, then in trust to permit and suffer Mrs. Rolfe to take the net rents, &c., during her life, then in trust to suffer Mr. Rolfe to take the net rents for his life, and finally in trust for the children of the daughter, with a power of appointing a fresh trustee on the death of Mrs. Barker. It could not be said that the trustees did not take the legal estate in the case of Mrs. Rolfe after Mrs. Barker's death, yet it is contended by the defendant that the same form of words does not create a legal estate for the trustees in the first instance. In looking at the will, it might be seen that Mrs. Barker was only to receive the net rents; now "net" means something which is not "gross," and then who is to take the gross rents? It is clear that Mrs. Barker is not, therefore the trustees must. If so, then they have the legal estate, and the action is well brought.

Mr. Baron PARKE.—The trustees, you say, must receive the gross rents in order that she may take the net rents?

Mr. Lumley.—Exactly, and then they have various burdens cast upon them in conducting the estate, and where trustees have any duties imposed upon them the Courts always held that the legal estate is in them. If, however, the legal estate is not in them, but in Mrs. Barker, what is to become of the contingent remainders in the children? for she may commit a forfeiture, when the estate would devolve on the heir-at-law. This is an important consideration. Mr. Rolfe is the heir-at-law, and then her husband would have the control of the rents, which the will says she is to take independent of her husband; so that a manifest departure from the testator's intention would be effected by repudiating the position taken up by the present plaintiffs. The Court, however, will not be too astute in scanning this will in favour of the defendant, for it is after all only a question of to whom the money is payable, the action being for the use and occupation of some of the property itself, so that it is justly due to one or the other.

Mr. Serjeant Ludlow, who came into court late, followed on the same side and to the same effect; and

Mr. Tyrwhitt then replied, contending, that as there had not been any case yet in which the word "net" had been introduced by which the Court could be guided, it was necessary to decide the question upon the bare circumstances of the will and its terms. It is admitted that wherever the trustees have duties imposed on them they take the legal estate, but none appear to be imposed in this will, while the argument on the word "net" is fully explained away by referring it to the rent-charge in favour of the daughter, and it is submitted that it means the rent subject to that deduction. When the first life drops, then she could receive the rent-charge under the settlement and the net rents under the will, independently of each other. This view is strengthened by a reference to the trust for the husband, where the word "net" is dropped.

Mr. Serjeant Ludlow.—I beg your pardon, the word is there; I have the probate before me, and I observe it to be still "net rents."

Mr. Tyrwhitt could only say that he was reading from an office copy of the will, in which the word "net" did not occur, and what the parchment might be which the learned Serjeant consulted he could not say.

Mr. Baron PARKE.—It is important to have that settled, as it carries the defendant a great step in his argument. Some one had better go to Doctors' Commons and inform us accurately.

This suggestion being adopted, in the mean time the argument was continued, and the learned gentleman was followed by Mr. Maule and Mr. Blosse. The Court, however, on the arrival of the messenger with the intelligence that the original will did contain the word "net" in the disputed passage, at once pronounced their judgment in favour of the plaintiffs. It was a well established maxim of the law, that whenever any duties are imposed upon the trustees, the legal estate is vested in them. That this is the case in the present instance may be gathered from the use of the word "net," which must be taken to be something contradistinguishable from gross rents and profits. The trustees are therefore to take the gross rents, and pay the net rents to the first *cestui que* trust, Mrs. Barker. It necessarily follows upon this that they must be the parties to keep up the estate and to pay all outgoings. This we think to be the proper interpretation to be put upon the word "net," although it has been ingeniously argued by Mr. Tyrwhitt as having reference to the rent-charge of 150*l.* payable to Mrs. Rolfe—a construction which we cannot adopt, as the word also occurs in the trust for Mr. Rolfe, which could only take place when Mrs. Rolfe's life had dropped. For these reasons we think that the plaintiffs were the proper persons to institute the present action, and judgment must be given for them.

The rule, therefore, was discharged.

EQUITY SITTINGS—SERJEANTS INN HALL.

Nov. 27.

The COURT sat for the first time this morn-

ing in Serjeants Inn Hall, Chancery Lane, much to the satisfaction of the Bar, and where it intends to hold its sittings after term in future, instead of Gray's Inn Hall.

*Motions.**ARROWSMITH v. JOHNSON.*

Ship's provisions. Whether they fall under the *women generale stores*—the necessary testimony required to obtain a rule for a new trial.

This was an application for a new trial—the case had been tried before Mr. Baron ALDERSON, and the question raised was, whether the defendant was entitled to claim under the bill of sale of a ship and her stores to him from the plaintiff, her provisions, under the *women generale stores*, or whether, as was alleged by the plaintiff, they were to be paid for over and beyond the price agreed upon for the ship and stores. Upon this ground the Court was unanimously agreed that the defendant was liable to the plaintiff for the value of the ship's provisions extra the purchase-money; and as to the other point, it was held that a new trial could not be granted upon the mere affidavit of the defendant, unsupported by testimony which he could avail himself of for a new trial. The rule, therefore, was refused on both grounds.

*QUEEN'S BENCH.—Nov. 26.**Nov. 27.*

Lord DENMAN, this morning, ordered the *Nisi Prius* sittings to be adjourned to this day week. The learned judges then sat *in banc*, pursuant to the power given them by the late act of Parliament, and took the special paper.

*COURT OF REVIEW.—Nov. 24.**Power of Attorney in matters of Bankruptcy—whether it requires a Stamp.**In Re Davis.*

Mr. Piggott applied to the Court on a difficulty which had arisen in drawing up a warrant of commitment in a case which was before it some days back. Mr. Gregg, the Master, hesitated in executing the order, in consequence of the power of attorney under which the application had been made not having been a stamped document. He (Mr. Piggott) thought it came under the 98th section of the Bankruptcy Act, which allowed certain exemptions from stamp-duty.

The CHIEF JUDGE.—Was the power of attorney specifically confined to this matter, or did it authorise the receipt of money generally?

Mr. Piggott read the letter.

The COURT said it related solely to matters in bankruptcy. It was therefore privileged under the section which had been cited, and was sufficient without a stamp.

Business in the Courts.**COURT OF CHANCERY.***Sittings after Michaelmas Term.*

Saturday, Dec. 1. The first Seal.—Appeal motions, appeals, and causes.

Monday, Dec. 3, Tuesday, Dec. 4, and Wednesday, Dec. 5.—Appeals and causes.

Thursday, Dec. 6. The second Seal.—Appeal motions, appeals, and causes.

Friday, Dec. 7, Saturday, Dec. 8, Monday, Dec. 10, and Tuesday, Dec. 11.—Appeals and causes.

Wednesday, Dec. 12. The third Seal.—Appeal motions, appeals, and causes.

Thursday, Dec. 13, Friday, Dec. 14, and Saturday, Dec. 15.—Appeals and causes.

Monday, Dec. 17. The fourth Seal.—Appeal motions, appeals and causes.

Tuesday, Dec. 18.—Petitions and causes.

VICE-CHANCELLOR'S COURT.*Sittings after Michaelmas Term.*

Saturday, Dec. 1. The first Seal.—Motions.

Monday, Dec. 3, Tuesday, Dec. 4, and Wednesday, Dec. 5.—Pleas, demurrers, exceptions, causes, and further directions.

Thursday, Dec. 6. The second Seal.—Motions.

Friday, Dec. 7, Saturday, Dec. 8, Monday, Dec. 10, and Tuesday, Dec. 11.—Pleas, demurrers, exceptions, causes, and further directions.

Wednesday, Dec. 12. The Third Seal.—Motions.

Thursday, Dec. 13, Friday, Dec. 14, and Saturday, Dec. 15.—Pleas, demurrers, exceptions, causes, and further directions.

Monday, Dec. 17. The fourth Seal.—Motions.

Tuesday, Dec. 18.—Petitions.

Short causes and unopposed petitions previous to the general paper every Friday during the sittings.

The Vice-Chancellor will sit in Lincoln's-inn hall till the first Seal to hear motions, &c.

COURT OF COMMON PLEAS.*Sittings after Term.*

The London adjournment Day is Saturday, Dec. 8.

ROLLS COURT.*Sittings after Michaelmas Term.*

Saturday, Dec. 1.—Motions.

Monday, Dec. 3, Tuesday, Dec. 4, and Wednesday, Dec. 5.—Pleas, demurrers, causes, further directions, and exceptions.

Thursday, Dec. 6.—Motions.

Friday, Dec. 7, Saturday, Dec. 8, Monday,

Dec. 10, and Tuesday, Dec. 11.—Pleas, demurrers, causes, further directions, and exceptions.

Wednesday, Dec. 12.—Motions.

Thursday, Dec. 13, Friday, Dec. 14, and Saturday, Dec. 15.—Pleas, demurrers, causes, further directions, and examinations.

Monday, Dec. 17.—Motions.

Tuesday, Dec. 18.—Petitions in the general paper.

Short and consent causes and consent petitions every Tuesday at the sitting of the Court.

COURT OF REVIEW.

The Court of Review will not sit again, unless for special appointments, until next term.

EXAMINATION OF ARTICLED CLERKS.

Michaelmas Term, 1838.

(Continued from page 64.)

Is a witness in a criminal matter entitled, before leaving home, to be paid his travelling expenses, and for his loss of time?

What is a nuisance, and how redressed? and is the remedy the same as to all nuisances?

What are the different modes by which a parochial settlement can be gained?

Can a landlord in any and what case, and in any and what manner recover the possession of premises which is withheld, after the term has ended, or been determined by legal notice, without bringing an action of ejectment?

ARTICLED CLERKS WHO PASSED THEIR EXAMINATION IN MICHAELMAS TERM, 1838.

<i>Name of Applicant.</i>	<i>Name and Residence of Attorney to whom articled or assigned.</i>
Allen, William	John Henry Clark, Shipston-on-Stour.
Allen, Benjamin Tuthill	Alfred Whitaker, Frome, Somerset.
Atkinson, John	Henry Atkinson, Whitehaven.
Ayling, Charles	Edward Tribe, 86, Great Russell Street, Bloomsbury Square
Baker, John, jun.	John Pontifex, 5, St. Andrew's Court, Holborn.
Barker, Charles Frederic	John Baker, Aldwick, parish Blagdon, Somerset; John Be-thune Bayley, Devizes; and Charles Meredith, Lincoln's Inn.
Barker, Samuel	John Barker, Northwich.
Baron, Samuel Braddock	John Hampson, Manchester.
Beal, Henry Ridley	Samuel Woodcock, the elder, Bury, Lancaster.
Beardsworth, John	Charles Harrison, 14, Southampton Buildings.
Blackburne, Edward	Leonard Wilkinson, Blackburn.
Bromley, William, jun.	George William Blackburne, Burcot, outparish of St. Cuthbert, in Wells; Thomas Lax, Wells.
Brooke, Cooper Charles	William Bromley, 3, Gray's Inn Square.
Brooks, Charles William	John Ambrose, Maningtree, Essex.
Broomhead, Henry, the younger	Charles Sabine, Oswestry, Salop; Thomas Cooper, 24, Lincoln's Inn Fields.
Buck, John Dawson	Henry Broomhead, jun., Sheffield.
Campion, Francis	Edmund Cooper, East Dereham.
Channell, Thomas Henry	Frederick Fisher, Doncaster.
Chappell, Frederick Patey	Thomas Moseley, 13, Bedford Street, Covent Garden.
Childs, Christopher	Richard Nation, 23, Somerset Street, Portman Square.
Clayton, John Naylor	Joseph Brown, Liskeard.
Colyer, Charles	John Gilbert Meymott, Great Surrey Street.
Combs, John	John Innes Pocock, 27, Lincoln's Inn Fields.
Concanen, George	Thomas Saunders, 1, Queen-street Place, Southwark Bridge.
Cooke, Masta Jocelin	George Gillson, Truro.
Cope, William Rogers	John Cooke, Ross.
Corner, Charles Calvert	Clement Ingleby, Birmingham.
Corser, Charles	George Richard Corner, 20, Dean Street, Southwark.
Cort, Joseph Denison	John Corser, Wolverhampton.
Cotton, John Lucas	Henry Haworth, Blackburn; Henry Hargreaves, Blackburn; and Dickson Robinson, Blackburn.
Cox, Thomas	James Dixon, Preston, Lancaster; Robert Bayley Follett, 1, Bedford Row.
Crowdy, Henry Crowdy	Benjamin Edward Willoughby, 13, Clifford's Inn.
Day, Alfred	William Crowdy, Highworth, Wilts; Thomas White, 11, Bedford Row.
	Peter Day, Norwich.

<i>Name of Applicant.</i>	<i>Name and Residence of Attorney to whom articled or assigned.</i>
Dennis, William	John Hensman, Sheep Street, Northampton.
Dickinson, Henry William	Joseph Mountford, Exeter; Wightwick Roberts, 57, Lincoln's Inn Fields.
Digby, Arthur	George Wyat Digby, Maldon, Essex.
Dolman, Thomas William Leach	Henry Richardson, York.
Drayton, John, the younger	Robert Hillman, Lyme Regis.
Edmonds, George Maxwell	George Nicholson, Hertford.
Edye, Francis Walrond	Thomas Peregrine Turner, 18, Millman Street, Bedford Row.
Elderton, Henry Merrick	Merrick Elderton, Brixton; Edward Merrick Elderton, 40, Queen Square.
Evans, Charles	Charles Shearman, Gray's Inn.
Evitt, Thomas Augustus	Thomas Evitt, 40, Haydon Street, Minories.
Fawcett, John William	Ottewill Tomlin, Richmond, Yorkshire; Thomas Fawcett, Sedbergh, Yorkshire; and Richard Addison, 8, Mecklenburgh Square.
Francklin, Frederick Fairfax	Edward Palmer Clarke, Wymondham.
Fryer, Kedgwin Hoskins	Henry Hooper Fryer, Coleford.
Furley, George	David Manser, Watchbell Street, Rye, Sussex; Robert Furley, Ashford.
Galworthy, John	William Chapman, Devonport.
Garbutt, John Redhead	Robert Breckon, Whitby.
Garrick, David	Joseph Robert Wilton, 19, John Street, Bedford Row; Thomas Magnus Cattlin, 39, Ely Place, Holborn.
Gordon, George	William Reynolds Austice, Iron Bridge, Salop.
Gray, Thomas William	George Henry Drake, Exeter.
Hall, George Blythe	Andrew Phillips, Sheffnall.
Hallen, William George	Thomas Hallen, Kidderminster.
Hallett, Henry Hughes	Thomas Charles Bellingham, Battle, Sussex.
Hanson, Alfred	William Pryce Pinchard, Taunton, Somerset.
Harris, Stanley	Henry Harris, Furnival's Inn; Mundeford Allen, 31, Bedford Row; re-assigned to Henry Harris.
Harrod, Henry	Edward Steward, Norwich.
Hart, Robert	William Read King, Serjeant's Inn, Fleet Street.
Hayton, Jonathan	Simon Ewart, Carlisle.
Heath, Samuel, the younger	Richard Tillyer Blunt, 10, Union Court, Old Broad Street.
Hepworth, John, the younger	George Barker, and George Morris Barker, Birmingham.
Hick, Henry	Gabriel John Fielding, Richmond.
Hill, Thomas, the younger	Thomas Hill, the elder, North Brixton; James Hodgson, 3, Raymond Buildings.
Hoare, Francis Buchanan	Edward Weedon, Gloucester.
Hodgkinson, William	Benjamin Goode, Howland Street, Fitzroy Square.
Holden, Hyld	William Saunders, Worcester; Charles Augustus Helm, Worcester.
Hunt, William	Benjamin Aplin, Banbury.
Insole, Thomas, jun.	William Finch, 8, Forgate Street, Worcester.
James, Edward Wallwyn	William Roberts James, 23, Ely Place, Holborn.
Jewitt, James Watson	William George Lyle, 10, Great James Street, Bedford Row.
Johnson, Saffery William	John Wing, Wisbech; Edward Jackson, Wisbech.
Jones, Henry Julius	Joseph Fisher, 30, Bury Street, St. James's; Edward William Lake, Bury Street, St. James's.
Kaines, Henry	Thomas Wills, Shaftesbury.
Kenny, William Fenton	Edward Nelson Alexander, Halifax.
Laing, David	George Vernon Cotton, Frederick's Place, Old Jewry.
Lambe, James	William Thomas Paris, Stroud.
Lambert, Anthony	John Lambert, Dyers' Buildings, Holborn.
Ludlow, Henry	Edward Moss Dimmock, 35, Abchurch Lane.
Lyndon, Charles	Cobbett Derby, 2, Harcourt Buildings.
Markham, Henry Philip	Charles Markham, Northampton.
Mason, Henry Baxter Branwhite	Frederick Browne Bell, Downham Market.
Masterman, William Stanley	Charles Stoddart, Barnard's Inn, Holborn; William Henry Austin, 31, St. Martin's Street, Leicester Square.
May, John	Thomas Parrott, Maclefield.
Medley, Lewis Whittle	Robert Samuel Palmer, 4, Trafalgar Square.
Moore, William	Methusalah Moore and Thomas Sheppard, Leicester.
Nettleton, John	Rober Carr, Wakefield.
Nicholson, John Wilson	Thomas Wing, Gray's Inn.
Page, Henry	Thomas Riddings, Southampton.

Name of Applicant.	Name and Residence of Attorney to whom articled or assigned.
Page, William Sagon, the younger	William Sagon Page, the elder, Scarborough.
Pank, Stephen Ewin	Charles Pestil Harris, Cambridge.
Pargeter, Benjamin	William Spurrier, Birmingham.
Peter, Richard	Benjamin Hart Lyne, Liskeard, Cornwall; William Castleman, Winborne Minster.
Phillips, James Percy	James Phillips, 10, St. Swithin's Lane.
Phillott, Robert	John Willmott Bradford, Langford.
Pickup, Mark	John Ramskill, Pontefract.
Price, Henry Read	Thomas Mullett Evans, Bristol; Neast Neville Prideaux, Bristol.
Probert, Thomas Henry	Charles Ehret Grover, Hemel Hempstead.
Ramsey, Benjamin May	George Leach, Devonport.
Richardson, George Rycroft	John Bate Cardale, 2, Bedford Row; John Allen Sibthorpe, Guildford.
Richardson, John Mott, jun.	Thomas Samuel Mott, and William Garsuch Times, Much Hadham.
Roberts, Thomas	Thomas Hippesley Jeckson, Stamford.

(To be continued.)

EXCHEQUER.

MIDDLESEX—The Sitting after Michaelmas Term, 1838.

REVENUE CAUSES.

CUSTOMS.

The Attorney General	Shillibeer
Same *	Noldwrit

Informations for Penalties.

REMANET.

J. Harmer	1 Waller	Pennyfather	Tres. W. G. White
Dendy and M.	2 Young	Bryan	Ca. Gardom and M.
G. Sharp	3 Bennett	Broughton, esq. & anr.	Ca. White and P.
Norcutt	4 Smith	Smith	Tres. Hewlett
Sydney	5 Tuck	Tuck	Dt. Trott
Roberts	6 Smith	Dukes	Ca. Sheriffs
Hembury	7 Williams	Knight	Tres. Dodds and L.
C. B. Wilson	8 Semple	Cole	Ca. T. H. Smith
Platts	9 Smith	Green	Ca. F. Hobler
Braham	10 Speck	Phillips	Ca. Judkins

NEW CAUSES.

H. Lacy.	11 Hampton	Cross	Ca. Brundrett and Co.
Tyler	12 Peers	Kenworthy & ors.	Ca. C. J. Smith
Pinkitt and D.	13 Scott	Smith	Ca. Moon
H. Lacy	14 Brown	Dickinson and ors.	Ca. Baker
T. Parker	15 Blacker	Martin	Tres. Methold
N. J. Whitcombe	16 Godden	Sly	Ca. J. Harmer
Barton	17 Thorowgood and anr.	Hearn	Ca. J. Dean
W. Montriou	18 Thorp, clerk	Mattingley	Dt. B. Aplin
Same	19 Same	Budd	Dt. Same
Same	20 Same	Bliss	Dt. Same
Ivimey	21 Weeks	Rogers	Ca. Burfoot
Jas. Robertson	22 Snell	Robinson	Ca. Carlon
In person	23 Mayhew and anr.	Baker and uxor.	Dt. Bowditch
In person	24 Hodgson	Parnell	Dt. Carlon
R. S. Wadeson	25 Belcher and ors.	M'Intosh	Ca. Tyrrell
Jas. Miller	26 Trevanion	Leigh	Ca. Capron and Co.
H. C. Chilton	27 Cocks and ors.	Paynter	Ca. J. Williams
Roberts	28 Costello	Morgan	Tres. Wright
Armstrong	29 Gibbs	Fowler	Ca. Harman and A.
Walker	30 Mette	Dayrell	Dt. Alger
J. Cole	31 Duckworth and ors. S. J.	Davenport & ors.	Dt. Bell and Co.
Lonsdale	32 Martyn and anr.	Milton	Dt. Billing
Bicknell and Co.	33 Bicknell	Hood	Ca. Freeman and B.
C. J. and R. Holmes	34 Thompson	Williams	Ca. W. Dark
Chadwick	35 Marks	Holland	Ca. Wight
T. W. Chappell	36 Osborn	Jones	Dt. J. Lewis

Ivimey	37 Hall	Hunter, the yngr.	Ca. Vincent and Co.
Same	38 Selway	Fogg	Ca. Woolmer and R.
J. Kingston	39 Cragg	Moon	Ca. In person
Same	40 Kingston	Same	Ca. Same
W. J. Holt	41 Stevens	Shield	Asst. Shield and H.
Lumley	42 Price	Pyne and anr.	Ca. In person
Gough	43 Durden	Melton	Ca. Melton
C. Lewis	44 Edwards	Clark	Ca. Columbine
H. Eaton	45 Hughes	Quentin, knt.	Ca. Baxters
Same	46 Frazer	Bunn	Dt. C. M. King
Jennings and Co.	47 Knatchbull	Harsett	Ca. Newbon
T. Weeks	48 Eldridge	Hunt	Tres. Neal
Boxer	49 Gould	Barrett	Ca. Wyche
Young and Son	50 Ruck	Denniss	Ca. Young, B. and G.
Braham	51 Seeley	Catlin	Ca. Taylor
Palmer	52 Windsor	Barnes	Dt. Helder
Adlington and Co.	53 Prince	Oakes	Ca. C. Cuff
Braham	54 Fox	Hill	Ca. D. Davies
Platts	55 Siggers	Nathan	Ca. J. Lewis
Adlington and Co.	56 Smith, assees., &c. S. J.	Pole	Ca. Dawes and C.
Same	57 Adlington and ors.	Daniel	Ca. A. Wilson.

Sit at Ten o'Clock.

QUEEN'S BENCH.

MIDDLESEX.—The Sitting after Michaelmas Term, 1838.

REMANET.

Sir R. Sydney	1 Cahill	S. J.	Macdonald, clerk, Dt. Bolton and others
W. Montrou	2 Martinez	S. J.	Houston, bart. Tres. Derby and R.
Brundrett and Co.	3 Broadhurst	S. J.	Boulnois the yngr Prom. Ashurst and Co.
Wm. Horsley	4 Doe sev. d. Palmer and others	S. J.	Johnson Eject. Hume and S.
Fosters and E.	5 Codrington		Fitzpatrick Tres. Fitzpatrick
Chisholme and Co.	6 Sims	S. J.	Thomas, esq. M.P. Dt. Young and T.
Mill	7 Paul	S. J.	James Tres. James
Person	8 Burt	S. J.	Baker and another Person
Chamberlain	9 Mitchelmore	S. J.	The London & Bir. ming . Rail. Co.Ca. Parker
R. Haynes, jun.	10 Roden	S. J.	Sir G. Carroll, knt.Ca. Sole and another
Sutcliffe and B.	11 Gellard		Hardwick Ca. Green
Acton	12 Barnett		Cox Ca. Rigge and Co.
T. M. Parker	13 Redaway		Redaway Dt. Webb
Millard and Co.	14 Hoppe	S. J.	Cocks and others Ca. Raymond
E. W. & S. Haines	15 Dane		Kirkwall Prom J. and W. Lowe
Kinder	16 Briggs		Aynsworth Ca. Litchfield and Co.
Penn	17 Dry and another		Waller Prom. Person
A. Burn	18 Dunn		Jones Homidge and Co.
Veal and Son	19 Mazzinghi, admix,&c.		Innes Prom. Lock and Co.
Weston	20 Finney		Youle Dt. Tucker
Railton and M.	21 Yates		Nixon Pros. Hill
Fleming	22 Thompson		S. Nye & J. Nye Pros. Kirkman
Hall and Sons	23 Crompton		Smith and another Pros. Olive
Henry Smart	24 Pearse		Buckler & another Dt. Oldershaw
Johnson, Son, & W.	25 Rowe the younger		Cope Prom. Chester
Cavelje and Co.	26 South		Tomlins Tres. Garry
W. Stafford	27 Peake		Dudman Dt. In person
In person	28 Braham		Hill In person
Yates and Turner	29 Harvey		Richardson Dt. E. Isaacs

NEW CAUSES.

White and W.	30 The Queen	S. Virrier	Indt. Bicknell and Co.
Same	31 Same	S. Hazard	Same
Same	32 Same	W. Virrier	Same
Same	33 Same	S. A. Hayward	Same
D. Davies	34 Fife	Newnham	Pros. J. Bebb
Same	35 Same	Same	Same

Hertslet and S.	36 Bourgot and another administrix, &c.	Rothschild & ohrs Prom. Chatfield and Co. executors, &c.
Pile	37 Cottrell and wife	Starkey Tres. Young
George Giggles	38 Smyth	Board Prom. W. H. Garry
White and W.	39 The Queen	S. J. Perjury Bicknell and Co.
Same	40 Same	S. J. Same
White and W.	41 The Queen	S. J. Perjury, Bicknell & Co.
Same	42 Same	S. J. Same
H. Walker	43 Morton	Halder, the elder Lythgoe and M.
Elkins	44 Wells and another	S. J. Prom. Capes and S.
Bishop	45 Burridge	S. J. Ca. Nicholson
Lucas	46 Baker	S. J. Prom. Lefroy
Adam Burn	47 Stevens	Watts Lane
Oliverson and Co.	48 The Queen	S. J. Infn. Lane
Fosters and E.	49 Codrington, esq.	S. J. Person
J. Lewis	50 Alexander	Goodman Prom. Parker and Co.
Same	51 Samuel	Davies Ca. J. P. Davis
Brundrett and Co.	52 Harrison and anr.	Ranger Pros. Lumley
Blake and L.	53 Webb	Waring Dt. G. T. Taylor
Robson	54 Ladd	Thomas and anr. Tres. Nethersole and B.
Battye and Co.	55 Farrar and others	Hutchinson Dt. Adlington and Co.
Pile	56 Godsell	Foote Trov. Lewis
Harmer and Co.	57 Lewis	Ponsford Tres. Keddell and B.
H. Method	58 Doe d. Martin	Blacker Eject. T. Parker
Blower and V.	59 Cole and another	Protheroe Pros. Weeks and G.
Day and H.	60 Wilson, admor., &c.	Knapp and anr. Ca. Beart
W. L. T. Robins	61 Smith	Groom and others Ca. Swain and C.
Vincent and P.	62 Basta	Ryan C. Hyde
Ed. R. Phillips	63 Devonald	Hope Dt. C. Robeson
W. Melton	64 Melton	Harvey Prom. Dufaur
Smith and W.	65 The Queen	J. G. Wrench and Indt. Pearse and Co. others
Pile	66 Smith and another	Simmons & ors. Trov. Spyer
Same	67 Pierson	Pain and another Tres. Watson and Sons
J. Lewis	68 Phillips	Croucher Prom. Sheriff
Lane	69 Doe d. Ive	Scott Eject. Taylor and Co.
Same	70 Burgess	Pearce Phillips
J. Humphrys	71 Farrington	Tilling and anr. Tres. Druce, Sons, and Dawson
Platt and Hall	72 Blewitt, esq., pub- lic officer, &c.	Morgan Prom. White and W.
Badham	73 Walton	Gaunce Tres. Lonsdale
Hodgson and B.	74 Collin and another	Arundell Prom. Davies
Chisholm	75 Smith	Walters Ca. Meredith

Sit at Half-past Nine o'Clock.

TO CORRESPONDENTS.

"A Student."—A tenant in tail by the statute 3 & 4 W. 4. c. 74. s. 40. is prevented barring the entail by will, of which the statute 1 Vic. c. 26, takes no notice. He must first acquire the fee under the former statute, and then he may make a devise.

"Hole v. Escott."—We have to thank the solicitors for one of the parties for the loan of the papers in this cause.

We take this opportunity of observing, that when we commenced this periodical, we stated in our prospectus that *reliance might be placed in its contents*, and it will serve the interests of the profession, and we shall be much obliged by the loan of the briefs in any cases of interest that solicitors may be pleased to favour us with, in order

to their being reported faithfully. Our publishers will receive and return them without delay or injury, and every confidence may be placed in us.

"Answers to Problem IV."—These are under consideration.

ERRATA in No. 4.

Page 55—Note (a) omitted referring to p. 52. Notice to Correspondents, *for* Follett v. Armstrong, *read* Tullett v. Armstrong.—Page 60, *for* Rule of Attornies, *read* Roll of Attorneys; and, in the same page, for detainer, *read* detainer.—Page 49, in the fifteenth line from the top of the second column, *for* early entry, *read* entry.

The Legal Guide.

SATURDAY, DECEMBER 8, 1838.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 67.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

HAVING drawn attention to Sections 25, 26, and 27, of the New Statute of Limitations, we think it necessary to shew the state of the law, upon these sections, previous to this Statute. Sect. 25 relates to cases of *express trust*, or *direct trust*; as where an estate is conveyed to the use of A and his heirs, in trust for B and his heirs. Here there is no adverse possession, consequently, as between trustee and *cestui que trust*, no time will operate as a bar to the latter. See *Townsend v. Townsend*, 1 Bro. C. C. 551. But this rule in equity will not apply between *cestui que trust* and *trustee* on one side, and strangers on the other, for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such a trust, and so the act would never take place; therefore, where a *cestui que trust* and his trustee have been both out of possession, for the time limited by the statute, the person in possession has a good bar against both (a). See *Llewellyn v. Mackworth, Barnard*. C. R. 445; *Townsend v. Townsend*, (ante); *Clay v. Clay*, 3 id.

639, n.; *Hercy v. Ballard*, 4 id. 469, Amb. 645; *Harmood v. Oglander*, 6 Ves. J. 199, 8 id. 106; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629.

Although the statute, as between a trustee and *cestui que trust*, operates as a bar to the latter, yet the trustee may, in some cases, be barred by the possession of the *cestui que trust*, or those claiming under him. See *Lord Portsmouth v. Lord Effingham*, 1 Ves. 430; *Harmood v. Oglander*, (ante); see 2 Mer. 360. A *cestui que trust* is a tenant at will to the trustee, and his possession is the possession of the trustee. See 1 Ventr. 329. And, therefore, under very particular circumstances, time could not operate as a bar. See 3 Mod. 149; *Earl of Pomfret v. Lord Windsor*, 2 Ves. 472; *Keene v. Deardon*, 8 East. Rep. 248; *Smith v. King*, 16 id. 283. A conveyance of the legal estate, by the trustee, or a disseisin or actual ouster of the trustee by the *cestui que trust*, may be presumed from length of possession, or under particular circumstances. See 1 Ves. 435. But *time alone* does not destroy the interest of the trustee. If a *cestui que trust* sells or devises the estate, and the vendor or devisee obtains possession of the title deeds and enters, and does no act recognising the trustee's title, there is great reason to contend that this is a disseisin of the trustee, and consequently, that the statute will operate from the time of such entry. This is a point which daily occurs in practice, but it rarely happens that a purchaser can be advised to dispense with the conveyance of a legal estate, where the

(a) *Sug. Vend. and Purch.* 393.

defect will appear on the abstract, when he sells; and, where there has been any dealing on the legal estate, and it has been recently noticed in the title deeds as a subsisting interest, it is clear that a purchaser must consider it as such (*b*). See *Goodtitle v. Jones*, 7 Term. Rep. 47.

Where a trustee, for infant children, of estates devised by an insolvent person, and the latter held part of the trust estates in satisfaction of debts of the devisor that he alleged he had paid, on a bill for an account and conveyance of the estate, by the children, *forty-five years* after the testator's death, stating that they had recently discovered the facts; special enquiries were directed to ascertain whether they had any notice of the circumstances; whether they had, in any manner, released; and whether the trustee had advanced money to the amount of the value of the estate. See *Chalmers v. Bradley*, 1 Jac. & Walk. 51. In the Attorney General *v. Lord Dudley*, Coop. C. C. 146, a purchase of trust property, by trustees, for their own benefit, was set aside, after a considerable lapse of time, and after several assignments; but in *Gregory v. Gregory*, id. 201, such a bill was dismissed, merely on the ground of the lapse of eighteen years. See *Champion v. Rigby*, 1 Russ. & M. 539.

The rule that trusts are not within the Statute of Limitations, was held, in *Townsend v. Townsend*, 1 Cox, 28, not to apply where a claim was made, after a great length of time, against a trustee, by *implication* of law, arising upon a doubtful equity.

As to *Constructive Trusts*, Sir William Grant, in *Beckford v. Wade*, 7 Ves. J. 97, (see 2 Harg. Jur. Exc. p. 394,) said, it is certainly true that no time bars a direct trust, as between *cestui que trust* and trustee, but if it was meant to be asserted that a court of equity allows a man to make out a case of *constructive trust*, at any distance of time, after the facts and circumstances happened out of which it arises, he was not aware that there was any ground for a doctrine so fatal to the security of property

as that would be; so far from it, that not only in circumstances, where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would, originally, have been given upon the ground of *constructive trust*, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief. An estate in the hands of a purchaser for valuable consideration, with notice of a trust or equitable interest, remains subject to it. See *Saunders v. Dehew*, 2 Vern. 271; *Langton v. Astrey*, 2 Ch. Rep. 30; *Daniels v. Davison*, 16 Ves. J. 249; *Wigg v. Wigg*, 1 Atk. 384; *Tourville v. Nash*, 3 P. Wms. 306.

Sect. 26. relates to cases of fraud, and, in cases of this nature, where the facts constituting the fraud are known, when there is no subsisting trust or continuing influence, the same principle held by Sir William Grant, in *Beckford v. Wade*, which we have before stated, will apply. See 1 Ball & B. 166. And, though courts of equity will interpose, in order to prevent those mischiefs which would probably result from persons being allowed, at any distance of time, to disturb the possession of another, or to bring forward stale demands; yet, as its interference, in such cases, proceeds upon principles of conscience, it will not encourage, nor in any manner protect, the abuse of confidence; and, therefore, *no length of time shall bar a fraud*. *Cotterell v. Purchase, Forrest*, 61; see also *Deloraine v. Brown*, 3 Bro. C. C. 633; *Smith v. Clay*, id. 639, n.; *Hercy v. Dinwoody*, 4 id. 258, 2 Ves. J. 87; *Yate v. Mosley*, 5 Ves. J. 480; *Moth v. Atwood*, id. 845; *Purcell v. Macnamara*, 14 id. 91; *Beckford v. Wade*, 17 id. 87; *Hovenden v. Lord Annesley*, (ante); *Moore v. Blake*, 1 Ball & B. 62; *Medlicott v. O'Donnell*, id. 156; *Gould v. Okenden*, 4 Bro. P. C. 198, Tom. ed.; *Morse v. Royal*, 12 Ves. J. 355; *Pickering v. Lord Stamford*, 2 id. 272. Unless it appears that the circumstances of fraud imputed, were known to the party, and that with such knowledge he had lain by a considerable time, in which case, length of time may

(*b*) *Sug. Vend. and Purch.* vol. i. 394.

be objected, as otherwise the mere imputation of fraud, might operate a fraud, as the evidence might be lost by which the imputation might have been repelled (*c*). See *Alden v. Gregory*, 2 Eden, R. 233; *Whalley v. Whalley*, 1 Mer. 436.

(*To be continued.*)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM IV. (*d*)

On 1st and 2nd Vic. c. 110.

The alteration which this statute has effected, in the law of debtor and creditor, is very material; in fact, the whole system is changed; and, unless a plaintiff can satisfy a Judge, of a superior court, that he has reasonable cause for swearing, that he believes defendant is about to leave England, arrest for debt, on mesne process, will, in no case, be allowed.

In order, therefore, to arrest a person, it is now necessary, not only to have a debt of twenty pounds, (*e*) but also, in the first instance, to have issued a writ of summons, (*f*) and to be prepared with an affidavit (*g*) alleging, a reasonable ground to suspect, that defendant is about to go out of the jurisdiction of the Court; and, having obtained this affidavit, to attend before a judge, and get his order to the effect, that the defendant is to be arrested; which order will always be made on reasonable ground. And, in the case of *Larnhim v. Willan*, Michaelmas Term, 1838, reported in the *Legal Guide*, (*h*) it was held sufficient to show, that defendant was about to go to Ireland, to join his regiment. Next issue a capias, in the form prescribed by the Act, and send it to the Sheriff, when he will proceed to arrest (*i*) defendant, who must remain in custody till he find bail as heretofore.

(*e*) Fonbl. Eq. 330, n.

(*d*) See Notice to Correspondents.—Ed.

(*e*) A question might be raised whether or not this power of making an order is not now given to the judges, in cases under £20, where defendant is about to leave jurisdiction.

(*f*) Sect. 2.—Ed.

(*g*) This affidavit must be entitled in the Court and Cause, whereas, formerly, the affidavit to hold to bail was not.

(*h*) Sect. 3, ante, p. 47.—Ed.

(*i*) Sect. 4.—Ed.

By the 5th section, the judge's order may be made at any time, before final judgment; an enactment of great importance, as a person may now be arrested at any stage of the proceedings.

If, however, a defendant think himself aggrieved, he may forthwith apply to a judge for his discharge; who has power, either to discharge him or not, and either with or without any conditions. And in case the judge's order be not to the satisfaction of the defendant, he may appeal therefrom to the Court. (*j*)

Next follow some enactments of temporary effect only, relating principally to the discharge of such persons as may happen to be in custody after the 1st October, on process issued before that day. (*k*) It will not be necessary here to add any remarks on this part of the Statute, except to state, that such prisoners may obtain their discharge, on making affidavit, that they are still in custody, and that they do not intend applying to the Court under the Insolvent Act.

By the 8th section (*l*), it is enacted, that if one creditor for one hundred pounds, two creditors to the amount of one hundred and fifty pounds, and so forth; of a person being a trader, within the meaning of the Bankrupt Act, shall file an affidavit of debt, in the Court of Bankruptcy, and shall cause the debtor to be personally served with a true copy of such affidavit; and also, with a notice, in writing, requiring immediate payment of his debt, provided the same be not paid, or otherwise satisfied or compounded for, or if the debtor do not give a bond, in such sum, and with two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve, conditioned to pay such sum as shall be recovered in any action, together with costs, or that he shall render himself to the prison of a Court in which the action was brought, within twenty-one days after such service, then the debtor shall have committed an act of Bankruptcy;

(*j*) Sect. 6. See *Bateman v. Dunn*, ante, p. 43.—Ed.

(*k*) Sect. 7. See ante, p. 28; see also *Roxburgh v. Brind*, ante, p. 57.—Ed.

(*l*) See *In re Hall*, a bankrupt, ante, p. 92.—Ed.

which shall, of itself, be sufficient to sustain a fiat; provided it be issued within two calendar months after the filing of the affidavit.

This would have been a very important and very salutary enactment, and would doubtless have had considerable effect in making people pay their debts, as it would have enabled every such creditor, to make a man, who refused to pay his debt, a bankrupt, were it not for one or two little omissions of matters of detail, or, perhaps, we ought rather to say, had it not been for the hostile reception with which it has been met at the hands of the judges of the Court of Bankruptcy; who have raised the following difficulties against making a man a bankrupt under it.

1st, That there is no officer with whom to file the affidavit, nor yet before whom to swear it.

2nd, That in country causes it would be necessary that all the Commissioners in town should go down to prove that no such bond, as is mentioned in the Act, had been given.

Would it not, it may be fairly asked, have evinced a far more liberal spirit, on their part, had they made an order to the following effect, and which they were by the statute authorised to do: "That Mr. A. B. be appointed clerk of this court, for the purpose of filing all affidavits of debt and bonds, under this section; and that, in order to prove an act of bankruptcy, under section 8, in the country, an examined copy of this affidavit, and an affidavit of such clerk that no bond has been given, shall be sufficient evidence."

The next clause enacts, "That no warrant of attorney, or cognovit, shall be valid, unless executed by the defendant, in the presence of an attorney, expressly nominated by him, and such attorney must also state that he attests as such attorney, and at his request."

This clause is merely an extension of the Rule of Court, Hil. T. 4 Wil. 4. 272, by which prisoners in custody were obliged to attend to the same formalities, on executing those instruments.

From the terms of the Act (m) it would

appear necessary, that in all cognovits and warrants of attorney, there should be a clause to the following effect: "And I hereby nominate A. B., of &c., gent., my attorney, to attest the execution hereof by me." And, moreover, that the attorney should state, that he attests as attorney for defendant, and at his request. The words of the Statute on this point are very plain, "expressly appointed by him," and attention to the above suggestion seems indispensable, as there would otherwise be nothing to shew any "express appointment," or, in other words, there would be nothing to show that the defendant was aware of the formalities, which the law clearly intended, should be observed on the occasion.

(*To be continued.*)

PROBLEM VI.

WHAT IS AN ACTION?

BY THE EDITOR.

REVIEW OF THE JUDGMENT of the *Lord Chancellor*, in the *Appeal Case, Hole v. Escott, (n)*

The decision of the Master of the Rolls, in the above case, appears to have rested upon the previous decision of Sir John Leach, in the case of *Badham v. Mee, (o)*. Where a father was tenant for life under a settlement made by himself, with remainder to such of his sons as he should appoint, subject to charges for the other children, with remainder, in default of appointment, to the sons successively in tail male, with remainder to the father in fee. The father became bankrupt, and *after his bankruptcy* executed a deed purporting to be an *appointment* to his eldest son in fee. The *Court of Common Pleas*, upon a case directed by the Master of the Rolls, certified that the eldest son of the bankrupt

(n) *Ante p. 71.*

(o) *Ante p. 72.*

See *Thorpe v. Goodall*, 17 Ves. J. 388. 460. It was in consequence of Lord Eldon's decision in the latter case, that the 77th sect. was introduced into the Stat. 6 Geo. 4. c. 16., by which every interest of a Bankrupt, and every power which he might have executed for his own benefit, vests in his assignee.

took no estate under the appointment, but under the settlement took an estate tail, expectant upon the determination of the life estate of his father, and this certificate was confirmed by the Master of the Rolls.

Upon what principles this Judgment was formed we are at a loss to conjecture. The bankrupt laws do not affect family settlements, except so far as such settlements provide for the interest of the bankrupt.

In the present case, and in Badham v. Mee, the power is not to be exercised for the benefit of the bankrupt, but for that of his children. It does not appear capable of being supported consistently with established principles. *The father could not affect the ultimate remainder in fee, vested in the assignees. But as between the issue of the marriage, the power subsisted, and was capable of being exercised.* As long as there was issue of the marriage capable of taking under the limitations in the settlement, the appointment would be operative; but if the remainder in fee would have fallen into possession if there had been no appointment, then the estate created by the appointment would cease. For the ultimate remainder in fee which vested in the assignees, was not displaced out of them, and the appointment was in its operation cut down to a base fee, by the power of the Bankrupt Act. The effect was no more than the common operation of a fine would heretofore have effected by a tenant in tail, with remainder in fee to another. And the bankrupt law ought not to be held to destroy the power in a family settlement *where their existence and the exercise of them do not affect the rights of the creditors.* (p)

Sir John Leach, in delivering his judgment, said it was conjectured in that case, from an observation made by one of the Judges in the course of the argument, that the *Court of Common Pleas* decided against the validity of the appointment, upon the ground, that by the execution of a power no estate can be created, which would not have been valid if limited in the deed creating the power; if, therefore, it were admitted that the power of appointment continued in

the bankrupt, notwithstanding his bankruptcy, and that the appointment in favour of the eldest son in fee might be construed as an appointment, creating a base fee only, and not prejudicing the remainder, which passed to the assignees; under the commission the appointment would nevertheless be void, because a limitation to that effect would have been void in the original deed creating the power, inasmuch as the rule of law does not permit one fee to be limited after another, although the first fee be only a base or determinable fee.

This rule (his Honour continued) applies to the present case, in which the donee has a particular and a general power, and will support the opinion which has been formed by the judges of the Court of Common Pleas, which his Honour confirmed.

There appears to be no ground for the doubt suggested, as to the extinction of the power; and the other point does not seem to have received from the Court the consideration it deserves. If such a power cannot be exercised after the bankruptcy, *the power of selection is gone*; and in some cases the immediate limitation over in default of appointment may be to strangers. In this case Badham v. Mee, the knot was rather cut than untied, for the appointment was to the eldest son in fee, and the limitation in default of appointment was to him in tail, so that much mischief was not done by the decision in the particular case, *however injurious it may be as establishing a false principle.* (q)

TO THE EDITOR OF THE LEGAL GUIDE.

Sir,—The following case having been put to myself and several other students, at a private meeting for the purpose of discussing law subjects, and many different opinions being given upon it, it was unanimously agreed to refer the subject to your valuable Journal for arbitration, convinced, from the tenor of the few numbers that have as yet appeared, that it is your *wish and intention* to afford every assistance to the younger members of the profession, which it is to be regretted has long been wanting, and we,

(p) Sugden on Powers, vol. i. p. 80.

(q) Sugden on Powers, vol. i. p. 82.

therefore trust you will take the following case under your kind consideration :—

" *A* dies intestate, leaving four daughters, *A*, *B*, *C*, and *D*, his only children, who accordingly share equally his estate, both real and personal. *A*, *C*, and *D*, marry and have families, and *B* continues single. *D* dies, leaving her husband and family surviving; *B* soon after dies without having been married, and intestate." The point at issue is, as regards the distribution of *B*'s property, *real and personal*. How is it divided? Do the children of *D*, the deceased sister, share the property equally, in thirds, with the two surviving sisters, *A* and *C*? and, if not, what interest do they take? I shall look forward to a communication from you in your next, and remain for all, Sir, your most obedient humble servant.

A SUBSCRIBER.

London, Dec. 4, 1838.

OPINION.

The case is, in appearance, somewhat complex, which will account for the difficulty that has been manifested in analyzing it.

We are of opinion that the children of *D* are entitled to one equal third of *B*'s real and personal estate among them, provided there be no sons of *D*;—if there be sons, then the elder—and if only one son, he will be entitled to the *real* estate, as heir at law of his deceased mother; and the third share of the *personal* estate all the children of *D* will be entitled to among them, in equal shares. *A* and *C* will take the other two third shares. See *Stanley v. Stanley*, 1 Atk. 458.

The husband of *D* has no claim.

By the statute 22 & 23 Car. 2. c. 10, explained by 29 Car. 2. c. 30, the whole surplusage of intestate estates is directed to be distributed in cases where an intestate dies, as in the present instance, among the *next of kin, in equal degree, and their representatives*; but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters.

To illustrate the opinion we have given, as regards the husband of *D*, we will shew what is the rule of law in cases of the like nature.

If an intestate dies, without wife or child, having had brothers and sisters only who had married and died before him, leaving wife or husband who shall survive the intestate, neither wife nor husband will be entitled to any part of the intestate's estate, which would pass to the Crown; the intestate having thus died without *kindred*, so it will be where the husband and wife of any one that were the next of kin of the intestate who had married and died before the latter. So a *mother-in-law* of an intestate can claim no share in this distribution, she not being of his blood. See *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 216.—ED.

TO THE EDITOR OF THE LEGAL GUIDE.

Case in reference to BARKER AND OTHERS v. GREENWOOD, ante, p. 73.

DEVISE to executors and their heirs, upon trust, to admit testator's widow to receive and take the rents of copyhold property for her life. After her decease, upon trust to sell and divide produce among testator's children. Who takes the legal estate?

OPINION.

The legal estate passed to the executors. See also *King v. Shrives*, 5 Sim. 461.—ED.

Law Reports.

COURT OF CHANCERY. *Dec. 4.*

Rigg v. Wall.

Practice.

THIS was a question of practice, as to the service of a subpoena to hear judgment by the defendant. The plaintiff did not appear when the case was called on, and there appeared to be some doubt on the proper form.

The LORD CHANCELLOR—For the future it must be understood that the new rule applied to both plaintiff and defendant, and the affidavits in the respective cases must be the converse of each other.

VICE-CHANCELLOR'S COURT. *Nov. 29.*

Nedby v. Nedby.

Trust for the separate use of a married woman. This was a motion that the sum of 47l. 15s., the produce of a fund paid into court, together with the future dividends, might be paid to Mrs. Nedby for her separate use. The suit was instituted on behalf of Mrs. Nedby by her

next friend to establish her right to a life-interest in a fund bequeathed to her by a former husband, named Keegan, who gave the whole of his property to trustees in trust to pay the dividends to his widow for her life, to her sole and separate use, independently of any husband she might marry, and directed that should have full power, by any will or instrument in writing, to bequeath or dispose of one moiety of the principal. The testator died in July, 1820, and in the following month of October the widow married Nedby, one of the trustees and executors of the will. In 1821 Mrs. Nedby assigned and appointed to her husband, for his own absolute benefit, a moiety of the testator's estate, as far forth as she was enabled to do under the trust, power, and authority expressed in the will for enabling her to grant, sell, assign, and dispose of the same. A separation having taken place between the parties, Mrs. Nedby filed the present bill in September, 1836. There was no settlement made on the marriage, and the dividends of that portion of the estate which had been invested had been received by the husband until the bill was filed and the fund paid into the court.

Mr. Jacob, in support of the motion, contended the deed of appointment did not affect the plaintiff's life-interest in the entirety, and that the effect of the marriage was not to give the separate estate to the husband.

Mr. K. Bruce, for the defendant, said it was believed in the profession the Lord Chancellor still retained the opinion he had expressed in "Massey v. Parker,"^(r) and there was a very general rumour his Lordship had recently declared he still adhered to that opinion. If it were so, in the present unsettled state of the law on this question, he trusted his Honour would not dispose of the present case on an interlocutory motion.

His Honour observed, that in a conversation he had with the Lord Chancellor and the Master of the Rolls, he certainly did understand his Lordship to express himself that he still retained the opinion he had expressed in "Massey v. Parker." He thought his Lordship's opinion seemed to hold out a notion that the effect of the marriage was to constitute a gift of the wife's chose in action in all cases to the husband.

The VICE-CHANCELLOR said the question was, whether by the deed of appointment to the husband, it was the intention of the lady to assign her present life-interest in the entirety of the fund, or one moiety or half part of the entirety. He was clearly of opinion the object of the deed was at the utmost to give the husband an interest in a moiety of the reversion, over which the wife had a power of appointment. As the case of "Massey v. Parker" had been alluded to, he would only observe that his notion of the general point in that case was, that trusts created for the separate use of married women were trusts which this Court had always recognized and preserved,

and which the Court would always recognize and preserve, unless the Legislature thought right to declare it should be otherwise. When I decided the case of "Davies v. Thornycroft,"^(s) I said there had been no judicial decision on the point. The extrajudicial opinion of the Lord Chancellor in "Massey v. Parker" is expressed in very guarded terms; and I, as a judge sitting here to administer the settled law of the court, am not called upon to depart from that settled law because the Lord Chancellor for the time being may be considered to have pronounced an extrajudicial opinion, which is contrary to my notion of that law. The question how far a trust to the separate use operated to prevent a married woman disposing of her property before marriage was different to the present, which was merely whether there could be any separate trust for the use of a woman when married. It appeared to his Honour, as soon as the widow of Keegan married Mr. Nedby, then the trust for the separate use took effect, which trust, as he understood it, was to her separate use, free from the controul of the husband, with a direction that her receipt alone should be a sufficient discharge to the executors and trustees. He thought the proper construction would be one which would prevent the wife from alienating the property. Looking at the whole of the transaction, he was of opinion a question might be raised at the hearing whether the deed would operate on the wife's interest in a moiety of the reversion. *It was not possible to say it had affected the life-interest in possession, and the dividends of the moiety secured to her separate use.* He had, therefore, no difficulty in making the order as prayed.^(t)

ROLLS COURT.—Dec. 3.

WESTHEAD v. KEEN and OTHERS.

Patent.—Not necessary to set forth in a Bill the full statement of the Specification.

The plaintiff's Bill was against Charles Keen and Christopher Nichols, and also the London Caoutchouc Company, and the cause was heard upon Demurrer of Charles Keen and Christopher Nichols.

The object of the Bill was twofold—against Keen and Nichols it complained of the infringement of the plaintiff's patent, by their making machinery included in the patent, and against the Company it prayed for a specific performance of a parol agreement for the purchase of the patent.

Mr. Tinney, in support of the demurrer—By an Act of Parliament the patentees, who had obtained a patent for the caoutchouc or India rubber, were allowed to sell to the company, and if they sold, their whole right was taken from the vendors and vested in the company. The patent, he contended, was void, and he also contended, that there was an improper joinder of parties, the defendants who de-

(s) *Ante*, p. 69.

(t) See *ante*, p. 70, note (a) second column.

murred having no connexion with the other defendants—the company. The letters patent were dated the 16th of February, 1836, and gave the patentee full power "to make and vend a certain invention, being an improved method of cutting caoutchouc and India rubber, so as to render them applicable for various useful purposes." In August the specification was enrolled. The patent ought to give a true idea of the alleged invention, but the present patent gave no idea of it at all. *Dolus versatur in generalibus.* Any possible use that could be made of the cutting might be included under this patent. It was a patent to enable the party to enroll a specification for cutting any sort of substance for any sort of purpose. No specific invention was shown, it was too vague and general. The specification was not set out in the bill, which was framed so as to give as little information as possible.

Mr. *Pemberton contra*, replied upon the case of "Kaye v. Marshall," (u) and said that, unless that case was over-ruled, the patent must stand. The defendants had not made out such a case as to induce the Court to prevent the plaintiff from bringing the cause to a hearing. The bill stated that the plaintiff was the first discoverer, and that the discovery was new and useful. The bill did not set out the specification, but it adopted precisely the language in "Kaye v. Marshall," and stated that the plaintiff had described the nature of his invention by an instrument in writing under his hand and seal, dated the 10th of August, 1836. The invention was explained in the specification by drawings and descriptions, which could not be set forth in the bill.

Mr. *Tinney* replied as to the joinder of the company as defendants with Keen and Nichols, the suit for specific performance might go on for an indefinite period between the plaintiff and the company, but in it Keen and Nichols had no interest whatever, and ought not to have been made parties.

Lord *LANGDALE*.—The bill was remarkable for the uncertainty of its statements, and the demurrer was complicated. He had understood it was necessary for the plaintiff to set forth his title in the bill in such a way as to enable the Court to form from the bill an opinion, whether the title was good or bad. This bill did not do so, for it did not set forth the specification; but, upon looking at the case of "Kaye and Marshall," he found that the Court did not then consider it necessary to set forth on the bill the full statement of a specification, but if the plaintiff alleged he did what was required, the Court would give credit to him on the argument of the demurrer. He was bound by that case. There was the same allegation in this record as in "Kaye and Marshall." In the absence of that authority he should have thought it not a correct mode of pleading, but it was there decided, and he must here decide, that that which was placed on the record there was sufficient to sustain the

equity of this case, but he did so in submission to the authority of "Kaye and Marshall;" for, before that case, he was of opinion, that it was the plaintiff's duty to state distinctly on the record what was necessary to sustain his title, and not merely to refer to it. The bill prayed for an account of the profits which had been made by the use of the plaintiff's patent. The other parties, the company, were made defendants, in order that the defendants who demurred might not be called upon to account twice, first to the plaintiff, and afterwards to the company. He could not allow the demurrer, but it had a very good *prima facie* face upon it, and he would not give the costs of it. The defendants were not bound to go upon the record only; if they had any thing over the record they must plead it. They might put in a short answer admitting facts stated by the plaintiff, but denying his right.

Demurrer over-ruled, but without costs.

CHAMEAU v. RILEY. Dec. 4.

Lex loci domicili. (v)

This bill was filed by the plaintiff, as claiming to be the next of kin of Robert Berthomier, against the defendant, William Felix Riley, and the object was to set aside a deed of release, dated the 20th of March, 1834, executed to the defendant, and to distribute the residue of the testator's property amongst his next of kin. It appeared that the plaintiff, in his bill, alleged that the domicile of the testator Berthomier at the time of his death was in France, but that the defendant in his answer had stated the domicile to have been in England, and the plaintiff now admitted that the domicile was in England. Berthomier had died at Eton in November, 1832. The bill stated that he had been resident at Eton some time before his death, but without any intention to be domiciled there, and the answer denied that Berthomier had no intention to be domiciled at Eton.

Mr. *Cooper*, for the plaintiffs, admitted that the denial in the answer to be true, and was willing and prepared to argue the cause upon the statement in the answer.

Lord *LANGDALE*.—The case depended on the domicile of the testator; if it was in France, the property must be distributed according to the law in France. The decree must be according to what was alleged and proved by the plaintiff; but the plaintiff's counsel wanted a decree upon what had been proved by the defendant, but not alleged by the plaintiff.

Mr. *Pemberton*, for the defendant, preferred meeting the case as it then stood.

Mr. *Cooper* said that the whole of his case would fall to the ground unless he could prove it was a French domicile. He asked to be permitted to withdraw the statement in the plaintiff's bill that it was a French domicile, and to be allowed to admit it was an English domicile, as the answer alleged.

(u) 1 Myl. & C. 373.

(v) See *Price v. Dewhurst*, ante, p. 54.—Ed.

Lord LANGDALE—The question of domicile was one of great complication and difficulty. (w)

Mr. Cooper—The same persons would be next of kin by the law of France as would be by the law of England; he hoped the case might proceed, the plaintiff making the record conformable with the answer, by stating it in the bill to be an English domicile, or to allow the case to stand over to amend the bill. The object of the suit was to set aside the release, and the bill prayed that the remaining residue of the testator's property should be paid to the plaintiffs in such shares and proportions as they were entitled to it.

Lord LANGDALE said, the plaintiffs, who were the next of kin, claimed to be entitled to the personal estate of the testator, to which it was alleged that Riley was entitled, and the question was between Riley and the next of kin. There had been a release executed to Riley, and the plaintiffs prayed to set that aside, to be restored to their rights under the will, and for consequential relief. The question was open that these plaintiffs were not the only persons who were next of kin; it might be argued that this suit ought to be set aside because other persons were entitled with the plaintiffs. All persons interested ought to be before the Court. To attain this the usual course was to direct an inquiry who were the next of kin. It had often been a surprise to him that such an enquiry was not asked for before the hearing. There was no reason why it should not be asked for in an early stage of the proceedings, and the consequence of omitting to do so was, that at the hearing the only result in most cases was the direction of such an inquiry. It did not appear to him judicially who were the next of kin. The enquiry must be who they are, if Riley was not entitled. The domicile was alleged to be by the plaintiffs in one place, and by the defendant in another. If the domicile was in France, it did not appear how the law could be applicable to such a will, and the inquiry would then be if Riley was entitled to the whole or some part of the estate, and if not, then the inquiry ought to be who was entitled? His Lordship then directed an inquiry by the Master what was the domicile? If in England, who were the next of kin? If in France, whether Riley was entitled to any and what beneficial interest in the estate bequeathed by the will; if, not so entitled, who by the law of France would be entitled? His Lordship then directed the cause to be in the paper to be mentioned that day week.

QUEEN'S BENCH.—Nov. 26.

Consequences attending the removal of a Witness (however humane the motive) to prevent his giving Evidence at a Trial.

THE QUEEN v. COLCRAFT.

The indictment in this case charged that the defendant assisted in the removal of Sarah Duffield from Manchester, to prevent her ap-

pearance as a witness on a trial, well knowing that she was a material and necessary witness in a prosecution for murder against William Duffield. It appeared that the coroner's inquest upon the body of Grace Avey, at Liverpool, had returned a verdict of "wilful murder" against William Duffield, and he was accordingly committed to prison; and Sarah Duffield, his daughter, and the chief witness against him, was bound to appear as a witness at the trial. Shortly before the trial the defendant, who was the uncle of Sarah Duffield, called upon her at Manchester, where she was in service, and stated to her master that her mother was dying at Nottingham, and that it was absolutely requisite she should go to see her, or she would never see her again alive, and promised to bring her back again in two or three days. The girl went with him, but could never afterwards be found; and, as she was the only witness who saw the murder committed, the grand jury threw out the bill, and the father was set at large. This indictment was then preferred against the defendant, who, not appearing at his trial, was found guilty, and had now come up for judgment.

Several affidavits having been put in and read,

Mr. Wightman, on the part of the defendant, urged upon the consideration of the Court, that there were many mitigating circumstances in this case. There was no sordid or bad motive for what the defendant did, but he acted under the influence of the most humane feelings. It was the case of a daughter being the only witness against her own father for murder: if she appeared, he must imperatively have been convicted; if she stayed away his life would be saved; the defendant now before the Court was called upon by the wife to fetch away her daughter, and save her husband's life. He acted upon these influences, and brought away the daughter, and these feelings almost confounded one in the consideration of whether he did right or wrong. There was another circumstance that might be urged—that he had been unable to take his trial at the assizes, and appear by counsel, on account of his having been ruined by various expenses in preparation for his trial at an earlier period.

Mr. Starkie stated, he did not wish to push the case to a great length against the prisoner, who was not now brought up for judgment by the prosecutors (the corporation of Liverpool), but came up by his own desire. It was a case that their Lordships would take into their consideration, with all the circumstances urged in favour of the defendant; and they would say whether those circumstances went so far as to extenuate the great heinousness of the offence that had been committed.

The COURT having conferred together,

Mr. Justice PATTESON pronounced judgment on the defendant:—Thomas Colcraft, you have been convicted at the assizes for Liverpool on an indictment which charges you with having assisted in taking away and concealing one Sarah Duffield, she being a material witness on the prosecution, on a charge

(w) See Editor's note, id.

of murder, against a person of the name of William Duffield. It appears that she was the daughter of the prisoner, and that you, I think, were the brother of her mother. You state, by your affidavit, that the mother being ill, she desired you to bring her daughter to her, and you assisted to take her from Manchester to Nottingham, but you say when she was at Nottingham you left her, and that she was a young woman twenty years of age, and was her own mistress, and that she might have gone back to Manchester if she had chosen; but it is perfectly clear that you assisted her to get away in the first instance. That is the principal charge against you, and of that you have been found guilty. You state in your affidavit that this case has been pending for some time; that you have travelled several times to different parts of the country to find this girl, and you have been to so much expense that you are ruined. It appears you have been imprisoned one month. The Court is willing to take all these circumstances into consideration; it is certain that this offence is one of a very serious description; you have assisted to defeat the ends of public justice, and successfully too, on this occasion, prevented a person from being actually tried for what appears to be a very foul and atrocious murder. It is by your interference a person who has been guilty of that offence has been prevented from being brought to justice. Every one ought to be, and is, aware, that it is the duty of every subject, not only not to prevent the purposes of justice, but it is their duty to contribute to bring offenders to justice. This is, no doubt, a painful case in some respects, because she was the daughter of the prisoner. One can well enter into her feelings, and not be much surprised at her going away, and you were her uncle I believe; but still, for all that, it was your duty, not only not to have assisted her to go away, but to have taken care she was forthcoming at the trial. Under all the circumstances, the Court, feeling you have already suffered very considerably, are willing to be merciful, but by your example, to satisfy everybody that such an offence as this may not be repeated, and that public justice is not to be defeated by any one. The sentence of the Court is, that you be imprisoned in Her Majesty's gaol in the county of Rutland for two calendar months, and in the mean time be committed to the custody of the marshal."

Michaelmas Term.

HALLIDAY v. BEST.

Dower—Adultery of wife—effect of subsequent condonation, and she again commits Adultery upon her claim to Dower.

This was an issue from the Vice-Chancellor under a Bill filed, claiming Dower.—Elizabeth Best was married to her deceased husband on the 20th December, 1817; she left his house voluntarily in 1818, and after staying away some days, and committing adultery, of which

her husband was ignorant, she returned to him, and they lived together again. In 1822 she again left her husband, and repeated the adultery, which her husband discovered, and they never lived together again. The husband died in 1827, and the wife claimed dower.

The COURT were of opinion, it was impossible that any condonation for past adultery could indemnify the wife against the consequences of any future adultery.

COURT OF EXCHEQUER.

Sittings in Banco.

Michaelmas Term.

ONLY v. GARDINER & OTHERS.

Construction of Sec. 2. of the Statute 2 & 3 W. 4. c. 71, for shortening the time of prescription (x) in certain cases.

The enjoyment of an easement under the 2 Wil. IV. c. 71, s. 2, must be continuous—and is destroyed by a unity of possession (y) during any part of the time limited by that act

Trespass, quare clausum fregii.

Plea—that the defendants were possessed of a right of way over the *locus in quo* for 20 years next before the commencement of the suit on which issue was joined under the 71st of the 2 Wil. IV. s. 2.

At the trial, it was proved that the defendants were possessed of their present estate and also of the *locus in quo*, over which they now claimed a right of way under the act, as having been in the enjoyment thereof for 20 years next before the suit. It, however, was urged by the plaintiff that this was not an easement, such as was required by the late act for shortening the time of prescription. A verdict having been taken, subject to the objection, the plaintiff moved to enter a verdict for him.

Mauls and Richards now showed cause.—The act does not limit the 20 years' enjoyment to an adverse enjoyment, but as the defendants contend, it may be existing, though merged in unity of possession. In this case the defendants have exercised and enjoyed this right of way over the plaintiff's premises adversely for 15 years; but for the space of 5 years prior to that period, they held both their present estate and also the land over which the right of way is claimed, so that there was no dispute upon

(x) *By prescription*—which means that a man is seized in fee of a certain messuage, and that he and all those whose estate he has in the same messuage have, from time immemorial, had the way. A way, being only an *easement* and not an *interest*, should not be laid as appurtenant or appurtenant. (*Yelv. 169.*)

—*Ed.*

(y) *Unity of possession*, however, of the land to which the way is claimed as appurtenant with the land over which the way lies, extinguishes the way, for it is an answer to the prescription, and the way is against common right. 5 East. Rep. 296. 1 Bos. & Pull. 371. 5 Taunt. 311. See, also, Codling v. Johnson, 9 Barn. & C. 933.—*Ed.*

the subject. This state of facts comes within the 2 Wil. IV. c. 71. s. 2, which does not say in express terms that the claim of an easement shall be for 20 continuous years, but only that it shall be actually enjoyed by the persons claiming right thereto, without interruption for the full period of 20 years. That easement may commence in unity of possession, and it is a right which can only be defeated by such an interruption as the fourth section points out, that is to say, one submitted to for one year after notice to the party interrupted. The right of the defendants, therefore, is good until the plaintiff can shew such an interruption. This he cannot do, for none has ever taken place up to this time.

Mr. BARON PARKE—They contend that you have not been in possession of it for 20 years next before the suit, and that under the words of the statute the enjoyment must have been of actual right and continuance.

Mr. Maude—The act says nothing about a continuity of enjoyment, but expressly alludes to one without interruption. Unity of possession does not interrupt the right, but merely operates as a suspension, and it cannot be said but that while the defendants had the unity of possession the time was still running on against the world.

Mr. BARON PARKE—No doubt this would be good for a prescriptive right of way under the old law; but I fear that under the peculiar tenor of the act it will not do.

Sergeant Talfourd in reply.—The right of way claimed under this plea is one granted by a statute, and must be strictly proved. The act says it shall be enjoyed, as of actual right, for the full period of 20 years next before the suit, without interruption. Such is not the case here, for the defendants have only so held it for 15 years, the remainder being a time when they had no such enjoyment as in the eye of the law is adverse to all the world. While the unity of possession existed, the statutory enjoyment ceases to exist; and if the defendant's case is good, it might be that an enjoyment of 20 years, composed of several portions of two or more years' duration, would be held good, and the express enactment of the Legislature be thereby evaded.—*C. a. v.*

Now, Nov. 27, the COURT gave judgment, and held that the defendant, in order to make out his plea, was bound to shew a continuous and uninterrupted enjoyment of the easement, claimed under the act, for the full period of 20 years next before the suit, adversely to all the world, and that such a right is invalidated by a unity of possession during any portion of the 20 years. The plea, therefore, was not made out by shewing, that the *locus in quo* was at any time within the 20 years in the possession of the defendants, for his enjoyment is merged then in the possession, its essence being that it should be one of actual adverse enjoyment for the whole period fixed by the statute.

The rule, therefore, must be made absolute for a verdict for the plaintiff; but the defendant to be at liberty to amend, by withdraw-

ing his plea, and pleading a right of way by prescription under the common law.

Judgment accordingly.

The distinction between the case of a *unity of possession* and a *unity of seizin*, does not appear to have been always accurately observed. In *Whalley v. Thompson*, 1 Bos. & Pul. 375, Eyre, C. J. is reported to have said: "From the moment that the *possession* of two closes is united in one person, all subordinate rights and easements are *extinguished*. The only point, therefore, that could possibly be made in this case is, that the ancient right which existed, while the possession was distinct, was merely suspended, and may revive again. If it be stated that a man, and his ancestors, have been in possession of two adjoining closes, and a prescription be then set up for a way over one to the other, that prescription will be *felo de se*. If, indeed, the fields were let to different tenants, and from time immemorial, a causeway had been built over one field to the other, by which the tenants had passed and repassed; this, in user and in fact would be a road, but there would be no right to a road in point of law, for no right could exist in the owner independent of the fee simple." So in *Brooke's Abr. Extinguishment*, pl. 15.; it is said, that a way to a mill having been extinguished by unity of possession in J. S., and on J. S.'s death, partition being made amongst his daughters, and the mill being assigned to one, and the land to the other, it was held that the way revived; but it is added, *tamen videtur* that it is a new way. There are, however, many authorities to shew, that in order to create an extinguishment, the interest which the party takes in the premises over and in respect of which the easement exists, must be the same.

Thus, with regard to a charge, it has been held, that where it comes to the same person that is entitled to the land, if he has not the same title to both, there shall be no extinguishment. *Price v. Leys, Barnasdist. C. R. 117, Vin. Ab. Exting. (A. 1.)* and the same rule holds with respect to the extinguishment of rents. If the conveyance of the land to the party entitled to the rent, be only of a particular estate, of shorter duration than the estate which the lord has

n the rent service,] though there be a union of the rent, and the tenancy in the same hand, yet because that union is but temporary, the rent in such case is only suspended and not extinguished; Gilb. on Rents, 150. But it is otherwise where the same party is seized of both the premises. Thus where two were seized of two several acres of land, of which the one ought to enclose against the other, and one purchased both, and let them to several men, it was adjudged that the enclosure was not revived but remained extinguished; Poph. 167, arg. citing Hemden and Crouche's case, 26 Eliz. Vin. Ab. Extinguishment, (A). But see *id.* (C.) where it was contended that a claim of common of pasture had been extinguished by unity of possession, in King Hen. 8. It appears that in the tenements in respect of which the common was claimed, he had a fee simple absolute, while in the premises over which the right was claimed, he had only a fee simple determinable. The Court held that such an unity worked no extinguishment; for where an unity of possession extinguishes a prescriptive right, it is requisite that the party should have an estate in the lands *a quâ*, and in the lands *in quâ* equal in duration, quality, and all other circumstances of right; *Rex v. Inhab. of Hermitage*, Carth. 239. See *Thomas v. Thomas*, 2 Cro. Mee & Ros. 41. n.; in the latter case, *B. Alderson* in delivering judgment said, "If I am seized of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands the easement is necessarily suspended, but it is not extinguished, because there is no unity of seizin, and if I part with the premises, the right not being extinguished, will revive," which was then the case.

EDITOR.

COURT OF REVIEW.—Nov. 26.

In Re HALL, a Bankrupt;—JUDGMENT.

Decision of the Court upon a Fiat of Bankruptcy, obtained under Sec. 8. of the Statute for Abolishing Arrest for Debt under mesne process.—Fiat superseded.

The COURT proceeded to deliver judgment

upon this important question, and which this case presented for a final decision.

Sir G. Rose, after adverting minutely to the various points of the case, said he was of opinion that the commission was good in all the legal requisites. The trading was hardly disputable; there was a good debt, and the act of bankruptcy was valid. But when he looked at the case generally, it was doubtful whether the bankrupt was not entitled to relief. The debt was not created by the deed which had been recited; that was a mere undertaking for an account; there was no covenant constituting a debt; there might be an inference, but there was no creation of a debt to the amount of 15,000*l.* If there had been an application to restrain this fiat by an injunction, the Court might have allowed it to go on to an adjudication, but would have considered the propriety of suspending the advertisement in the *Gazette*. It would have been the duty of one of his colleagues, who entertained a decided opinion on the illegality of the fiat, to have superseded the commission. For himself, he (Sir G. Rose) thought there were equitable grounds for interference. Under similar circumstances the Court might hesitate as to the *supersedeas*, and might allow the parties to go on to a choice of assignees, in order to see whether the commission could properly be worked. Here, by accident, the parties had gone on to that point, but no other creditor had come in. It was right to draw the inference that there was no creditor under the commission; and with reference to the case, as between the applicant and the petitioning creditor, the former was entitled to say he was solvent. Such was a right conclusion from the proceedings of the creditor. How, then, was the property to be realized by proceedings in that Court? A court of equity was the only one which could effectuate a remedy. The bankrupt had had no indulgence; matters were pressed against him by intention. The suit in equity was ripe for hearing, and no injury could happen to the proper interests of the company. Ought not such a commission to be superseded? If allowed to stand, could it be worked? A choice of assignees had been left to two meetings, but had failed. It might possibly be worked by making the petitioning creditor an assignee, under an order of the Court for that purpose; but certainly, under the circumstances, he would be a most unfit person to be appointed. These being a state of things in which a commission could not be worked, it was in ordinary practice to supersede. Independent of the consideration of the suits in equity, it was right to look at the conduct of the parties and the state of the proceedings. There was no creditor to be benefited, and no means of making the commission beneficial to the petitioning creditor. There had been harsh proceedings against the applicant, who had been driven into the commission of an act of bankruptcy. He regretted to say there was a good commission in point of law, but had no hesitation in saying the Court ought to supersede on principles of equity.

Sir J. Cross said the case offered two questions—the act of bankruptcy, and the consideration of circumstances. The act of bankruptcy was created by the recent act for the abolition of imprisonment for debt. The eighth section provided that the creditor should file an affidavit in the courts of bankruptcy, alleging a debt by a person verily believed to be a trader. It was clear that the clause required such an affidavit to be made by a creditor; this was not so. The act of bankruptcy depended on two incidents—affidavit of debt, and subsequent default. The default was admitted, but it was questionable if the affidavit, without extrinsic aid, would constitute an act of bankruptcy. There were various objections to it—that it was not taken before the proper officer, not made by the proper party, and not filed in the proper place. This was a question of great public importance; and though not strictly material to the present decision, ought not to be passed over in silence. The person before whom the affidavit had been taken was a Master extraordinary in Chancery, and it was contended that he had no lawful authority thereon. If so, the intention of the Act was defeated; the eighth section would become a dead letter, and the system of bankruptcy would be nearly useless; for what had been good acts of bankruptcy in nineteen cases out of twenty, would be no longer of any avail. The eighth section did not say before whom such an affidavit should be made; it only specified when it should be filed. It was a literal transcript of the tenth section of the Bankruptcy Act, relating to proceedings against creditors being members of Parliament, directing the filing of affidavits therein, but not saying where they should be filed. The question therefore arose, what was the intention of the Legislature? It was a usual course to take affidavits before a Master extraordinary in Chancery; and the thirty-eighth section of the Bankruptcy Act provided that affidavits might be sworn before Judges, Commissioners, or Masters ordinary and extraordinary in Chancery. Was not this a matter in bankruptcy? He (Sir J. Cross) was clearly of opinion that the administration of the affidavit had been properly made under the 1st of William IV. It would be important that it should be understood that the Court entertained no doubt upon that point. The next objection was that the affidavit was not sworn by a creditor. The agent, as representative of the company, might make an affidavit; but the present one did not make the agency clear. It did not allege that the public officer was nominated pursuant to the 7th of Geo. IV. It ought to have stated that the company was carrying on business pursuant to the Act: it did not state so, but merely that the parties were united for such a purpose. This objection raised considerable doubt whether the affidavit by this party was sufficient, but it was unnecessary to give an opinion upon that point. The third objection was of public concernment; that the affidavit was not properly filed. The Act required it to be filed in

the "Courts of Bankruptcy." Now, the Court had been split into so many divisions, that it was almost a nonentity. The Act constituting the Court, made it a court of law and equity, and of record, having judicial, administrative, and ministerial authorities. The Court was thereby constituted an integral court of record. It was so carried on; and the Commissioners in the London district were incorporated in the Court itself. All went on well, until one of the Commissioners imposed a fine upon a solicitor for sending a contumacious letter. The solicitor complained to the Court of Exchequer, which discharged the fine, stating that there existed no power to impose it. The Court at the same time disclaimed such power for its own members when sitting in chambers; and held that the matter before it ought to have been referred to this Court, as in matters of Chancery. That was the case of *The King v. Faulkner*, reported in Messrs. Montagu and Ayrton's Reports. In a note appended to that report it was stated that a clause relating thereto was introduced into the act for the appointment of an Accountant-General in Bankruptcy. All this passed without any communication with this Court. The clause recited a doubt relative to the jurisdiction of the Court of Review and the Court of Commissioners, and proceeded to enact that the Commissioners' Court should be a court of record in subdivision courts, and that each commissioner should have the power of a court of record. The power to fine was emphatically incidental to a court of record. A suggestion, however, was made in Parliament, and a proviso made, that those powers should not extend to fine and imprisonment, and thus the clause was nullified. In the act for the abolition of imprisonment for debt, a similar clause was again introduced, constituting the Commissioners in Bankruptcy a court of record, with powers to make rules and orders for regulating its own proceedings. This clause was afterwards struck out. He (Sir J. Cross) had adverted to these points to show that doubts had existed as to the boundaries of the several courts; and with a view to show that the Court of Bankruptcy was one integral court, though sitting there, as the judicial bench, under a different name. The subdivision courts were precisely the same as the local boards, and had not a jot more power. The subdivision courts were mere matter of convenience, having the mere name of a court of record, but exercising none of its functions. They were merely for executing the requisite duties on flats. It had been necessary to advert to these circumstances to account for the expression of "Courts of Bankruptcy," and the subsequent use of the word "Commissioner." The subdivision court, or single commissioner, was not the Court of Bankruptcy, but members of this Court, discharging duties in a court of record. If this was a good affidavit, and by a sufficient party, there was a good act of bankruptcy. Now, this question only affected the parties before the

Court, the other was of public importance. Was this a fiat which under the circumstances ought to be sustained? If all the Courts had agreed on the insufficiency of the act of bankruptcy, a reference to these matters would have been unnecessary. Mr. Hall was a member of the company. He had no other trading, and had no debts but those alleged under the affidavits. A bill in equity was filed, with proceedings for an account. It then occurred to the plaintiff that it would be better to make the defendant a bankrupt, the new act of Parliament having provided an opportunity, if an affidavit of debt could be made large enough to drive the party into an act of bankruptcy. The representative of the company swore to a debt of 15,000*l.* without any reference to the securities, and to an amount far beyond the balance due. By this contrivance the debtor was driven by the creditor's affidavit into the snares and trammels of an act of bankruptcy. He did not find bail, and was made a bankrupt simply on the affidavit of a partner. They carried down the fiat, and applied for a provisional assignment to the petitioning creditor, a proceeding contrary to all usage. He (Sir John Cross) had had long experience as a commissioner, and certainly would never have given such a power. The cause for this provisional assignment was not shown on the proceedings. Now, mark its effects. It empowered the seizure *instante* of all real and personal estate; it enabled the parties to turn the debtor out of his house, and leave him at the mercy of his adversary in the suit in equity. The bankrupt swears there was no other creditor, and that the claim itself was *sub judice*. The Court had left the matter for the choice of assignees; but the commissioners could not stir a step. They sat their hour, and received their fees, but no creditor proved a debt, not even the petitioning creditor himself; the prosecution of the fiat broke down. This was not a case to which bankruptcy was intended to apply; it was not for equal division of property amongst creditors, there being none other than the plaintiff in equity. It would be monstrous to say that all this gentleman's property should be left at the mercy of his legal adversary. It had been doubted if there was a precedent for such a case. In the 4th Vesey, *in re Bowles*, a similar case, where there was a suit in equity, Lord Loughborough superseded with costs. He (Sir J. Cross) was of opinion, upon the merits, that this fiat ought to be superseded.

The CHIEF JUDGE said, that with regard to the trading a doubt had arisen from what had fallen from the Court on a former occasion, when an individual had endeavoured to support a fiat upon the purchase of shares to enable a friend to sue out a commission. This the Court would not allow; but it had never said that a shareholder did not make himself a trader as a banker, and would not allow such a person to set up a denial of trading. Here the person was not only a shareholder, but a manager, and there could be no doubt as to the trading. He thought the fiat was well sued

out by the requisite officer for a debt due to the company. This was allowable under the 1 & 2 Vic. c. 96. The decision in "Guthrie and Fisk" against a fiat was, in reference to a private act of Parliament, to be construed strictly. The Legislature had since extended the powers of banking companies. The affidavit adverted to had been duly filed and served; and the question was, if it was properly sworn. The statute was silent, as in 6 Geo. IV., leaving the conclusion that it was intended to be sworn by persons permitted to take, and before persons empowered to receive, affidavits in bankruptcy proceedings. As regarded the person to take the affidavit, if it was a question of pleading, its sufficiency might be doubtful, but affidavits in bankruptcy were not sworn to such nicety. On none of those grounds had the validity of the fiat been disturbed. He (the Chief Judge) had the misfortune not to see the case in such a strong light as his colleagues, and should have hesitated to supersede. Still there was enough to induce him to think that the judgment of the Court would indicate the proper course. There had been harsh proceedings, and the respondents were not entitled to benefit thereby. He would, however, have preferred waiting to see whether the fiat could be worked by other hands. He scarcely relied on the bankrupt's solvency, and saw no reason to think the fiat had been sued out by the respondents to rid themselves of the petitioner. It was a strong circumstance that no other creditor had proved; and as his colleagues thought it a case for a *supersedesas*, though, for his own part, he would have preferred waiting, the Court would order the fiat to be annulled.

Fiat superseded with costs.

Reviews of New Books.

The Mirror of Parliament, Part 490, No. 51. Nov. 17th, 1838. Second Series, commencing with the reign of Queen Victoria. Edited by JOHN HENRY BARRON, Esq. Barrister at Law. Session 1st Victoria, 1837-8. London, Longman, Orme, Brown, Green & Longmans, Paternoster Row; John Murray, Albemarle Street; and J. Richards & Co. Fleet Street. Subscription, five shillings per week during the entire Session, exclusive of the Index, Abstract of Parliamentary Papers, &c. &c.

This is a periodical of very great use to that part of the legal profession who have Parliamentary practice. To the Member of Parliament and general reader it affords abundant information of the transactions in the Houses of Lords and Commons. The present number contains a full report of the debate on the clauses proposed by Lord

Sandon, in the abolition of Imprisonment for debt Bill on the 24th July last, which were negatived. The debates upon this bill should be read by every professional man, and they are in this periodical detailed with great care. It also contains the debate upon the Bishop of Exeter's question to Ministers as to the Earl of Durham's instructions on the 23d July last, and much other interesting matter, which is highly valuable.

The LAW STUDENT'S Common Place Book, being a Collection of Titles, Divisions, and Subdivisions of THE LAW, arranged Alphabetically with references to the Authorities to be consulted on each Title, or Division, and with appropriate blanks to enable the Student to insert such Notes or Memorandums as the progress of his reading or experience may suggest, or alterations or amendments in the Law render necessary. Compiled and arranged from the MSS. of Charles Petersdorff, Esq. of the Inner Temple. London, L. Houghton, 30, Poultry; Henry Butterworth, 7, Fleet Street.

This is an excellent work, not only for Students, but also for all practitioners, as a Tabular Note Book, wherein all legal subjects are classified and arranged alphabetically, and which, by being kept regularly posted up, assumes the form of a Practice Book, which under care and attention united with industry, must be of very great service, and save much time that would, but for its consequent information, be occupied in research.

A Letter to the Right Hon. the Lord Chancellor on the present state of the Law of Lenacy, with suggestions for its amendment, by a Barrister of the Inner Temple, London, William Crofts, 19, Chancery Lane, 1838.

The simple object of the writer appears to be to draw his Lordship's attention to the fact, that by the law as it now stands an idiot "—a monomaniac—the mere lovely and quiet sufferer from morbid feeling and imagination, is placed in a worse condition, and a more perilous situation with regard to his personal liberty, than the criminal, who by his delinquencies has rendered himself liable to punishment. The property of an actual or supposed lunatic is infinitely better guarded than his person, indeed property receives all the protection which can be bestowed; but let the individual himself be never so inoffensive, and sane upon every subject but one, his per-

sonal liberty can at all times be placed in jeopardy by the written order of a friend, when backed by the warrant of two physicians, surgeons, or apothecaries."

Upon this "startling anomaly in the jurisprudence of England," the writer addresses the Chancellor in a lucid and intelligible manner. The pamphlet merits the attention of our readers.

Business in the Courts.

COURT OF CHANCERY.

Rawson v. Samuel, appeal motion for judgment—*In re Taylor*, lunatic petition, to be spoke to—Watson v. Murray, further directions by order.

Appeals.

Eyre v. Marsden, part heard—Wood v. White—Fradgley v. Campbell.

Causes.

Lewis v. Rees—Morris v. Palmer—Swain v. Pratt—Orton v. Ditto, exceptions, further directions, and costs—Curtis v. Lloyd.

VICE-CHANCELLOR'S COURT.

Short Causes.

Rawson v. Bowman—Askew v. Peddle—Barnes v. Barnes—Cowborne v. Marshall—Kaye v. Peile—Dyson v. Oakley, further directions—Wise v. Edkin, ditto and petition.

Unopposed Petitions.

Beadles v. Russell—Saxby v. Saxby—Cochetane v. Robinson—Powell v. Longden—*In re Harrison*—Simmonds v. Barber—Peach v. Pigion—Dawson v. Dawson—Stonnell v. Browning—*In re Webb*—*In re Antholin Trust Estate*—*In re Mill-hill Grammar School*—*In re Bowman*—*Ex parte Overton*—Shipley v. Shipley—Wray v. Field—*In re York Estates*—*In re Wisbech Charities*—*In re Oadly Charities*—Taunton v. Mouzen—Shirley v. Lord Manners—Slaughter v. Ferrier—Cannings v. Flower—*Ex parte Evans*—Boulger v. Blandy.

After the Petitions.

De Tastet v. Thorpe, to be spoke to—Bradly v. Birch, ditto—Davis v. Pitt, ditto—*In re Dorchester Charities*, petition by order—Julian v. Powell, ditto—Holmes v. Crispe, ditto—Plowes v. Bossy, ditto.

COURT OF QUEEN'S BENCH.

Middlesex Common Juries.

Farrar and others v. Hutchison—Lewis v. Ponsford—Wilson v. Knapp and another—Basta v. Ryan—Devonald v. Hope—Melton v. Harvey—Pierson v. Pain and another—Phillips v. Croucher—Doe, dem. I've, v. Scott—Farrington v. Tilley and another—Blewitt v. Morgan—Walton v. Gomme—Daniel v. Smith—Jones v. London and Birmingham Railway.

ROLLS COURT.

The following notice has been posted in the Registrar's Office:

"The Master of the Rolls, taking notice that there are now remaining in his Lordship's cause-book, to be heard, several pleas

demurrs, exceptions, further directions, and causes, which have stood over for a considerable time, and it is probable that the matters in difference in some of them are accommodated, is pleased to direct that all such pleas, demurrs, exceptions, further directions, and causes which are now remaining in his Lordship's cause-book to be heard, and now marked 'to stand over,' will, on the first day of hearing pleas, &c., in next Hilary Term (if not previously disposed of) be called on and then struck out of the paper, unless good cause be shown to the contrary; and that in future no pleas, demurrs, exceptions, further directions, and causes be allowed to stand over to an indefinite period.

"Registrar's Office, December 5."

Motions continued.

General Paper after the Motions.

Wilmott v. Jenkins, part heard—Feary v. Stephenson—Canning v. Bell—Hughes v. Hughes—Saward v. M'Donnell—Close v. Wilberforce.

COURT OF COMMON PLEAS.

Middlesex Special Juries.

Story v. Richardson and another—Reed v. Baillie—Douglas v. Chalk and another.

Middlesex Common Juries.

Goodricke v. Wood—Smith v. Bull—Rose v. Smith—Priddey v. Leman.

The last Common Jury cause is No. 21 on the list.

COURT OF EXCHEQUER.

The Court having disposed of all the Middlesex cases will sit in London this day.

EQUITY EXCHEQUER.

Petitions.

Re Mayor, &c., of Hythe—Re Stafford and Worcester Canal, petition of Brewood School—Re Great Western Railway, petition of Edridge—Re North Union Railway, petition of Legh—Re Liverpool and Manchester Railway, petition of Newton—Re Kenyon and Leigh Railway, petition of the same—Re North Midland Railway, petition of Rimington—Re Birmingham Railway, petition of Harrison—Re Paddington Charity Estate, petition of Campbell—Re Eastern Counties Railway, petition of Baker—Re Birmingham Canal Navigation, petition of Addenbrooke—Re Eastern Counties Railway, petition of Stephens—Re Bristol General Cemetery Act, petition of Butler—Thompson v. Webster—Bakewell v. Tagart—Prebble v. Fenner—Crawford v. Holden—Berrington v. Evans, petition of Dillwyn—Blenkinson v. Foster.

After the petitions—motions.

TO CORRESPONDENTS.

We do not engage to answer cases for professional gentlemen, upon matters of business that come within their practice, and for which they receive remuneration—such cases are our bread and cheese. We

wish to be useful to all the profession, but, in being so, we must not destroy our ways and means.

"A Student."—We have inserted as much of his "Answer to Problem IV." as our limited space will afford him. We commend his industry, but we cannot congratulate him upon the view he has taken of this statute, as we did upon his construction of Problem I. Such parts of Problem IV. as he has construed, we have been obliged to make plain and intelligible, which should not be. Much also remains to be shewn. He must retrace his steps and study sects. 36, 38, 94, and 119.

"F."—We advise him to the same course of study.

"Veritas" compels us to repeat that in our prospectus we declared, that "we had no intention of interfering with our contemporaries," we "live in charity with all men," and really wish that all men would do the like by us. The evil complained of by "Veritas" carries its own remedy along with it, and if he is dissatisfied with that which he thinks proper to purchase, who is to blame but himself? Men may write what they please; but the public are neither compelled to read nor buy. Our business is with ourselves and our "Guide," and not with any contemporary. We shall never be found wanting in our pledges for its conduct.

"R. G. S" shall have attention in our next, though we doubt much whether our noticing his suggestion will be of any service to the profession, and we can only spare a corner in our columns for utility's sake; the remedy lies alone with the Masters in Chancery.

"J. W. B." shall be attended to in our next.

"J. E." in our next.

TO OUR COUNTRY CORRESPONDENTS.

We stated our intention (z) to issue a stamped edition of this paper for the country, at the extra price of the stamp only—our publishers have received such large country orders, (but not, as required by us, post paid, which having put us to considerable expence, we must request may be observed in future) that, having made the necessary arrangements, we now announce that we shall commence issuing a stamped edition for the country on Saturday next, December 15, which will be forwarded by the mail on that night, post free, and every succeeding Saturday, to our country subscribers.

(z) Aut. p. 48.

The Legal Guide.

SATURDAY, DECEMBER 15, 1838.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 83.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

IN continuation of our observations upon the state of the Law previous to the passing of this Statute, we proceed to Sect. 27, which *saves the Jurisdiction of Equity*, on the ground of *acquiescence* or otherwise; it is therefore the more necessary that this jurisdiction should be well understood at the present day.

Long acquiescence by a party acquainted with the facts is a bar to equitable relief. (See *Selsey v. Rhodes*, 2 Sim & Stu. 41.) So also length of time or long acquiescence in a transaction may bar relief in cases where the transaction, if impeached within a reasonable time, would be set aside. (See *Hickes v. Cooke*, 4 Dowl. 16.) But to fix acquiescence upon a party, it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers. The doctrine of acquiescence does not apply where all the parties are under the influence of a common mistake (see 2 Mer. 352); and where a party is ignorant that he has a right to dispute there can be no acquiescence. See *Cholmondeley v. Clinton*, 2 Mer. 362. A *cestui que trust* concurring or acquiescing in a

breach of trust by the trustee, is barred of relief. See *Walker v. Symonds*, 3 Swanst. 64; *Brice v. Stokes*, 11 Ves. 319; *Ryder v. Bickerton*, id. 83. n. *Underwood v. Stevens*, 1 Mer. 712.; *Trafford v. Boehm*, 3 Atk. 444. In the former case it was observed by Lord Eldon that, "it is established by all the cases, if the *cestui que trust* joins with the trustees in that which is a breach of trust knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust, and either concurrence in the act or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the Court must enquire into the circumstances which induced concurrence or acquiescence, recollecting in the conduct of that inquiry how important it is on the one hand to secure the property of the *cestui que trust*, and on the other not to deter men from undertaking trusts."

But this doctrine of acquiescence must be construed differently, in the relation of *husband and wife*. In *Honner v. Morton*, 3 Russ. 65. S. P. *Watson v. Dennis*, id. 90. the wife had a vested interest in remainder expectant on the death of a tenant for life, in an ascertained fund, *the wife and tenant for life survived the husband*. Previous to the death of the husband he and his wife executed four assignments, by which they assigned portions of the fund for valuable consideration; *after the death of the husband the wife assigned to one of the former purchasers by indorsement on the first purchase-deed, a further portion*

of the fund, and the deed recited that the purchaser was entitled to that portion of the fund he had first purchased, and referred to the three other assignments. She afterwards filed a bill, insisting that the assignments made while her husband and the tenant for life were living, did not bind her, and the question rose was, whether when a husband and wife have assigned to a purchaser for valuable consideration, an ascertained fund in which the wife has a vested reversionary interest expectant on the death of a tenant for life, and the wife and the tenant for life both outlive the husband, the wife is entitled by right of survivorship to claim the whole of the fund against such particular assignee for valuable consideration.

The *Lord Chancellor* said, that this fund was a *chose in action* of the wife; it was her reversionary *chose in action*. Whether the husband has the power of assigning his wife's reversionary interest in a *chose in action*, is a question which has been repeatedly agitated, and has excited considerable interest both at law and in equity. At law the *chooses in action* of the wife belong to the husband if he reduces them into possession. If he does not reduce them into possession and dies before his wife, they survive to her. When the husband assigns the *chose in action* of his wife, one would suppose on the first impression, that the assignee would not be in a better situation than the assignor, and that he too must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But *equity* considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do as actually done, and therefore where the husband has the power of reducing the property into possession, his assignment of the *chose in action* of the wife will be regarded as a reduction of it into possession. On the other hand, his Lordship said, he should also infer that where the husband has not the power of reducing the *chose in action* into possession, his assignment does not transfer the property till by subsequent events he comes into the situation of being

able to reduce the property into possession, and then his previous assignment will operate on his actual situation, and the property will be transferred. His Lordship concluded that the judgment of the Master of the Rolls, in *Purdew v. Jackson*, (a) was right, and that the husband dying while the wife's interest continued reversionary, had no power to make an assignment of property of this description, which should be valid against the wife surviving, and declared that the four assignments made during the husband's life-time could not be sustained.

His Lordship observed, upon the allegation, that there had been *aciver and acquiescence* on the part of the wife, because the suit was not instituted, and the assignments were not called in question till more than seven years after the husband's death; but the bill was filed the month following the death of the tenant for life, and the wife was not called upon to take any step till the death of the tenant for life.

And with reference to the assignment executed by the wife after the husband's death, which is made subject to the former assignments also there recited, and was relied upon as amounting to a recognition and confirmation of those assignments. His Lordship continued, it would be too much to attribute such an effect to such recitals and such phrases, which were intended merely to state the order in which the assignments were to have priority. See on this subject *Mitford v. Mitford*, 9 Ves. J. 99; *White v. St. Barbe*, 1 Ves. & B. 405; *Hornsby v. Lee*, 2 Mad. 16; *Dawbury v. Atkins*, Gilb. Eq. Rep. 88; *Grey v. Kentish*, 1 Atk. 280; *Bates v. Dandy*, 2 id. 208; 1 Russ. 33, 3 id. 73, and cases cited in the latter; *Bush v. Dalway*, 1 Ves. S. 19, 3 Atk. 530; *Hawkins v. Obyn*, 2 Atk. 549; *Duke of Chandos v. Talbot*, 1 P. Wms. 602; *Theobald v. Duffoy*, 9 Mod. 102; *Woollards v. Crowcher*, 12 Ves. J. 177; *Howard v. Damiani*, 2 Jac. & W. 458; *Gayer v. Wilkinson*, 1 Bro. C. C. 50; *Gage v. Acton*, 1 Salk. 327; 1 Id. Raym. 115, upon which case see 4 Term Rep. 385, where Lord Ken-

(a) 1 Russ. 1.

yon observed that the opinion of Lord Holt was as repugnant to the rules of law as of equity.

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM V.

In the first place, the stat. 3 & 4 Wm. 4. c. 42. (b) sec. 2. enacts, that actions of trespass, or trespass on the case, as the case may be, for injuries to the real estate of a person deceased, may be brought by his executor or administrator, for any injury done to the real estate of such deceased committed in his life time; so that such injury shall have been committed within six calendar months before the death of such person deceased; and the action be brought within one year after his death; and for which an action might have been maintained by the deceased: the damages, when recovered, to form part of his personal estate. This enactment created a remedy for that damage which had no provision by law. The same section also enacts that actions (c) may be brought against executors or administrators, for any injury to property real or personal, which any person deceased had committed in his life time to the property of another, in respect of such property; provided such injury should have been committed within six calendar months before such person's death, and the action brought within six calendar months after such executors or administrators shall have taken upon themselves administration; and the damages, when recovered in any such action, to be payable in the order of administration as simple contract debts. (d) This also is new law. By the stat. 4 Edw. 3. c. 7., a right of action was given to executors for a trespass done to the goods and CHATTELS of

their testator, which was extended by 25 Ed. 3. c. 5. s. 5. to executors of executors; and, by an *equitable construction*, to administrators also; so that, by those statutes, an executor or administrator might have maintained an action for an injury done to the personal estate of the testator, or intestate in his life-time, whereby that estate became less beneficial, whatever the form of action might be. But the stat. of Ed. 3. did not extend to the freehold of the testator, and therefore the executors or administrators before the act 3 & 4 Wm. 4. c. 42., could not have maintained any action relating to the freehold, for such died with the person, unless the profits of the estate were affected, to render the personal estate of the deceased less valuable; such having been the gist of many decisions.

By sect. 3, positive limitations are given to actions of debt for rent, upon an indenture of demise, all actions of covenant, or debt upon any bond, or other specialty, and all actions of debt, or *scire facias* upon any recognizance, (e) to ten years from the then session of Parliament, or twenty years from the cause of such actions. (Bonds securing money, for a long time prior to this act, were presumed to be paid, or satisfied after twenty years.) Actions by the party grieved, one year after the end of the session, or within two years from the cause of action, and all other actions within three years from such session, or within six years after the causes of action. Sec. 14 also, gives a new remedy, by enacting that an action of debt on simple contract shall be maintained in any court of law against any executor or administrator. (f)

In actions to recover any debt or demand, depending in any of the superior courts, where the sum sought to be recovered and endorsed on the writ of summons does not

(b) Personal actions both *ex contractu* and *ex delicto* are affected by this statute, which was passed as supplemental to the 21 Jac. 1. c. 16., the provisions of which extended to Scotland. By sec. 7 of this act, however, no part of the United Kingdom of Great Britain and Ireland, nor the Isles of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to them are to be deemed beyond seas.—Ed.

(c) Of trespass, or *trespass on the case*.—Ed.

(d) See Tid. Practice, 9 ed. 9.—Ed.

(e) And also all actions of debt upon any award, where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved by any statute.—Ed.

(f) Heretofore an action of debt would not lie in all cases against an executor or administrator.—Ed.

exceed 20*l.*, and where no difficult question of law or fact is likely to arise, the court in which the same is pending, or a judge of the court, may order the issues to be tried before the sheriff of the county where the action is brought, or the judge of any court of record for the recovery of debt therein, who is to summon a jury to try such issues, and return the verdict to the court at a certain day, in term or vacation, sec. 17.

Sec. 21, enacts, that in all personal actions (except assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, debauching the plaintiff's daughter or servant) a defendant by leave of the court, or a judge of the same, wherein such action is pending, may pay money into court by way of compensation or amends.

To prevent unnecessary delay and expense, by sec. 22, local actions may be tried, by order of the court, or a judge, on the application of either party, in any other county, than where the venue is laid. (g)

In actions of trover or trespass *de bonis asportatis* also, the jury upon the trial, may if they think fit, give damages in the nature of interest, over and above the value of the goods at the time of the seizure and conversion.

A further alteration was likewise made in the law regarding executors and administrators, suing in right of their testator or intestate; sec. 31, enacting that they should be liable to pay costs to the defendant, unless the court, or judge, should otherwise order, in case of being non-suited, or a verdict passing against the plaintiff; and in all other cases where he would be liable if the plaintiff sued in his own right, upon a cause of action accruing to himself, the defendant should have judgment, and that they should be recovered in like manner. (h)

In conclusion allow me to return thanks for the valuable mode you have adopted, in making your pages the means of incit-

(g) For which purpose the court or judge may order a suggestion to be entered on the record.—Ed.

(h) Sect. 13, enacts that no wager of law shall be hereafter allowed. See Tid. Pr. ed. 9. 649.—Ed.

ing to diligence; and to say to my fellow students, that they bear in mind *qui non laborat non manducet*,

I remain,

Your obedient servant,

J. E.

PROBLEM VII.

WHAT ARE THE CHANGES THAT HAVE BEEN EFFECTED BY THE STATUTE 3 & 4 W. 4. c. 26, AS TO THE COMPETENCY AND EXAMINATION OF WITNESSES.

TO THE EDITOR OF THE LEGAL GUIDE.

Sir,—I shall feel much obliged, either by your favouring me with your opinion on the following case, or by giving it publicity in your paper, so that I may have the advice of any of your readers on the subject.

I was articled in the latter part of the year 1833 for five years, and served for two years, when my health became so bad that I was obliged to go a voyage up the Mediterranean, where I remained for six months by the advice of my doctor, and with the consent of my master, who will make affidavit.

I then returned to my office, and served one year and a half, that is, till the expiration of the fourth year, when I again became so ill, that I was again necessarily absent for the space of three months; and before I had so far recovered as to be able to undergo the fatigues of the office, circumstances occurred to make me give up all idea of serving the remaining portion of my articles, which expired in the month of October last. It has since become necessary that I should return to the study of my profession, and I particularly wish to know whether in your opinion the Court would make a conditional order (at present) that, on my making up the time I was absent my service should be deemed sufficient, without being articled again, and serving a full term of five years.

The principal difficulty arises from my articles having expired, and whether the Court would allow the service under my first articles to be coupled with any after service. The only case at all in point is Ex

parte Unthank, 2 M. & P. 453, where a person after serving only two months, gave up the profession, and was afterwards assigned to a solicitor, and served a term of two years and 10 months (he was a B. A.); the Court held that the one service could not be coupled with the other, as the first articles had expired. But it may be fairly contended that in the case above cited there was not the same equitable cause for relief, I having served bona fide four years.

And moreover the Courts seem now to be putting a more liberal construction of cases of mere defective service, on the ground of the necessity of passing an examination. See *Ex parte Hodge*, reported in your Journal, where an absence of above 12 months was excused on the ground of ill health; and an order was in that case made that the applicant be allowed to go in for his examination.—Yours, &c.

J. W. B.

OPINION.

J. W. B. has most certainly an equitable claim upon the Court for relief; but relief is involved in some difficulty by reason of the *articles having expired*.

The Statutes 2 Geo. II. c. 23. sec. 5. and 22 Geo. II. c. 46. s. 8. require the clerk to continue during the whole period specified in the contract in the service of the master, and to be actually employed by him or his agent in the proper business of an attorney or solicitor.

J. W. B. is in error as to *Ex parte Unthank*, 2 M. & P. 453, being "the only case at all in point," and the decision in that case was upon the *assignment* of that which was not in existence. The articles having expired previous to the assignment.

The case of *Rowle*, 2 Chitty 61. is more in point; there the clerk had served part of his time with a master, who afterwards left this country, and, before he got his articles assigned, ten months elapsed, during which he did not serve; but afterwards served the then remainder of the articles with another master, and applied to the Court to be admitted, which was refused until he had served the lapsed ten months under new articles. It has also been ruled that the five years' service need not be continuous. See *Ex parte*

Hill, 2 W. Blacks. 957. In *Smith's case*, 1 Dow. & Ry. 14. the clerk had served part of his time with an attorney who died before the clerkship was completed, and six years elapsed, after which he served the lost time with another attorney, and was allowed to be admitted. This is certainly in opposition to *Taylor's case*, 4 Barn. & C. 341; 6 Dow. & Ry. 428; 5 Barn. & Co. 538; in which it was held that service under the first articles could not be coupled with service under the second articles; but in that case there was no equitable claim for relief.

Matthews's case, 1 Barn. & A. 160. also approaches the present; there the clerk had served two years and a half, when he was prevented by illness from giving regular attention to business during the rest of the term; but attended as his health permitted, and the Court allowed him to be admitted.

Ill health appears to be the equity of J. W. B., and we are inclined to be of opinion that upon his serving his *lapsed* time under new articles he will be entitled to admission.

We nevertheless advise him to apply to the Court, as in *Hodge's case*, for liberty to go before the examiner under his *expired articles*, offering satisfactory evidence of his ill state of health, relying upon *Matthews's* and *Hodge's* cases for an order.—En. (i)

CHANCERY WARRANTS.

TO THE EDITOR OF THE LEGAL GUIDE.

Sir,—I wish to suggest to the profession through the medium of your valuable work, an alteration in the form of the warrant issuing out of the Master's office in Chancery.

The present form is as follows: "By virtue of an order of reference I do appoint to consider of the matters thereby referred, on Saturday next at 11 of the clock in the forenoon," &c. &c. and then follows the date, &c.

Now it would be much better to follow the example adopted in the Exchequer warrants, of adding not only the day of the week, but also the day of the month, in the warrant, as it would save to solicitors, when

(i) See Notice to Correspondents.

taxing costs, a vast deal of trouble, and a reference to the Master's books to ascertain the exact time when the warrant was attended, as the production of the warrant now to the clerk in court taxing, only shews that the warrant was returnable on "Saturday next at 11," and is no check against the solicitor's bill, which only shews the day of the month of the attendance.—Yours, most obediently.

R. G. S.

Law Reports.

COURT OF CHANCERY.—Dec. 6.

CURTIS v. LLOYD.

Practice—the Right of a Plaintiff to dismiss his Bill.

In this case the plaintiff, who had filed a bill against the defendant, applied to have it dismissed on payment of costs.

The *Solicitor-General*, for the defendant, contended that when the Court was in possession of a cause by commencing its discussion, it was not competent to the plaintiff to dismiss his bill on payment of costs.

Mr. *Wakefield*, for the plaintiff, likened the case to a non-suit at law, and quoted the opinion of Lord Hardwicke, in *Carrington v. Holly*, Dick. 280, that a plaintiff after issue directed may at any time before issue tried, move to dismiss his bill.

The *LORD CHANCELLOR* said, that before argument the same result must follow from the non-appearance of the plaintiff. He could not understand why he should be in a worse situation in consequence of informing the Court of his intention. He felt no difficulty in allowing the plaintiff to dismiss his bill with costs in the present case, although he was not aware that the Court had gone so far as Lord Hardwicke was reported to have done.

But a cause once set down for hearing, the bill cannot be afterwards dismissed on mere motion, *Lyonce v. Wye*, 9 Price, 166. So where a plaintiff sues on behalf of himself and other parties concerned in the same interest, which he may do to avoid a multiplicity of suits, he cannot dismiss his bill *after decree*, because it not only provides for himself, but for other persons. *White v. Lord Westmeath*, 1 Beat. 177. Nor can a plaintiff dismiss his bill, in any case *after decree*. *Guilbert v. Halls*, 2 Freem. 158; 1 Ch. Ca. 40.

Nor can a plaintiff dismiss his bill by consent *after decree*; but an arrangement for disposing of the fund in Court may have

effect by consent on further directions. *Lashby v. Hogg*, 11 Ves. J. 602. Nor can he move to dismiss his bill after the trial of issue. *Gartside v. Isherwood*, Dick. 612.

Nor can a plaintiff dismiss his bill *without costs*. *Dixon v. Parke*, 1 Ves. J. 402. *Anon.* 1 id. 140. But he may do so with the express consent of the defendant in Court. *Fidelle v. Evans*, 1 Cox, 27. S. C. 1 Bro. C. C. 267. *With costs it is of course.* *Dixon v. Parke*.

Nor can a bill be dismissed by agreement of the parties: there must be some step taken in Court. *Rowe v. Wood*, 1 Jac. & W. 345.—ED.

ROLLS COURT.—Dec. 10.

BULMER v. THOMAS.

Practice—Injunction ex parte.

Mr. *Pemberton* moved for an injunction *ex parte*. The bill had been filed, but the defendants had not appeared, nor had they been served with *subpoenas*.

Lord *LANGDALE* said he was afraid of such an example. The plaintiff filed a bill, and gave intimation that he had done so; but instead of prosecuting it with diligence, no subpoena was served, and now he came as if the application were made immediately after the bill was filed. He could not do it *ex parte*.

An injunction will be allowed to be moved for *ex parte* in a pressing case *after* the defendants have been served with *subpoenas*, and entered appearances. See *Acraman v. Bristol Dock Company*, 1 Russ. & M. 321; and though that part of the bill preliminary to the prayer for *subpoena* asks for an injunction, yet if the prayer is not also for *subpoena*, that is a sufficient ground for refusing an injunction. See *Ambler*, 70, note.—ED.

CLOSE v. WILBERFORCE.

Liability of an Equitable Assignee to perform Covenants in the Lease. (a)

Major *Closes* filed a bill against the defendant, to compel the payment of a sum for the repairs of a farm-house and premises at Kilburn.

The premises belonged to the Rev. Thomas Hyde Ripley, by whom they were leased to a Mrs. Jeffries for a term which expired in Michaelmas, 1835. In May, 1823, Mrs. Jeffries underleased the premises to the plaintiff, who afterwards by deed poll, in 1825,

assigned his lease to three trustees in trust for the London and Westminster Dairy Company. That company did not succeed, and in 1826, the lease was to be disposed of by public auction, and particulars of sale were prepared, but it was not put up to auction, for the defendant became the purchaser. Upon this occasion the particulars of sale were used for the contract, in which it was stated that the unexpired term of the lease was nine years and a half, that the rent was 300*l.* a-year, and the tenant bound to repair. The fourth condition was, that the purchaser on payment of the purchase-money was to receive possession of the lease and other title deeds, but was not to be entitled to any assignment to him, or to the production of the lessor's, or the investigation of the vendor's, title. The contract was that the defendant agreed to purchase, subject to the annexed conditions, and to give the sum of 100*l.* At the expiration of the term Mrs. Jeffries brought an action against Major Close upon his covenant, in the under lease, to repair, and the Major gave his cognovit for 450*l.*, the estimated amount of the repairs, and filed the present bill against the defendant to obtain repayment from him.

Mr. *Pemberton*, for the plaintiff, contended that the defendant was equitable assignee of the lease; he took the interest in the farm for the whole term of the lease. He had not the legal estate, and therefore was not liable at law, but was liable in this Court.

Sir C. *Wetherell*, for the defendant said, the farm was at Kilburn, very conveniently situated for a dairy for the supply of the metropolis, and the plaintiff took it at a rent of 300*l.* a-year. In 1825, the *annus fatuus* of companies, the Westminster Dairy Company purchased the lease from the plaintiff, who was a shareholder in the company, and continued as their manager, but the farm was not a land of milk and honey for the company, which soon became *functus officio*. There had been no assignment to the company, but only to trustees named for them. The plaintiff got for his lease 1,629*l.* from the company. When the company was dissolved, the defendant purchased a great number of their cows and stock, and laid out 8,000*l.*, but he never meant to be assignee; he did not wish an assignment from the plaintiff, he wished one from other persons, but never had it. The company only contracted with him for the possession of the land. It was a contract for the possession during the remainder of the term, and not a contract to be assignee, and if a bill for specific performance had been filed, the defendant could not have been compelled to accept of an assignment. His agreement was, that he should have a mere naked possession, should be occupant, but not assignee. There was no right to compel him to be assignee, nor any legal liability on him to pay for the repairs. To make him liable would be a mischievous precedent, as it would lead to an inference that from a bare possession the party possessing was an assignee. .

Mr. *Tinney* contended that if the plaintiff had any remedy it was at law. The company ought to pay for the repairs, and the plaintiffs had funds in their hands. It was a demand in the nature of damages, and Courts of Equity never gave that relief. From the moment he paid rent, the defendant became tenant from year to year; but he had had no right to call for the possession of the lease or for an assignment, and consequently was not liable as assignee.

Mr. *Pemberton* replied, that the defendant was equitable assignee, and therefore the remedy was in equity, and not at law, and the defendant was answerable for the repairs.

Lord *LANGDALE* said, it was an agreement to have in equity the leasehold interest to purchase the equitable interest in the whole leasehold estate, but not to have a legal assignment. If the defendant had accepted a legal assignment, there could have been no doubt of his legal liability; the lessee would have been a surety, and entitled to call for his indemnity, and then it would not have been necessary to come to this Court. He thought the defendant had all the equitable interest, and his obligation was co-extensive with his interest, and he was bound to indemnify the plaintiff. He was not sure that 450*l.* was the sum to be paid, and if the parties could not agree on that point, there must be an inquiry.

See ante p. 25; and we need only add that the rule of law is now clearly settled, that to charge any person in covenant as assignee, *first*, the covenant must relate to the land demised, and *secondly*, *there must be a priority of estate between the assignee and covenantee*; and if he is to be charged as assignee of the lessee, he must have in him the whole term and interest of the lessee. So if the subject matter of a *covenant running with the land* has existence at the time of the demise, the *assignee* is bound, though he be not named; but a covenant in a lease can only affect assignees claiming subsequent to the lease. See *Chandos v. Brownlow*, 2 Ridg. P. C. 406. 412.

As regards the case here reported, we believe it to be the first of its kind. Upon principle, it having been proved that the defendant had been in possession as equitable assignee of the lease, *when it expired*, he was in equity liable to all breaches of covenant for which his lessor had suffered damage, and for which he had no remedy at law.—*ED.*

QUEEN'S BENCH.
Michaelmas Term, 1838.

BARTRAM v. CADDY.

Promissory Note—as to its being re-issued.

This action was brought by the indorsee of a promissory note for 20*l.*, payable on demand, against the indorser. To these two pleas were pleaded, first, that Hatherley and Hamlyn made the note, and that the defendant had indorsed it as a security for a debt due from the plaintiff to them, which debt was paid, and then that the note had been re-delivered to Hatherley and Hamlyn, and that the latter had placed it with the plaintiff as a security for a debt of his own. There was a second plea, that Hamlyn had been guilty of fraud, and the plaintiff of negligence. These pleas were demurred to, and the point was, whether this second indorsement was not, by the 55 Geo. III. c. 184, illegal.

The Court held, that the debt having been paid, for which the note had been originally given, it had been satisfied; and in the case of *Freakley v. Fox*,^(k) it had been decided, that under such circumstances a note could not be re-issued, and the statute fully bore out this ruling, because the note had evidently been treated as satisfied.

Judgment for the defendant.

See also *Workford v. Workford*, 1 Salk. 299; *Cheetham v. Ward*, 1 Bos. & Pull. 630. An acceptance is void in all cases in the hands of a person aware of an illegality in its making or issue.—ED.

Dec. 6.

Sittings at Nisi Prius.

SAMUEL v. DAVIS.

Subpoena—Liability of Partners to attend a Subpoena served upon one of them.

This was an action brought to recover the amount of the expenses to which the plaintiff had been put to in consequence of the defendant not having attended the Court as a witness, in pursuance of his subpoena.

The defendant pleaded, first, the general issue—not guilty: and several special pleas.

It appeared, that there had been a cause in the Exchequer in which the plaintiff was a party, and that it was requisite to produce a warrant which had been issued, and which had been directed to the defendant Davis and to Whittaker, who were sheriff's officers. The attorney of Mr. Samuel, therefore, went to Davis and served him with a subpoena to attend and produce the warrant; upon which occasion Davis told him that he knew nothing of the transaction, but that the warrant had been executed by his partner Whittaker, who was the proper person to be subpoenaed. The attorney told him he did not care which of them attended, but the warrant must be in

Court. He left the subpoena with Davis, and endeavoured to find Whittaker, to give him one also, but he could not find him. The cause was subsequently put down for trial in a list of causes which were to be tried on a Saturday. Whittaker was in attendance at the court the whole of that day with the warrant, but the cause was not called on, and he was not subpoenaed: the case was then put in the list for Monday. On that day the case was called on, when the attorney remarked that Whittaker had not arrived. Mr. Kelly then said, if the warrant was not there, the record must be withdrawn, and the record was withdrawn. Whittaker arrived within a very few minutes afterwards. The case was tried some months afterwards, when Whittaker attended, and gave his testimony, and Mr. Samuel recovered. The plaintiff had been put to about 20*l.* extra expense in consequence of the record having been withdrawn, and he brought this action to recover that amount.

This was the case for the plaintiff.

Sir F. Pollock then submitted that a party could not be legally called upon his subpoena until after the jury were sworn; that although, in order to save time, a practice had been introduced of calling witnesses before the jury were sworn, yet that, under such circumstances, an action would not lie against a person who did not appear when so called.

Lord DENMAN said he would be sorry to have it supposed that it was necessary first to swear the jury; he was clearly of opinion that, if the witnesses did not appear, it was the duty of the counsel to withdraw the record, and the witness would be liable to the expenses. It appeared to him, that all the special pleas must be found for the plaintiff, but he thought the jury would say the defendant was entitled to the verdict under the plea of not guilty, because the loss was sustained, not by the absence of Davis, but by reason of another man not being there who could have given the necessary evidence. It was an abuse of language to say that Davis was the cause of the record being withdrawn.

The Jury asked, whether one partner was not answerable for the other?

Lord DENMAN said, not for the wrong of another. Here Whittaker was the party mentioned to the attorney by Davis, and the moment he came on the Saturday they ought to have subpoenaed him.

Sir F. Pollock addressed the jury for the defendant, urging that Davis had given every requisite information to the attorney, who ought to have subpoenaed Whittaker. He then submitted that it was perfectly evident the non-attendance of the witness was not the cause of the trial being postponed, but that that was made an excuse, as counsel considered the plaintiff could not go to trial safely without the production of a warrant of attorney, which at that time they had not got. He also urged upon them that it was evident the parties relied entirely upon Whittaker, and had given up all idea of Davis being a witness; and if they had waited for a few

(k) *Man. & Ry.* 22.

minutes, or had sent round to the coffee-houses in the neighbourhood, in all probability they might have found him; but instead of doing that they had instantly caught at his absence as an excuse for withdrawing the record: the plaintiff, therefore, could not recover the expenses from the defendant, who had not at all interfered in the matter.

Lord DENMAN then again addressed the jury, and said, that witnesses were bound to be in attendance when called upon, and that it was not the duty of counsel to postpone a cause until the witnesses might arrive; there was great inconvenience in doing this, as it had a tendency to make persons careless in their attendance, and it was important they should know that they exposed themselves to great peril by their negligence. If the jury thought there had been improper haste, and that there was a decided disposition on the part of the plaintiff to have the cause postponed, when they had reason to believe the witness was almost in attendance, they would find a verdict for the defendant; and he would put it to them whether upon their oaths they could say that the absence of this individual, Davis, was the cause of the withdrawal of the record; he owned the facts appeared to him to be clear, and that his absence was not the reason.

The jury retired for a great length of time, and then came into Court.

Lord DENMAN then said he had left two questions for their consideration, and he wished to know whether they disagreed upon both of them.

The jury said, they disagreed upon what they considered to be the main point, which was whether Davis should be liable or not.

Lord DENMAN said, that was the question in the cause, and would depend upon whether or not the record was withdrawn by reason of the defendant's absence.

The jury said, it was not likely by any chance that they should agree.

Lord DENMAN.—Gentlemen, you don't agree by chance, it is by reason, and by looking at the evidence, and now, considering the information given by Davis to the attorney, that Whittaker could give the requisite evidence, the attendance of Whittaker on the Saturday, and his attendance on the trial, can you say that the record was withdrawn in consequence of the absence of that individual, Davis? I request you will give that question your calm consideration.

The jury returned a verdict for the defendant.

Dec. 10.

THE BIRMINGHAM, BRISTOL, AND THAMES JUNCTION RAILWAY COMPANIES v. LOCKE.

Joint Stock Companies.—Liability of Shareholders to calls on their shares.—Scrip shares. (I)

This was an action brought to recover 200/- or the amount of calls on 40 shares in the

railway. The defendant pleaded that he was not indebted; that at the time of such calls being made he was not a proprietor, and that after he had become a proprietor, the directors had declared the shares in question were forfeited.

The *Attorney General* for the plaintiff, The defendant held scrip for 40 shares, and had, in September, 1836, claimed to be registered for them, and that his name was entered in the books of the company accordingly; that calls were regularly made and advertised, but that the defendant had not paid any of them; that he had attended one of the meetings of the company and claimed to vote, but was not permitted to do so, on account of his being in default. It was admitted, on the cross-examination of the plaintiff's witnesses, that the defendant was not an original subscriber to the Parliamentary contract to whom scrip shares had been issued, and it was also admitted that other proprietors were registered in respect of the same shares as Mr. Locke had demanded to be registered for, and that they had registered him for other numbers than those he claimed.

Sir W. Follett for the defendant contended that it had not been shown that he had become a proprietor in the way pointed out by the act in respect of shares sold after the passing of the Act, which required it to be by a prompt conveyance in the form prescribed, and which was to be registered or memorialized in the company's books. That with respect to the register itself, the act required that the amount of subscriptions should be entered on the books; but here there was no such entry. That it was necessary the sums paid should appear for the safety of the parties, as showing for what sum they were to have credit. In the present instance, when the defendant claimed to be registered in respect of the scrip which he held, his name was put down for other numbers than those purchased or mentioned in his scrip receipts. That the latter were registered to other proprietors, and who consequently were held liable as well as the defendant. It was further urged that, supposing the defendant to have been at any time a registered proprietor, in the secretary's letter for payment it was expressly stated that if default was made in payment on or before a given day the shares would be declared forfeited, and that the defendant acting upon this, preferred having his shares forfeited, and therefore had not paid the calls, and that he considered the shares had become forfeited accordingly.

Mr. Justice COLERIDGE said, the directors had the power of declaring the shares forfeited. In the notice they said the shares would be declared forfeited; that was a declaration that something would be done at a future time. No subsequent declaration was made, and therefore the shares were not forfeited. It appeared that the defendant had attended a meeting, and held up his hand as a voter, but was told he could not vote because he had not paid up. It did not appear that

at that time the defendant stated that he knew his shares were forfeited, therefore he (Mr. Justice Coleridge) considered the directors had not declared the shares forfeited. That plea was not made out. There was more difficulty on the other point; his opinion, however, was against the defendant, and that he must be taken to be a proprietor. The shares, although not the same in number were the same in amount, and the defendant's name appeared as a registered proprietor: there was, therefore, a *prima facie* case made out by the plaintiff. His opinion also was, that the 136th section did not apply to the scrip shares, but to the sealed certificates. The defendant's counsel had contended that that section pointed out the only mode by which the property in these scrip shares could be transferred, and that the company had no right to hold the defendant and the original subscriber liable. He felt there was some difficulty in this, but as neither party would be bound by his opinion, he should direct the jury to find for the plaintiff, giving the defendant leave to move the Court upon all the objections to enter a non-suit.

*Verdict for plaintiff's for 213*l.* 9*s.**

COURT OF EXCHEQUER.

Michaelmas Term.

Sittings in Banco before LORD ABINGER, &c.

TICKLER v. INNES.

Setting aside Proceedings for Irregularity of Service—what sufficient Affidavit for.

Mr. Home moved to set aside all proceedings in this cause for irregularity. The application was founded on affidavits which disclosed the following state of facts. A stranger called at the house of the defendant, and the door being opened by a friend then in the house, the man said to him "Are you Mr. Innes?" to which he replied, "No, I am not;" when the man said, "Then will you give him this?" at the same time offering to him the copy of the writ in this action; to this the defendant's friend said, "No, I won't," and rejected the paper, which being out of the man's hand, fell to the ground in the street, where it was left, and the man went away while the door was closed. This, it was submitted, could not be held to be such a service as would be maintained by the Court.

Lord ABINGER.—It certainly does not appear that there was any service there; but do you swear that you have not had any other notice at all of the institution of legal proceedings against you?

Mr. Home.—No, my Lord; that fact does not appear.

Lord ABINGER.—Then you cannot take any thing by your motion; for it may very well be that, though the defendant never was served on this particular occasion, either personally or through his friend, yet he may have been served *aliumde*. Your affidavit does not shew

that you have not in fact had all the notice which we should require on your behalf, to compel your appearance in court, though there was a failure in the instance set forth by it, and therefore we cannot help you.

The rule was refused accordingly.

HOOPER v. ANNES and OTHERS.

Law of Distress—some Damage implied in all excessive Distresses—Trespass on the case for an excessive Distress.

At the trial it was proved that the plaintiff had taken a house of the defendant Annes at a certain rent, and that a distress was put in at a time when it was alleged that rent was due for only one quarter, whereas goods were seized which covered by a great deal the sum which the landlord claimed, namely, half-a-year; under these circumstances, Lord Abinger, by whom the cause was tried, it having been admitted that the greater sum was due for rent, left it to the jury to say, whether any damage could have accrued to the plaintiff by the broker holding all his goods in possession for a few hours, while he had the free use of them, in the house;—on which the jury found that there were none, and therefore a verdict was entered for the defendant generally.

Sergeant Andrews now, (Nov. 5,) moved on this point for a new trial, on the ground of an alleged misdirection in this respect, on the part of the learned Chief Baron. It was an injury in the eye of the law, for which it implied damages; they might be nominal, but still some there were, and it ought not to have been left to the jury to say whether there was any at all. Even though the goods were not sold, yet if more are seized than would reasonably satisfy the distress, all the parties implicated are liable in some extent to the tenant for the wrongful act thus committed. This is clearly laid down in the case of Baylis *v.* Bishop, in 7 Bing. 155, where it is said, that the act of seizure itself is an injury.

Baron GURNEY.—That was a wrongfull seizure *ab initio*—here the seizure was right in the first instance.

Sergeant Andrews.—It is submitted, that the principle is the same, for the broker has no better right to seize more goods than are enough than he has to seize any when nothing is due.

Baron PARKE.—You say that the plaintiff sustains a legal injury and damage by the distress being put in for more than would have been due under any circumstances?

Sergeant Andrews.—Yes; and of the degree of damage, not the existence of it, ought the jury to be the judges. Here, however, it was left to them to say, whether any damage could have accrued; while the proper question was, how much; the law in fact having decided that some had been incurred. The damages might be nominal indeed—but then the jury ought to be told that the law gives some.

Baron PARKE.—I am afraid that it is a case in which some damage must be given, though

a farthing and a certificate would amply meet the justice and merits of the action.

Rule nisi therefore granted for a new trial.

SAINTSBURY v. MATTHEW.

Statute of Frauds—a Contract to sell the Produce of a certain Close deliverable on a future day, not an Agreement for an interest in Land.

Action on the case for not delivering a quantity of potatoes according to agreement.

Plea—*non assumpsit.*

At the trial before COLTMAN, J., at the last Wits Assizes, it appeared that the parties made the bargain early in the year at a public-house. The terms of which were, that the defendant should sell to the plaintiff the crop of potatoes then growing in a certain close, which he was to have at "digging" time on sending for them, and providing the labour.

A verdict having been taken for the plaintiff, CROWDER, Q. C., now, Nov. 8, moved to enter a nonsuit, on the ground that this being an agreement for the sale of an interest in land, it ought to have been reduced to writing by the provisions of the statute of frauds, and not having been so reduced, was null and void. At the time the bargain was made, the subject of it was growing in the ground, and was uncertain in its extent. The potatoes could not then be transferred, and they required the care and attention of human labour to bring them to perfection, while they also were dependent upon the land in the meantime. In support of this view, the cases of Parke v. Stannillard, 11 East 362, and Evans v. Roberts, 5 B. & C. 829, are cited, in which latter a distinction is made between what is the ordinary produce of land and that which is the result of care and attention. But in the case of the Earl of Falmouth v. Thomas, Lord Lyndhurst states, that growing crops are within the statute of frauds, and the subject of an agreement; and in Carrington v. Roots, 2 M. & W., the impression of the Court seems to have been, that growing grass was an interest in land.

Per Curiam, however.—We do not think that the objection is well-founded. The contract was clearly nothing more than an undertaking to deliver at a future time the produce of a certain close, be it what it might, at so much per sack. The verdict therefore must stand.

SAME CASE.

Power to amend quite discretionary in judge—and term in which a new trial will be granted for such. CROWDER also moved for a new trial on the ground of the Judge at *nisi prius* having made very extensive alterations and amendments in the contract set out in the declaration, and also in some of the introductory averments—but this motion was also refused;

LORD ABINGER, C. B. saying that the power to amend is quite discretionary, or it would be nugatory—unless you can shew by affidavits that the defence was really prejudiced, or that you would have been able to offer a good de-

fence to such an amended contract if you had known of its terms before. We cannot grant your application.

Rule refused accordingly on both grounds.

BADHAM v. HAYLEY. Nov. 24.

When the Court has once ordered either party to give security for costs on quitting its jurisdiction, it will not rescind such order.

Mr. Whately applied to the Court to rescind an order on the plaintiff, which called upon him to find security for costs of the action, on the ground that he was then about to quit England. This was complied with, and a most responsible security given by the bond of a friend. The plaintiff, however, since that period had returned to this country, and as he was sworn for the purpose of this application, with an intention of taking up his permanent residence here. The object, therefore, of this motion was to obtain a release of the surety from the obligation of his bond, which was now unnecessary.

Per Curiam, we cannot grant such a motion, as it would lead to a practice fraught with the greatest inconvenience. When once security has been ordered and found for costs, it is much better to allow things to go on to the end, without any other change; otherwise we should always be subject to similar applications, and when the surety has been released, how can we tell but that the party may choose to go off again, in which event another application for costs would be rendered necessary. For these reasons we are of opinion that this rule ought not to be granted.

Rule refused accordingly.

In re ARCHER.

Power of Court to enforce the delivery of an Attorney's bill.

In this case a rule had been obtained by R. V. Richards, calling on the attorney, Mr. Archer, to shew cause why he should not deliver his bill of costs to the defendant, so that he might ascertain the amount of it and the manner in which certain monies had been appropriated by the attorney, and also why the bill should not be taxed.

Mr. Humphrey now showed cause, and contended that the Court had no such power as was sought to be exerted on this occasion. As for the part of the rule, it was long since decided that the Court cannot enforce a taxation, and, if so, it is submitted that it will not order a bill to be delivered, which it must be before taxation. In this case the bill was very large, and it would cost more to make it out than the attorney is ever likely to get from the defendant, who is a bankrupt. He is therefore averse from incurring a needless expence. If, however, the defendant will make it part of the rule that the costs of making out the bill should be paid, there would be no opposition to it.

The COURT, however, were decidedly of opinion that they had the power of enforcing

the delivery of a bill from an attorney, in order that the party might satisfy himself of the amount, and have an opportunity of seeing whether he had been properly credited for all sums received on his account by the attorney. Though the point has never been decided before on argument, yet it has been constantly acted on in practice, and the instances of such orders being made and never disputed have been numberless. The rule therefore must be made absolute as to the delivery of the account, and discharged as to the taxation, over which the court certainly has no jurisdiction.

Rule absolute accordingly.

CALVERT v. BAKER.

Liability of an acceptor to a bill of exchange altered in its acceptance as payable at a certain place without his knowledge.

Mr. R. V. Richards applied for a new trial in this case, for a misdirection. This was an action by an indorsee against the acceptor of the bill, and the defendant pleaded that he did not accept the bill *modo et forma*. At the trial it appeared that the original acceptance had been a general one; but that, on being presented for payment, it was found to have been altered into a special acceptance at a certain place. Evidence was gone into to prove the consent of the defendant to this alteration, but as the jury found against the plaintiff in this respect, it must be taken that it was done without his knowledge. Notwithstanding this it was urged that he was liable on his plea, for the declaration was on the original bill with the general acceptance; and as it is admitted that he did accept such a bill, it is submitted that the plaintiff is entitled to a verdict on the issue raised by the record. The defendant ought to have pleaded specially that the bill was altered; but he did not do so, and having contented himself with simply denying his acceptance, the verdict must be entered for the plaintiff.

Per Curiam, however, not so, for when the plaintiff produced the bill at the trial, though he declared upon a form of bill accepted by the defendant, yet it is found that the defendant did not accept such a bill as that before the Court, and he is entitled to a verdict.

Rule refused accordingly.

It has been long settled that an acceptor is exonerated from all liability by any material alteration in a bill after he has parted with it, even if the alteration be made by a stranger, and the bill is in the hands of an innocent holder. See *Masters v. Miller*, 4 Term Rep. 320; S.C. 5 id. 367; 2 H. Blacks. 141; 1 Anst. 227.

In the above reported case the special presentation to the acceptance was added after negotiation; if it had been added before, the acceptor would not have been exonerated. See *Jacob v. Hart*, 2 Stark. 45.—ED.

INSOLVENT DEBTORS' COURT. Dec. 11.

GEORGE LOCKWOOD'S CASE.

Escape—stopping on the road from the prison to the court.

Mr. Cooke objected to the petition of the insolvent, an escape having taken place since he was last before the Court.

It appeared, that after the insolvent had been heard on a former day, he had, accompanied by an officer of the Borough Compter, gone to a house in Little Guilford-street, in the Borough, which was about 300 yards out of the direct line of road from this court to the prison. They remained at the house about an hour and a half, and had some refreshment.

Mr. Woodroffe contended, that the insolvent had never been out of the custody of an officer of the prison; and the officer of the Borough Compter deposed to the insolvent not having been out of his sight.

Mr. Commissioner Bowen said, it was set forth by the Act of Parliament that a man must be in actual custody; the only intermission that was allowable was during his being brought from the prison to the court, and being taken back again to prison.

The Chief Commissioner Reynolds said, if an argument for stopping on the road for an hour and a half were tenable, it would be equally good for ten hours. The insolvent had been out of custody, and his petition must be dismissed. He hoped the case would be a warning to others.

JEREMIAH BOARD'S CASE.

Abolition for Imprisonment for Debt Bill, Sec. 66.

Mr. Cooke applied for a rule nisi for an attachment to be issued against Jeremiah Board, that he might be committed to Newgate for contempt of the Court, in not having filed a schedule in compliance with an order of the Court to that effect, and relied on the 66th section of the Act. The party was in prison on civil process, and had been in the Fleet prison nearly 23 years. That imprisonment was not a matter of punishment.

The affidavit of service of the notice on the prisoner was then put in and read, after which the Court granted the rule nisi.

This is a most important question, which involves the power of the court to commit a prisoner for contempt of its orders.—ED.

JOHN ROSEVEAR'S CASE.

The same Statute, Sec. 36—obtaining a vesting order after Insolvent has filed his petition, but never filed his schedule.

The insolvent had been in prison since 1835. He filed a petition in May of that year, but had never filed a schedule. The object now was to dismiss the petition, in order to enable the creditors to obtain a vesting order under the compulsory clause of the late act. The

insolvent some time back had applied to dismiss his petition, but that application had been resisted.

The COURT suggested, that a rule should be served on the insolvent to show cause why he should not file a schedule, and why, in default, his petition should not be dismissed.

ARCHES COURT.—Dec. 12.

THE OFFICE OF THE JUDGE PROMOTED BY BREEKS AGAINST WOOLFREY.

Property—Inscription upon a Tombstone, in a Protestant Church-Yard.—“Pray for the soul of Joseph Woolfrey,” and “It is a holy and wholesome thought to pray for the dead—2 Maccab. xii. 46.” Whether to be taken in a Roman Catholic sense?

SIR H. JENNER gave sentence in this case. It was a cause of office promoted by the Rev. George Breeks, vicar of the parish of Carisbrooke, in the diocese of Winchester, against Mary Woolfrey, of the same parish, widow, citing her to answer to certain articles addressed to her “for her soul’s health, and for the lawful correction of her manners and excesses,” which is the usual language of citations, and more especially for having unduly and illegally erected, or caused to be erected, a certain tombstone in the church-yard of the said parish to the memory of Joseph Woolfrey, late of the parish, deceased, with a certain inscription thereon, contrary to the articles, canons, and constitutions, or to the doctrine and discipline of the church of England.

The cause was brought by letters of request from the diocese of Winchester (this Court having no original jurisdiction), the Chancellor of that diocese having consented to refer the matter to this Court, which he had a right to do; this Court, therefore, had no alternative but to accept the letters of request; for it was not contended—nay, it was admitted, that if the inscription was of the character attributed to it in the citation, no person had a right to erect a tombstone with an inscription impugning the doctrines and discipline of the church of England, and that a person so offending was liable to be punished, and the tombstone to be removed. The question then was, whether the inscription had been properly described in the citation, and the additional offence laid in the articles, that it was erected without leave of the incumbent, did not appear on the face of the citation. The question, therefore, was confined to the legality of the inscription. The inscription set forth in the articles was “Pray for the soul of Joseph Woolfrey,” and “It is a holy and wholesome thought to pray for the dead. 2 Maccab. xii. 46.” Now, from the nature of the case, which was a criminal proceeding, the burden of proof was on the party setting up the illegality of the inscription.

The minister of the parish was the proper party to proceed, if the inscription was of the character described, for he was bound to remove what was a scandal to the parishioners

resorting to the parish church, and contrary to the rites and ceremonies of the church of England as by law established. To the incumbent belonged the superintendence of the church and churchyard, and it was his duty to take care that no inscriptions should be placed there which could be made the means of disseminating doctrines inconsistent with those of the established religion. The articles purported to state the law, and the facts to which the law was to be applied. The first article alleged that, by the 22d article of the church of England, it was declared that the Romish doctrine concerning purgatory, pardon, and other things therein mentioned, is “a fond thing, vainly invented, and grounded upon no warranty of Scripture, but rather repugnant to the word of God.” It then went on to state, that the defendant, notwithstanding, did erect a tomb or headstone in the church-yard of Carisbrooke to the memory of her husband, on which were the beforementioned inscriptions, both of which, it is alleged, are contrary to the doctrine and discipline of the church of England, and to the articles, canons, and constitutions thereof; that notice had been given to Mrs. Woolfrey to remove the stone, and that she had refused, or neglected to do so, and that the same still remains; and the last article concludes with praying that she may be peremptorily monished to remove the stone, and be canonically corrected and punished, and condemned in the costs. The law then principally relied on is the 22d article of 1562; for although there is a general reference to the other articles, canons, and constitutions of the church, the canon principally relied on is the 22d.

In the argument in support of the articles against the defendant, it was urged that the 22d article, in declaring the Romish doctrine of purgatory to be repugnant to the word of God, did in effect declare, that the offering of prayers for the dead was also opposed to the word of God, as constituting part of the doctrine of purgatory; for that the two were so intimately blended together, that it was impossible to separate the one from the other; consequently an inscription inviting passers-by to pray for the soul of Joseph Woolfrey, and containing the passage from the Maccabees, was an illegal inscription. It appeared to him that the point upon which the whole question turned was, whether praying for the dead was so necessarily connected with the Romish doctrine of purgatory as to form a part of it. It was no doubt true, that the doctrine of purgatory included the practice of praying for the dead, but it did not necessarily follow that the converse of the proposition was true—that is, that prayers for the dead necessarily constituted a part of the doctrine of purgatory as held by the Romish church. If that fact could be made out, there would be an end of the case. Many authorities had been cited in support of the different views of the counsel in the cause, and to some of them it would be necessary for the Court to advert. The counsel had very properly abstained from the

theological part of the question ; and it would not be proper for the Court to take upon itself the duty of inquiring, whether the doctrine of purgatory, as received by the Romish church, was or was not supported by any warranty of Scripture. The law, that is, the 22d canon, had expressly stated, that it was "grounded upon no warranty of Scripture, but rather repugnant to the word of God," and by this law he was bound to govern himself. The question then shortly was this—is praying for the dead involved in the doctrine of purgatory? and with a view to deciding that question, the first thing to determine was, what is the doctrine of purgatory as received in the Romish church? As far as he had been able to learn, it did not appear that there had been any declaration of the doctrine of purgatory by any general council, till that of Florence, in 1438, which contained the first allusion to the doctrine. This was afterwards followed up by the council of Trent in 1563.

(To be continued.)

PREROGATIVE COURT. Nov. 30.

*In re THOS. NEWMAN.
New Will Act, sec. 9, (m).*

Mr. Thomas Newman (the deceased) had made several wills, and on the day of his decease executed a Codicil, in the presence of two witnesses, but who did not, as the 9th sec. of the 1 Vict. c. 26 requires, attest his signature *in his presence*, they having taken the Codicil and retired into another room, away from the testator, and *there*, in the presence of each other, signed their names as attesting witnesses to the Codicil.

The Court refused probate.

MIDDLESEX ADJOURNED SESSIONS, Dec. 3.

(*Mr. Serjeant ADAMS Chairman.)
APPEAL.*

THE WEST INDIA DOCK COMPANY v. THE PARISH OF POPLAR.
Parish Assessments—Construction of the Statute 6 & 7 Will. IV. c. 96.

This was an appeal (that excited considerable interest) against an assessment which had been made upon the Docks by the respondents, who were the trustees of the parish of Poplar. The rate, however, against which the appeal was made, was that which had been assessed upon the West India Dock Company alone, inasmuch as its incorporation with the East India Dock Company did not take place until after the assessment appealed against. The question at issue was the value of the property that was known by the name of the West India Docks, or rather that portion of the docks which was situated in the hamlet or parish of Poplar. The rate in question was made under the 53d George III., a local act,

which gave to all persons who were dissatisfied with the rate a power of appeal to the justices, and afterwards from their decision, if unsatisfactory, to the Court of Quarter Sessions. The assessment (the subject of consideration) had been appealed against by the Company before the trustees, who confirmed the rate, and the Company came on an appeal to the sessions. It appeared that there had been two rates made, the one in January, and the other in June last. The gross amount of the rateable property in Poplar was 177,338*l.*, which, after a deduction of one-sixth for repairs, &c., left a sum of 144,996*l.* whereon to make the assessment for the relief of the poor. Out of the gross amount of this rateable property, the West India Dock Company were rated at 80,412*l.*, from which was deducted one-sixth, thereby leaving a net amount of 67,010*l.* to be levied on. The simple question for the consideration of the Court, as arising out of the present appeal was, whether that amount of assessment was or was not too high. That fact would depend upon the construction to be put on the language of the 6 & 7 Will. IV. c. 96, by which all parish assessments were to be regulated, and that act declared "that from and after the 21st of March no rate for the relief of the poor should be allowed which was not made upon an estimate of the net annual value of the property rated, that is, the amount for which such property might reasonably be expected to let for by the year, free from all tenant's taxes, and making deductions for repairs, insurance," and other analogous expenses. The question then was, what the West India Docks might reasonably be expected to let for, from year to year, to any person or body of persons who might be inclined to take them, supposing that any such person or persons who could apply them to a profitable advantage were to embark in the undertaking.

The CHAIRMAN said that the Bench had given their attention to all of the various points, and it had been his intention to have stated the reasons and the principles on which they had arrived at their decision upon them. It appeared, however, to be the feeling of some of the members of the Bench, that it would be better not to do more than to say, that, having taken into consideration, on the one hand, the fair expenditure of the Company with the view of yielding a reasonable remuneration, and the amount of the profits realized on the other with the view of determining what was a fair amount of rental which it would be likely that a party would give for the property, the Court had arrived at the opinion, that that sum should be fixed, taking into consideration at the same time the increased value of the undertaking during the present year, at 54,579*l.*, which amount the Court now ordered should be inserted in the rate instead of the figures 67,010*l.* The rate would therefore be amended in accordance with the decision of the Bench.

There were three other appeals against other rates, all of which were determined by this decision.

(m) See re Ayling, ante p. 48.

**ARTICLED CLERKS WHO PASSED THEIR EXAMINATION
IN MICHAELMAS TERM, 1838.—(Concluded from p. 78.)**

<i>Name of Applicant.</i>	<i>Name and Residence of Attorney to whom articled or assigned.</i>
Robinson, George Millar	John Eyre Coote, 20 Austin Friars.
Roscorla, John	Edward Hearle Rodel, Penzance.
Scales, Thomas Jackson	John Poole, Gillhead.
Selby, Gerard, the younger	Gerald Selby, Alnwick.
Sheppard, Alfred Byard	William Clark Merriman, Marlborough, Wilts ; John Iliffe, 2, Bedford Row.
Simpson, Thomas Broderick	James Walker, Whitby.
Slater, Joseph	Thomas Morris, Wigan.
Spurr, Orlando	John Siddell, Sheffield ; Thomas Thwaites Vickers, Sheffield ; and Thomas Rayner, Sheffield.
Steele, Adam Rivers	Thomas Flower, 87, Hatton Garden ; James Harmer, 87, Hatton Garden.
Swann, Edward Bonson	John Chadborn, Gloucester.
Taylor, George William	Robert Bickerstaff, Preston ; James Woods, Rochdale, Lancaster.
Thorne, William	Robert Medcalf, 20, Lincoln's Inn Fields.
Twining, Aldred	Thomas Wing, South Square, Grays Inn.
Tyas, John	Thomas Gould, Sheffield.
Vardy, William Stoughton	James Boor, Warminster, Wilts ; Rowland Wilks, Finsbury Place.
Wall, William Henry	John Coles Fourdrinier, Salvador House, Bishopsgate ; Daniel James Lee, 1, Field Court, Gray's Inn.
Webb, John	Robert Dolphin, Birmingham.
Winter, William Esdaile	Robert Winter, 16, Bedford Row.
Wray, George	Walker and Jesse, Manchester.
Wyatt, James	James Husband, Devonport.
Young, George	William Myers, Darlington, Durham ; Ralph Park Phillipson, of Newcastle-upon-Tyne ; George Walford Armstrong, Red Lion Street, Clerkenwell : re-articled to George Walford Armstrong.

REVIEW OF NEW BOOKS.

Instructions for the Use of Candidates for Holy Orders, and of the Parochial Clergy, as to Ordination, Licences, Institutions, Collations, Inductions, Reading in, Resignations, Pluralities, Avoidance, Dispensations, Unions, Disunions, Residence, Glebe-houses, Purchasers, Mortgages, Exchanges ; with ACTS OF PARLIAMENT relating to the above, and FORMS to be used.
By CHRISTOPHER HODGSON, Secretary to His Grace the Archbishop of Canterbury. The Fifth edition. London, Printed by Eyre and Spottiswoode, for J. G. & F. Rivington, 62, St. Paul's Church-yard, and 3, Waterloo Place, Pall Mall, and sold by J. Hatchard and Son, Piccadilly, 1833.

We cannot do better, in noticing this useful book, than quote the advertisement to the present edition, in which the author says, that it has been called for at a time particularly seasonable, by reason that the principal subjects treated of in the former

editions have been under the revision of Parliament during the last session. By acts passed in that session, material amendments have been made in the law respecting the providing of fit houses for the residence of the clergy ; an entire alteration has been effected in the law for regulating the holding of benefices in plurality, and various amendments have been made as to the residence of the clergy, and powers given for facilitating the union and disunion of benefices, and that these, with other alterations, additions, and amendments, are of so great extent, that by the insertion of them the present edition may almost be considered as a new work.

The work is so well known in its former editions, and the capabilities of the author for communicating information on the subjects of his book, are so justly appreciated, that little is left for us to say in praise of that before us, which is, *in fact*, from the great changes that have been made, *a new book*, and suited equally to the lawyer as the clergyman.

The author, with the view to render the work of more general and extensive utility, has set forth the Act of Parliament 1 & 2 Vict. c. 106. in the Appendix, to which a copious Index of reference to the contents of the Act is added, and instructions for the exercise of its various powers, and observance of its provisions, are given in the body of the work.

We recommend a perusal of it to our readers, as a well written practical book, from which much information may be gained, and practical instruction be had upon Church property and Ecclesiastical matters.

Business in the Courts.

COURT OF CHANCERY.

Appeal Motions.

Bowes *v.* Fernie, by order—Gompertz *v.* Ansdell, to be spoke to—*Ex parte* Tolson and Dovenby—Andrews *v.* Walton—The Same *v.* The Same—Greene *v.* Cooper—Dimes *v.* Grand Junction Canal—Earl of Falmouth *v.* Alderson—Attorney-General *v.* Barker, cause part heard.

VICE-CHANCELLOR'S COURT.

Short Causes and Unopposed Petitions.

Petitions by order, after the Unopposed Petitions. Woodfall *v.* Bagster, to be spoken to—Bray *v.* West, ditto—Pearce *v.* Pearce—Ward *v.* Ash—Watson *v.* Birch.

Causes.

Attorney-General *v.* Mayor, &c., of Boston, part heard—Attorney-General *v.* Ellison, four causes, by order.

ROLLS' COURT.

Bulmer *v.* Thomas, to be spoken to—Miller *v.* Sherren, ditto.

Causes.

Willis *v.* Curteis—Attorney-General *v.* Jones—Richards *v.* Wright—Reeves *v.* Gill—Lippiatt *v.* Holley, exceptions, further directions, and costs—Green *v.* Campbell—Mence *v.* Chinn, exceptions, further directions, and costs—Turner *v.* Hitchin—Lambert *v.* Hutchinson—Rowley *v.* Adams, exceptions, further directions, and costs—Neame *v.* Cobb, ditto—Hobson *v.* Bell, ditto.

COURT OF QUEEN'S BENCH.

London Common Juries.

Byrne *v.* Cornish and another—Hubbard *v.* Sheen—Wilkinson and another *v.* Godfrey—Harris *v.* Davis—Larkin and another *v.* Beagrie—Elliott *v.* Pepprell—Hodson *v.* Sant and

another—Harris *v.* Hunt—Lambert *v.* Coleman—Heath and others *v.* Norbury.

COURT OF COMMON PLEAS.

London Common Juries.

Newham *v.* Tate—Green and another *v.* Cunney—Hopkinson *v.* Wilson—Hyslop *v.* Salmon—Webber *v.* Jones—Forder *v.* Drake.

COURT OF EXCHEQUER.

London Special Juries.

Wilkinson and another *v.* Nicholson.

London Common Juries.

Hathwaite and another *v.* Marshall—Aldred *v.* Easton—Kingham and another *v.* Robins.

EQUITY EXCHEQUER.

Re Mayor, of Hythe and Co., petition by order.

Causes.—Richards *v.* Perkins—The Same *v.* Stokes—Kirby *v.* Mash—Angell *v.* Dawson—Buchanan *v.* Dale—Bewick *v.* Gillson—Hodges *v.* Attorney-General—Moses *v.* Williams—Foot *v.* Besant—Clarke *v.* Faulkner, on sequestration—Russell *v.* Harts—Grueon *v.* Wankley.

TO CORRESPONDENTS.

“J. E.”—Read up more closely, and spare us all the labour you can.

“J. W. B.”—comes within the meaning of our *first* notice to correspondents last week, and being a *personal and pecuniary* matter should have been sent to a barrister.

“A Subscriber,” whose case we inserted in our last, is requested to direct his attention to the “Errata” in this number.

“Problem VI.”—The answers are under consideration.

TO OUR COUNTRY CORRESPONDENTS.

We are unable to comply with our promise made last week of issuing a stamped edition this day, by reason of the arrangements of the Stamp Office not being perfected. We hope to do so next Saturday.

ERRATA.

Page 83—note (!) for “ante” read “supra.”

— 86—in the third line of the opinion, in the first column, for “analyzing” read the editor’s more appropriate word “resolving.”

— 96—second column, twelfth line to “Veritas”—for “nor” read “or.”

The Legal Guide.

SATURDAY, DECEMBER 22, 1838.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 99.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

We think it necessary to continue our observations upon the doctrine of *acquiescence* ruled in the courts of *equity*, in relation to the 27th section of this statute. In cases of bankruptcy, the act of signing a deed reciting the bankruptcy is an *acquiescence* in the validity of the fiat, *Exp. Hall, Mont.* 354; see *Exp. Hill re Arnott, Mont.* 9; this makes it desirable that he should always be made a party to all conveyances of his estate, and enter into covenants for title, but he is not *prima facie* a necessary party to such conveyances. His being made a party, however, prevents the difficulty which a purchaser might otherwise be put to in maintaining and proving his title.

After a bankrupt had surrendered and acquiesced a year and a half in the proceedings, Equity refused to direct an issue at law to try the validity of the bankruptcy. See *Exp. Mitt.* 1 Atk. 102.

If a *remainder-man* lies by and suffers a lessee to rebuild, he will be bound by this *acquiescence*, and equity will compel him to grant a new lease. See *Stiles v. Cooper, 3 Atk. 692, and 1 Scho. & Lef. 72.*

So if a remainder-man, when he arrives

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at possession, takes that possession with full knowledge of the imperfection of the tenants' leases, and because those tenants agree to continue as such, he consents to leave them undisturbed, this consent will bind him for life if the leases should so long continue, but it will not of course bind those in remainder to him. See *3 Madd. 384.*

So where a person with full knowledge of his right, acquiesces in another building upon his ground, without setting up a right till after the building is set up, equity will compel him to permit the person building to enjoy it quietly. See *E. I. Comp. v. Vincent, 2 Atk. 83.*

So where a building lease was granted during the minority of infants, with a covenant that they when of age should confirm it, which they do not, but accept rent for ten years after coming of age, equity will establish the lease. See *Smith v. Low, 1 Atk. 489.*

So where a lessee has incurred a forfeiture, yet if the lessor with knowledge of the forfeiture receive rent due since the condition broken, he waives his right to take advantage of it. In *Goodright v. Davis, Cowp. 803.* A covenant restraining alienation without licence was in the lease, which contained the usual power of re-entry on breach of covenant. The lessee nevertheless did underlet without licence, but the lessor knew of it and acquiesced by receiving rent afterwards. It was in that case observed by Lord Mansfield, that to construe this acceptance of rent due since the condition broken, a waiver of the forfeiture is to construe it

according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, he does not take advantage of it, but accepts rent subsequently accrued. That shews he meant that the lease should continue. Forfeitures are not favoured at law, and when a forfeiture is once waived, the court will not assist it.

This *acquiescence* by a lessor in a breach of covenant is not confined to restraint upon alienation, but has been held to extend to other covenants that may have been broken by the lessee, and been acquiesced in by the lessor. See *Doe v. Meux*, 4 Barn. & Cress. 606. *Doe v. Birch*, 1 Mee & K. 408.

There are, however, *distinctions* to be drawn.—As where the proviso for re-entry declares the lease *void* on breach of covenant, and where it empowers the lessor to *re-enter* on such breach, which makes the lease only *voidable*.

In the *former* case any breach of covenant determines the lease; it becomes *void*, and no acquiescence of the lessor or subsequent acceptance of rent will afterwards set it up again.

In the *latter* case, the acquiescence of the lessor and subsequent acceptance of rent, operates as a waiver of his right to re-enter, and shews an intention on his part that the lease shall continue.

As to the *former* case, see *Coke's 1 Inst. 214 b.*; *Pennant's case*, 3 Rep. 64; *Browning and Biston's case*, *Plowd.*; *Finch v. Throgmorton*, *Cro. Eliz. 221*; *Mulcarry v. Eyres*, *Cro. Car. 511*; *Doe dem. Simpson v. Butcher, Douglas*, 51.

The *distinction* has however not been applied to *leases for lives* but only to *leases for years*, for where a lease for lives contains the proviso for making it *void* on breach of covenant by the lessee, still it is in contemplation of law only *voidable* by re-entry, for it is a principle, that an estate which begins by livery can only be determined by entry. See *Doe v. Pritchard*, 5 Barn. & A. 765.

There is also *another distinction* where the proviso for re-entry declares the lease *shall be void* on breach of covenant by the lessee, AND THAT IT SHOULD BE LAWFUL FOR THE LESSOR TO RE-ENTER. The latter authority

shews the intent of the parties to be, that the lease should be only *voidable* by re-entry, and consequently, if the lessor acquiesces in the breach, and subsequently receives rent, he waives the forfeiture. See *Arnsby v. Woodward*, 6 Barn. &c. 519. See also *Doe v. Birch*, and *Dakin v. Cope*, 2 Russ. 170. But the distinction first mentioned, although founded on such high authorities, was by an *extra-judicial opinion* of *Lord Tenterden's*, given in *Arnsby v. Woodward*, attempted to be shaken, although no express decision has been made, nor do we think can with justice and equity be made to support it. This opinion thus expressed was to the effect, that supposing the proviso had been that the lease *should become void on breach of the condition*, he (Lord Tenterden) should have still thought that a receipt of rent by the landlord would be an admission that the lease was subsisting at the time when that rent became due, and that he could not afterwards insist upon a forfeiture previously committed—that to hold the contrary would be productive of great injustice, for it would enable a landlord to eject a tenant after he had given him reason to suppose that the forfeiture was waived, and after the latter had on that supposition expended his money in improving the premises.

Lord Tenterden expressed this *extra-judicial opinion* after pronouncing judgment in the case, upon the ground that taking the two clauses together, the sound construction of them gave to the landlord a right to re-enter, to be exercised or not at his election, otherwise the latter clause "it shall be lawful to re-enter," would have no effect. If it required the two clauses to let in acquiescence or waiver of the forfeiture, we cannot see upon what ground Lord Tenterden rested his extra-judicial opinion, the more particularly when we consider the high authorities in support of the distinction. Lord COKE, in his Institutes before referred to, says "where the estate or lease is ipso facto void by the condition or limitation, no acceptance of the rent after can make it to have a continuance; OTHERWISE it is of a lease or estate voidable by entry."

The case of *Doe v. Banks*, 4 Barn. & Ald. 401, is also supposed to have disturbed the distinction. In that case the proviso declared the lease should be void upon breach of a condition. Abbot, C. J. held that it did not become absolutely void by the breach unless the landlord thought fit to make it so, and if it were held that a lease thus became absolutely null and void even where it was made to appear that there had been a continuance of the receipt of rent afterwards, the consequence might be, that when the landlord at an advanced period, brought his action of covenant, he might be told that he had no right to bring that action on the ground that the lease had become void by forfeiture many years before, and his lordship expressed his opinion to be that the lease did not become absolutely void on breach of the condition, unless the landlord chose to make it so, and Mr. Justice Bayley in delivering his opinion in the same case, said "that the true construction of the proviso was, that it (the lease) shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee who has been guilty of a wrongful act in omitting to work pursuant to his covenant, to avail himself of that wrongful act, and to insist that thereby the lease has become void to all intents and purposes. By the express provisions of the 13 Eliz. c. 10, certain ecclesiastical leases are made void to all intents, constructions and purposes, yet it has been frequently held that such leases are good during the life of the person by whom they are made." The rest of the Court concurred.

Upon this decision Lord Eldon expressed considerable doubt in *Dakin v. Cope*, 2 Russ. 180, which was a similar case to *Arnaby v. Woodward*, in which Sir Thomas Plumer, M.R. observed upon *Doe v. Banks*, that the words there were much stronger than in the case before him, and after quoting the opinion of Mr. Justice Bayley, as before stated, said, "that in the case before him both on the reason of the thing, and on authority, he was of opinion that the effect of the proviso (*with two clauses*) was to make the lease voidable, not void. Lord

Eldon, upon appeal, gave no opinion upon the point save the observation before referred to. See also *Read v. Fare*, 6 Man. & S. 121. It is supposed that in the case of *Roberts v. Darcy*, 4 Barn. & Adol. 664. The Court had followed up the extra-judicial opinion of Lord Tenterden, and had over-ruled the distinction so long held; but if that case is well considered, we think such a supposition void of foundation: it was certainly argued in that case, "the result of the authorities was that the difference supposed formerly to exist between leases for lives and for years, as to the necessity of an entry to avoid the lease no longer existed;" but no decision was come to in support of that argument, and the judgment of the Court was in accordance with that in *Doe v. Banks*, which was a similar case.

These cases, it will be seen on consideration, depend upon their own peculiar circumstances, and we see no sufficient reason to opine that the distinction so expressly laid down by *Lord Coke*, has been overruled.

(To be continued.)

ANSWER TO PROBLEM IV.

On 1st and 2nd Vic. c. 110.

(Continued from p. 84)

The Statute next proceeds to give additional effect to judgments; and, by section 11, the sheriff is to deliver execution of all the debtor's lands, and real estate, to the judgment creditor, who may hold the copy-holds until the debt and costs be satisfied. The creditor must pay all rents and charges due to the lord, and reimburse himself. (a)

By section 12, the sheriff is empowered to seize money, bank-notes, and bills of exchange, and to pay over same to execution creditor, who may sue for them, in the name of the sheriff, who is entitled to an indemnity from the plaintiff against costs. By

• (a) The rights of purchasers, mortgagees, or creditors, who were such before the 1st Oct. 1838, are saved.

The jurisdiction heretofore exercised by courts of equity is abolished, and the execution creditor is subject to the same account in the court of which he obtains his writ, as he was before subject to the court of equity.—ED.

the 13th section, this charge does not operate until one year from the time of registering the judgment with the Senior Master of the Common Pleas.

Upon the alienation of real property, a search will, in all cases, have to be made at the proper office, to see whether any judgment may have been charged on the land; and it would seem, that a purchaser or mortgagee becoming such after any judgment has been so registered, as is required by the Act, will be considered as taking subject to the charge. Registering will be notice to all the world, and the judgment creditor will have the priority. It would be as well in the covenant against incumbrances specifically to state, that no judgment has been charged on the lands. The enactment appears to be defective as a remedy, inasmuch as the charge is not to operate until the end of a year; and even then, to render it altogether effectual, a suit in equity must be instituted, and we may very fairly argue, that its operation, as in the cases of elegit heretofore, will be very confined. If I might make a suggestion, the whole remedy ought to have been at law; in other words, the statute should have given absolute power to sell, at the expiration of a given time; for, as heretofore, the remedy by elegit being tedious and uncertain, it was seldom applied for.

Execution has also, very properly, been extended, so as to enable the judgment creditor, by means of a judge's order, to charge any stock in the funds, or shares in public companies, belonging to the debtor, and standing in his name; the judge's order may, in the first instance, be obtained *ex parte*, and, on giving notice to the bank, or the company, it will operate as a distringas.

With reference to this part of the Act, it might not be altogether impertinent to mention a case, which lately came under the writer's notice, as to the removal of a judgment from an inferior court of record, so as to give it the benefit of the above enactments, and make it available against the debtor's lands. In order then to remove a judgment from an inferior court of record, it will be necessary to have,—1st, The record of the judgments, under the seal of the

court; and certificate of the prothonotary; and if the court had not previously a seal, one must be made. 2nd, There must be an affidavit verifying the seal, and signature of prothonotary, and that as such he is the proper officer of the court. It must also state that the judge of the court is of sufficient standing at the bar, to bring the case within the statute. And, lastly, that the judgment remains wholly, or in part, unsatisfied.

In this case, which arose in the Sheriff's Court of Newcastle, the officer of the court refused to deliver up the record, without some authority; and a writ of certiorari was sent down, which writ did not, formerly, lie after judgment, *Patterson v. Reay*, 2 Dowl. & Ry. 177; but which, it seems, is now, the only means of compelling the officer of an inferior court to part with the record.

By section 16, it is enacted, that in case execution shall at any time issue against the person, all securities, not then realized, that is, all charges on the lands, &c., of the debtor, in respect of the judgment not then satisfied, shall be given up. (b)

All judgments are henceforth to bear interest after the rate of 4*l.* per cent., per annum.

The remainder of the act, with the exception of a few clauses, re-enacts the law of insolvent debtors, in much the same form as heretofore, and which it would take up too great space to notice. There are, however, many important additions, and improvements, in the law of insolvent debtors, contained in the latter portion of this act, and which will need an attentive perusal; as, for instance, an insolvent may now be discharged out of custody, on his finding two sureties, with recognizances, to the provisional assignee, in such sum as the court shall think fit, with a condition that the insolvent shall attend at the place of hearing.

It ought also to have been observed, that

(b) But when the security has been realised, and the produce insufficient to satisfy the judgment, then the latter remains in force against the person for the deficiency.—Ed.

by section 18, all decrees and orders of any court, are to have the same effect as judgments.

And that, by section 19, no judgment, decree, or order, shall have the effect of charging land, or real estate, other than such effect, as they would have had, before the passing of this act, unless such judgments, &c. be registered with the Senior Master of the common pleas; hence, all old judgments must go through the new ordeal before they can be made available, as against the lands of a debtor.

In conclusion, it may be remarked, that although the practice admitting of arrest has received a severe blow, by the late act, yet that when, under the new order of things, it is still permitted, the same rules and decisions will still affect the practical machinery of this very nice point of law. The sheriff, and his officers, will now, as before, be bound to observe all the old forms, and technicalities, and the minutiae of the bail bond must still be attended to.

"A STUDENT."

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM VI.

What is an Action?

The signification of this term at law is defined by Bracton, lib. 3. c. 1., and also by Justinian, lib. 4. Inst. tit. de actionibus, viz., *Action nihil aliud est quod alicui debetur*. It is otherwise defined to be a *legal demand of one's right*, 2 Co. Lit. 285. (c). For as all *wrong* may be considered as merely a privation of *right*, the plain natural remedy for every species of *wrong* is, the being put in possession of that *right*, whereof the party injured is deprived. Hence, therefore, as the design of entering into society was the protection of our persons and security of our property, men in civil society have a *right*, and indeed are obliged, (in place of becoming their own revengers, which would introduce all that inconvenience which the

state of nature endured, and which government was at first invented to prevent) to have recourse to the strong arm of the law and the courts of justice, for support and assistance in their several wrongs and injuries, and *this application* is what is called bringing *an action*, the different forms of which are varied according to the nature of the case. (d) Actions at law are divided into *criminal and civil actions*, the former (under which may be classed *actions penal*) are either to have judgment of death, as appeals of death, robbery, &c., or only to have judgment for damage to the party, fine to the king, and imprisonment; as appeals of malice, &c.; Co. Lit. 284; 2 Inst. 40. *Civil actions* are such as tend only to the recovery of that, which by reason of any contract, &c., is due to us—as *action of debt, upon the case, &c. &c.*, 2 Inst. 61; and in England are divided into *actions*—1st, *Real*; 2nd, *Personal*; and 3rd, *Mixed*. 1st, *A Real Action* is one which is brought for the recovery of real property. 2nd, *A Personal Action* is that which one man may have against another, by reason of any contract for money or goods, or for any offence done by him, or some other, for whose act he is answerable; *personal actions* are divided into, *actions ex contractu*, i. e. founded upon contract, of which an account, assumption, covenant, debt, annuity, *scire facias*, and *actions ex delicto*, i. e. founded upon force or upon fraud, which consist of replevin, trespass, case and detinue. And 3rdly, *Mixed Actions* are those that are brought for the recovery of real property, and also for damage for its detention. It partakes of the nature of the other two, as for instance in the case of *an action of waste* brought by the reversioner against the tenant for life, not only to recover the land wasted (which would be merely a *real action*) but also treble damages, by the

(d) The Romans, following the example of the Greeks, introduced set forms for actions and suits, by which a proper remedy was provided for every injury. "Actiones," say the Pandects, "composite sunt quibus inter se homines discepitarent: quas actiones, ne populus prout vellet institueret, certas solemnnesque esse voluerunt."—ED.

(c) Or as Bracton and Fleta express it in the words of Justinian (Inst. 4. 6. pr.) *jus prosequendi in judicio quod alicui debetur*.—ED.

statute of Gloucester, (e) which is a *personal* recompense, and so both being joined together, is denominated a *mixed action*, and so great is the signification of these three heads, viz.: actions real, personal, and mixed, that under them every species of remedy by suit or action in the courts of common law may be comprised.

H. D. M.

PROBLEM VIII.

WHAT ARE THE DIFFERENT SPECIES OF
ESTATES TAIL, AND HOW ARE THEY
CREATED?

Law Reports.

COURT OF CHANCERY.—Dec. 17.

FARRAND v. HAMEE,

Practice—Amending Bill before Answer.

The *Solicitor-General* applied to discharge an order obtained as of course, to amend a Bill before answer, without prejudice to a common injunction. They urged that the plaintiff might make repeated amendments, and so delay and injure the defendant.

Mr. Monroe contended the order was agreeable to the practice established.

The *Lord Chancellor* said the order was very usual at the Rolls, but if the practice were not settled, he would lay down a rule in the course of the week.

Before the Statute 3 & 4 Wil. 4. c. 94. s. 13., applications to amend were necessarily made in Court, or at the Rolls. That statute ordains that the *Masters in Ordinary*, are to hear and determine all applications for time to plead, answer, or demur, and for leave to *amend Bills*, also for enlarging publication, as well as all other matters, as the Court shall by any general order direct. The act, however, has not been literally pursued in regard to amending bills. The applications to the Master, (f) are confined to those more *special* occasions which may occur *after replication*, and also to any *second* application after answer, and *before* replication, while all other and previous applications to *amend* are still made to the Court, and at the Rolls as before the act.—ED.

(e) *Torts*, or wrongs, the same as are called, by the *CIVIL LAW*, *actiones in personam que aduersus cum intenduntur qui ex contractu vel delicto obligatus est aliquid dare vel concedere.*

6 Edw. I. c. 5.—ED.

(f) 1 Smith, 299. 309.

VICE-CHANCELLOR'S COURT.

Dec. 17.

MILLEE v. SMITH.

As to giving one of many Plaintiffs the conduct of a Suit where the Co-Plaintiffs conspire to delay it.

Mr. Jacob moved, that Mr. Shipley, one of the plaintiffs, should have the conduct of the suit. The bill was filed in 1833, by some of the legatees under the will of the late Samuel Smith, of Homerton, for the payment of their legacies; but since that time scarcely any progress had been made in the cause, and Mr. Shipley, one of the plaintiffs, who was the largest legatee, alleged that his co-plaintiffs conspired with the defendants to delay the suit, for the purpose of making him forego a portion of his legacy rather than wait for the eventual payment in full, whenever it pleased the other parties to proceed in earnest for a decree.

Mr. O. Anderson opposed the motion, on the part of the co-plaintiffs, insisting the Court could not exercise a control over plaintiffs in a dispute between each other before the decree.

The VICE-CHANCELLOR granted the motion.

ROLLS COURT.—Dec. 13.

WHEATLEY v. WHITAKER.

Practice—Cross-Bills.

This was a motion that further proceedings should be stayed until the plaintiff should put in his answer to a cross-bill filed against him by the defendants.

Mr. Palmer stated, that the original bill was to carry into effect the trusts of a deed executed by the wife of the defendant, being a security upon her separate property, and the cross-bill was to set aside that security, upon the ground of fraud. The plaintiff in the original suit was in Australia, where it was impossible to serve him with a subpoena. The original bill was filed in 1837, but the subpoena was not served until June, 1838, and the cross-bill was filed in December, 1838. In cases of fraud, where the plaintiff was abroad, or could not be found, and where a cross-bill was filed before answer to the bill, the proper course was to stay the cause in the first suit until the answer was put in to the cross-bill.

Mr. Pemberton, *contra*, denied that such was the practice; it was inconsistent with common sense and with the precedents. Where a party abroad filed a bill and gave security for costs, which was all that could be required of him, there could be no reason to stay his proceedings. The wife of the defendant was in receipt of the income, and she, knowing the plaintiff was in Australia, filed a cross-bill, stating such circumstances as the ingenuity of her advisers might suggest. No cases could be produced to show that a defendant, by mere suggestions on the record without an affidavit, could stay proceedings until his

cross-bill was answered. The subpoenas were served with some difficulty, and an appearance was entered for Whitaker and his wife, and there was an application to strike out the appearance for Eliza Jane Whitaker, which was refused, but an order was made that the plaintiff should give security for costs before the defendants should be obliged to put in their answer. A bond for that purpose was accordingly executed and deposited in the Six Clerks' Office on the 13th of July last. Since then the ingenious device of filing a cross-bill was resorted to, that the defendants might avoid putting in an answer, and continue receiving the dividends of the stock.

Mr. Palmer.—The original bill was to enforce a security upon property given by the will of Sir Henry Nichols, her uncle, to Mrs. Whitaker for her separate use, and the security was executed under forcible coercion. The plaintiff in the original suit was out of the jurisdiction of the Court.

Lord LANGDALE said, if the defendants in the original suit had put in their answer he should have no hesitation, but he never heard that a defendant in an original cause, who was plaintiff in a cross-cause, was not to put in his answer until an answer had been put into the cross-bill. The motion was made avowedly to prevent the original plaintiff from compelling an answer to his bill; no instance could be found in which this was done, nor were proceedings in an original cause stayed, unless the plaintiff in the cross-cause had first put in his answer. There was no doubt about the practice, and it would be contrary to the principles of common justice to hold the contrary; for then the defendant in the original cause, by abstaining to do his duty, can deprive the plaintiff of what he is clearly entitled to—an answer to his bill. The motion must be refused with costs.

An original bill *must be answered* before an answer can be insisted on to the cross bill. If, however, the plaintiff after a cross bill filed, amends his bill, he loses his priority. 2 Madd. Ch. 429.

Cross bills are of eight kinds.—1. Cross bills. 2. Bills of review to examine and reverse decrees signed and enrolled. 3. Bills in the nature of bills of review, to examine and reverse decrees either signed and enrolled, or not brought by persons not bound by the decree. 4. Bills impeaching decrees upon the ground of fraud. 5. Bills to suspend the operation of decrees on special circumstances, or to avoid them on the ground of matter subsequent. 6. Bills to carry decrees into execution. 7. Bills in the nature of bills of revivor. 8. Bills in the nature of supplemental bills.—ED.

QUEEN'S BENCH.

Sittings at Nisi Prius. Dec. 15.

ABRAHAM v. SKINNER.

Bill of Exchange on a discontinued Stamp.

This was an action brought by the indorsee of a bill of exchange against the acceptor, to recover principal and interest. The bill which was for 25*l.* was drawn by Waller in August 1835, and payable three years after date. The acceptance was admitted, but it appeared that the stamp upon the paper was that used before November, 1833.

Mr. Humphrey, for the defendant submitted that this was a fatal objection, since by the act 3 & 4 Wil. 4. c. 97. s. 17, "all deeds and instruments for the marking or stamping of which any such new die or dies shall have been provided, and which after the day so fixed and appointed as aforesaid shall be engrossed, written, or printed upon vellum, parchment, or paper, stamped or marked with any other die or dies than the said new die or dies, so provided for the same as aforesaid, and also all such deeds and instruments as aforesaid which having been engrossed, written, or printed upon vellum parchment, or paper, stamped or marked as last aforesaid, shall not have been executed or signed by any party thereto before or upon the day so fixed and appointed as aforesaid, shall respectively be deemed to be engrossed, written, or printed on vellum, parchment, or paper not duly stamped or marked as required by law."

Lord Denman said that something more than the act of parliament was required to make out the defence; and then the London Gazette, with the notice of the commissioners, altering the die under authority of the above-mentioned act, and dated October 11th, 1833, was put in as part of the defendant's case.

Hereupon **Mr. Jervis**, for the plaintiff, called a witness, Newton, who said that Skinner, when spoken to in June, 1838, respecting this bill, said that Waller, the drawer, had cheated him out of 400*l.* worth of *blank acceptances* five years ago, and that this was one of them. The following point of law then arose :

Mr. Jervis submitted that the Act does not apply if the instrument be at all written or printed before the commissioners' notice in October, 1833. That the bill in question was at all points an instrument before that date by having the acceptance written upon it, and he instanced the case of an escrow, or of a composition deed in which it should be provided that until all parties come in and sign, the deed shall be in operation; suppose then, one did not sign till an order for a new stamp were issued, the deed would not be in operation.

Mr. Humphrey, contra.—It is urged that this is an instrument which was signed before the act 3 & 4 Wil. 4. c. 97, and the consequent notice of the commissioners in October, 1833; but it cannot be called so, for a bill of exchange before it is a bill or "instrument," such as is contemplated by the act, must have a drawer.

His LORDSHIP inclined to this opinion, but left it with the jury to say, whether the acceptance being admitted this was an instrument previous to the issuing of the new stamp.

The *Jury found for the defendant*: but the plaintiff had leave to move to enter a verdict for himself if the legal point raised should be decided for him—Lord Denman remarking that this was a very curious case.(g)

Special Jury.

REGINA v. LAWSON.

Criminal Information for Libel—Prosecutor not appearing as the witness.—In an indictment, as well as a criminal information, the question of truth or falsehood must be altogether laid aside.

Mr. Theeiger, for the prosecution, stated the case. The prosecution was instituted by the sanction of the Court of Queen's Bench against the defendant, John Joseph Lawson, the printer and publisher of *The Times* newspaper, for a libel which appeared in that paper on the 9th of March last against Sir John Conroy who for many years held an appointment of great trust and confidence, first, in the household of his Royal Highness the late Duke of Kent, and afterwards in the household of her Royal Highness the Duchess of Kent. The libel complained of, he stated to have been published in *The Times* of the 9th of March last, and was in the following terms:—

"The British public, we believe, was aware of the demand of a certain newly-created baronet attached to the household of the Duchess of Kent when her Royal Highness' daughter ascended the throne of these realms—a red riband (to be sure one little thought how that decoration would be afterwards bestowed), 'a peerage! a pension!' We wish he had had the red riband promised him: it would have been as much honoured by his wearing it as by its present possessor.

"We believe the chief merits of the person who made these demands were his *respectful* conduct to the estimable Monarch then just defunct, and the *happy* state in which the pecuniary concerns of the illustrious lady whom he served were found under his management. The amount of this latter obligation of the nation to him it is perhaps hardly possible to compute: it may be thought to be in hard cash somewhere about 80,000*l.*; and the large annuity of 30,000*l.* was granted with an understanding that a gradual liquidation of the 80,000*l.* should silently take place. Happy be the end of the affair! we say; but a matter which has come to our knowledge may throw some doubt on its success. We learn that the baronet of whom we are speaking, having been so happy in conciliating the respect of the late King of England, is desirous of exercising the same amiable and modest qualities

towards the King of Sweden, and to be sent to that Court in the character of Ambassador! And we have been told that the Premier was disposed to acquiesce for the purpose of getting rid of him; but the highest personage did not approve of such a representation of the Crown of England.

"Should he quit his present position, we ask, where are talents to be found capable of applying a due portion of the 30,000*l.* to the liquidation of the 80,000*l.*, and who can so well understand wiping off as he who has chalked on?

"There is another matter also worth notice. There is a certain estate in Wales purchased and paid for not long ago. If any public inquiry should take place whence the money for the payment came, who so competent to answer the question as this Baronet?"

The publication, and its identity with Sir John Conroy having been proved,

Lord DENMAN addressed the Jury; his lordship said, "This is a criminal information at the instance of Sir John Conroy, complaining of the proprietors of *The Times* newspaper for having published a libel which, as he alleges, charged him with a fraudulent misappropriation of funds belonging to her Royal Highness the Duchess of Kent. There is an introductory averment setting forth that the said Sir John Conroy had been attached to the household of the Duchess of Kent, holding therein the offices of equerry and private secretary, and that the libel meant to impute to him that he took advantage of the power which those situations conferred, and the trust reposed in him, to convert monies, the property of the Duchess of Kent, to his own use, and applied them to the purchase of certain estates in Wales, and the counsel for the prosecution has this day called Mr. Mirehouse, who proved that the estates in question had, long before the period referred to, been purchased and paid for. One of the questions for the jury, but one respecting which you can entertain no sort of doubt, relates to the individual referred to in the alleged libel. Of course you cannot have the least doubt that the publication complained of in the present information refers to Sir John Conroy. There being no uncertainty then on this point, the remaining question is, what construction will the publication before you bear? and if you should be of opinion that it will not bear the construction which the prosecutor affirms it must bear, then the defendant is entitled at your hands to a verdict of not guilty. The proper question and the only question for you is, whether the construction sought to be put by the prosecutor on the statement and observations complained of is an improper and forced construction. In the course of the trial several general observations have been made which render it necessary that I should thus state the form in which the question comes before you, and I am bound to tell you that you, and you alone, are to determine the construction which ought fairly to be put on the publication. There are various ways in which

(g) Field v. Woods, 7 A. & E. 114. Dawson v. Macdonald, 2 M. & W. 26.

a party complained against for the publication of a libel may seek to relieve himself from the accusation which such a complaint carries with it. If the party complaining adopt one course of proceeding, the defendant may justify by alleging and proving the libel to be true, even though he should at the same time admit that the publication is defamatory; but in a proceeding by way of criminal information the only question which you, gentlemen of the jury, can have to determine, are these—the fact of publication, the identity of the individual referred to, and the construction which the libel can fairly be considered to bear. The main question, therefore, for you to consider on the present occasion is, whether the libel before you carries with it the defamatory charge of which the prosecutor complains. *Had the present proceeding been one by way of indictment, the question of truth or falsehood must have been from the very outset altogether laid aside. Likewise in a case of criminal information a jury must leave the question of truth or falsehood equally out of view.* But at the preliminary stage of the present proceedings, before it was ripe for the consideration of a jury, the defendant might have offered evidence to the Court of Queen's Bench to show that the allegation of the prosecutor as to its falsehood was without foundation, and if, when the defendant showed cause against this rule, he at the same time established the facts in the libel, or, failing to do that, had shown that at the time of the publication he had reason to believe them to be true—if the statement complained of appeared to the Court to have been made with a *bonâ fide* belief that it was true, then I venture to say that the Court would not make the rule absolute,—that is all along supposing that the Court were of opinion that the defendant had good grounds for believing that that which he stated was true. That gets rid, then, of the question as to the truth of the publication. A question next comes into consideration,—namely, whether the prosecutor gains the necessary vindication of his character by being allowed to declare his innocence on oath, that declaration being met by no opposing evidence on the part of the defendant, otherwise the question of character must be considered to remain as it was before. The prosecutor in the present case having come before the Court by affidavit, and the rule having at his instance been made absolute, the only question for you, gentlemen of the jury, is whether the publication complained of is a libel. A great deal has been said in the course of the trial concerning the circumstance that Sir J. Conroy did not present himself in the witness-box, and was not called as a witness. When he had already made a declaration on oath, in his affidavit before the Court of Queen's Bench, it would, I think, have been an idle parade to have had him in the witness-box. I then say, gentlemen, that as regards your verdict, there would have been no use in putting Sir John Conroy into the witness-box. Reference has been made by the learned coun-

sel to two other cases in which the prosecutors were examined as witnesses. One of those cases was that of a Sunday paper, which I defended as counsel; the publisher of that paper most certainly had no intention of casting any such imputation as the prosecutor in that case supposed him to have cast. It seemed to him to convey the grossest possible reflection upon his character, and you will well suppose that a person labouring under such a charge would feel a strong wish to present himself in the box: that young gentleman did so present himself; there was no imputation as to his character in other respects, nor, indeed, did any rest upon it; but I am sure it must be felt, that when he then came forward, no vindication could be superabundant as to the nature of such a charge. With respect to the case of the Duke of Cumberland, it was one intrusted to my hon. and learned friend Sir Charles Wetherell, who is not quite so much in the habit of conducting cases of this nature as the learned counsel at this bar, who have had the conduct of the present case. He called the Duke of Cumberland, but I could not consider that an inquiry; it was a mock issue: the parties giving testimony on it, if they gave that testimony falsely, could not be indicted for perjury. The man who brings his complaint before a court in the shape of a criminal information is not bound to throw out a challenge to meet inquiry in the way suggested by the learned counsel; and a prosecutor would be told by his own counsel in consultation, that coming forward under such circumstances was a species of parade that had better be avoided. I will now repeat once more, that the question which you have to consider is,—is the publication defamatory, and is it defamatory in the way of which the prosecutor complains? Is it your opinion that the writer of the libel wished it to be understood that Sir John Conroy had been guilty of mismanagement and breach of duty, and that he improperly and fraudulently paid for the estates in Wales to which reference had been made by means of money belonging to the Duchess of Kent? Whether the question be a matter of law, or a matter of fact, I conceive there cannot be much difference as to whether the publication does or does not impute to Sir John Conroy a misapplication of money. Every man with a grain of common sense or feeling must be satisfied that the publication conveys a gross imputation upon the character of Sir John Conroy, and has reference to the mismanagement of money in his care and custody. The libel complained of is contained in a leading article of *The Times* newspaper. It begins by mentioning the alleged demands of a newly created baronet to a red riband, a peerage, and a pension; it ironically imputes to him disrespectful conduct towards the late King; it goes further ironically to speak of the nation owing him an obligation amounting to 80,000! [The noble and learned judge then read the remaining part of the publication as follows:—“Happy be the end of the affair! we say; but a matter which

has come to our knowledge may throw some doubt on its success. We learn that the baronet of whom we are speaking, having been so happy in conciliating the respect of the late King of England, is desirous of exercising the same amiable and modest qualities towards the King of Sweden, and to be sent to that Court in the character of Ambassador! And we have been told that the Premier was disposed to acquiesce, for the purpose of getting rid of him; but the highest personage did not approve of such a representative of the Crown of England.

"Should he quit his present position, we ask, where are talents to be found capable of applying a due portion of the 30,000*l.* to the liquidation of the 80,000*l.* and who can so well understand wiping off as he who has chalked on ?

"There is another matter also worth notice. There is a certain estate in Wales, purchased and paid for not long ago. If any public inquiry should take place whence the money for the payment came, who so competent to answer the question as the baronet?"]

From the information, gentlemen, it is clear that the main portion of the complaint is not against the defendant for imputing to the prosecutor mismanagement of the funds of the Duchess of Kent; the complaint is, that he is charged with having actually misappropriated the money intrusted to him, to pay for estates which he had purchased in Wales. It is for you to say whether or not the publication can bear that construction. The concluding paragraph of the libel is that which is chiefly relied on, and to that I am bound to call your attention. It is in these words—"There is another matter also worth notice. There is a certain estate in Wales, purchased and paid for not long ago. If any public inquiry should take place whence the money for the payment came, who so competent to answer the question as the baronet?" Now, it will be for you to say does this, or does it not, impute to Sir John Conroy that he took the money of the Duchess of Kent and applied it to the purchase of this estate? If you think it does, you can have no doubt that it conveys an imputation of the grossest description. It has been observed by the learned Attorney-General that this latter paragraph is distinct from those which precede it. It is your province to determine how far that view of the publication is just. There is a reference in the paragraph to an inquiry. How could there be any occasion for an inquiry unless there had been some malversation? The paragraph followed other paragraphs written in no friendly tone, and it suggested that there might be a public inquiry, and asked, if so, who so competent as the baronet to tell whence the money for purchasing those estates came? Suppose, gentlemen, that the treasurer of a charity, or the person having the care of the money of a parish, had been charged with such conduct in the management of its concerns as that a debt of 80,000*l.* had been incurred. If any one then stated, that in the event of a parochial inquiry it

would be important to ascertain where the money came from with which he purchased a certain estate lately acquired by him, should you, or should you not, suppose that that statement was meant to convey an imputation injurious to his character? I think the case admits of this illustration; and if you put that construction upon a statement such as I have been supposing, and I do not see how any other construction can be put upon it, you will probably take it into your consideration in coming to a verdict. You have heard the whole of the observations made throughout the trial. I repeat, as strongly as I can state anything, that the jury are the sole judges of the question at issue. Ay or no, is the defendant guilty of the libel? If you think that the construction put upon it by the prosecutor is the true construction, you will find the defendant guilty; if otherwise, you will acquit him.

The jury returned a verdict of Guilty.

COURT OF EXCHEQUER.

Sittings at *Nisi Prius*.—Dec. 10.
COLTMAN, J. sat in the Exchequer under authority of 1 & 2 Vict. c. 45.

DIXON v. HURRELL.

Liability of Husband for goods sold to his Wife while living apart from him.

Action against husband for coals supplied to his wife.

Plea.—Not liable.

It appeared, that Mrs. Hurrell, who was now dead, had for some years previous to her death lived apart from the defendant, her husband: that she received dividends of 85*l.* a-year under her marriage settlement: that her husband's income from his business was not so much as this; and that when the husband was applied to, to send her her pecuniary aid, on one occasion, he said he would not, but would let her go to the workhouse.

Mr. Erle, for the defendant, submitted that the plaintiff was out of Court, inasmuch as there was not any evidence of the circumstances or the causes of separation. (g)

Mr. Wightman, *contrâ*, contended that what even might be the causes of separation, the wife had not sufficient maintenance. (h)

In the evidence for the defendant it appeared, that the plaintiff had kept separate accounts with the defendant and his wife, and had received money from her on her account: that some of the coals were supplied while the plaintiff was in partnership with his father, and the rest since his father's death: also, that the defendant being once applied to for payment of his wife's account, had told the plaintiff that he would pay no debts of hers, to which the plaintiff made no reply, though the witness said he appeared satisfied.

(g) *Mainwaring v. Lesley.*
(h) *Clifford v. Leighton.*

In summing up, the learned Judge said, "The plaintiff, by his form of action, can only recover for the goods delivered since the death of his father: but the main point is, whether he can recover at all. If a wife elope from her husband, he is not liable for her subsequent debts; so, on the contrary, if he turn her away either actually, or by his own bad conduct, as by living in adultery, he is liable. This case is intermediate. Where the parties separate by consent the husband is still liable, unless it appears that the wife has a competent maintenance, either by the provision of the husband, considering his station in life, or, as here, by a settlement. If the husband is liable at all, it is of no avail that he told the plaintiff he should not consider himself so—unless the plaintiff agrees to this, and the evidence to that effect is very meagre."

His Lordship then left the case to the jury on these two points, and they found for the defendant, on the ground, as they said, that the provision by the settlement was sufficient.

Dec. 11.

NEWTON v. BARCLAY.

Liability of Husband for the maintenance of his Wife after she has committed Adultery.

The plaintiff is an hotel-keeper, living in Blackfriars-road, and it seems that Mrs. Barclay came to his house some day in May last, having just arrived from the continent, and remained there until the month of July, when she removed, having in the interval incurred debt of 35*l.* of which she had paid 9*l.*, leaving the sum now claimed. This, however, the defendant refused to pay, denying his liability to discharge any bills of his wife's, even though incurred for necessaries, by reason of her having committed adultery.

Mr. Theriger for the defendant said, his wife was of Spanish origin, while the defendant was, or rather had been, an artist, who, travelling in pursuit of professional studies, had fallen in with the unfortunate object of the present inquiry. The introduction took place at Paris: she was then a widow: the marriage took place at Rome, from which place they removed, and eventually settled at Paris. At that time the defendant had not the slightest suspicion of his wife's fidelity; but she left him in 1828, for the purpose of going to Madrid with a youth named Carlos Bennett, the son of her former husband by another wife, with the intention of placing him at some academy in her native country. After an absence, which continued till 1831, she returned to Paris, where she found her husband, and after again living under his roof for about six months, she again quitted him for Madrid. About this time her conduct excited the suspicion of her husband, and inquiry and search were made, which ended in the discovery of letters which left no moral doubt in his mind of her guilt. These, however, were not in themselves sufficient to establish her infamy, but the defendant was determined to abandon her, and he accordingly, having heard nothing

of her, left Paris for London, and took up his abode with his father, with whom he lived till 1833, without having any idea at all of what had become of his wife, till at that period she made her appearance, and claimed to be acknowledged by him as his wife once more. This, however, he indignantly refused, and through his brother, after much negotiation, an arrangement was come to, by which he bound himself to pay her 5*l.* monthly, on the condition of her retiring and living respectably at Barcelona. Whither accordingly she repaired, and her allowance was duly forwarded to her by the brother until very lately, when he received a letter from her, informing him of her intention to repair to town, and requesting all communications to be made to her at the "Poste restante, Paris." The brother, however, deeming this an infraction of the compromise entered into by him on behalf of his brother, ceased to have any further intercourse with her, and nothing was heard of her movements until in the month of July last she called at the residence of her husband, and demanded admittance. This being refused, she commenced making a disturbance, which ended only with her being given in charge to a policeman, by whom she was taken before a magistrate. He, however, declined to interfere in the case, as she asserted her innocence, and also that she had instituted proceedings for the restoration of her conjugal rights in the Ecclesiastical Court. Under these circumstances, the defendant was once more prevailed upon to make her some allowance, though he denied his liability to any amount whatever, and the parties separated on the understanding that she was to have a guinea per week. Annoyed with these unhappy matters, the defendant was determined to seek out some evidence of her guilt on which to rely in the event of any fresh disturbance, and accordingly two of his friends proceeded to Paris, and there they found out one Annette le Peut, who had been engaged during all the time of Mrs. Barclay's residence with her husband in the capacity of waiting-maid, from whose testimony, united with that of a man named Brunet, who was a sweetheart of hers, it was ascertained beyond all doubt that Mr. Barclay's suspicion rested on but too sure a foundation. These witnesses would prove that so far back as 1828 Mrs. Barclay's character was tainted—that an Englishman, named Wilmore Bennett, had been admitted by her to a degree of intimacy quite incompatible with her innocence; while it would further appear, that Mrs. Barclay had returned to Paris after her husband had quitted it, and having engaged Annette again, had taken lodgings at No. 15, Boulevard des Capucins, on the sixth-floor, at which place it would be proved that a Spaniard, named Carlos Valbeno, had been actually seen in bed with her on several occasions by Annette (who was accustomed to go into the bed-room) after the matter had been once accidentally discovered by her, and also by her sweetheart Brunet, who had seen him lying in Mrs. Barclay's bed

one morning, when she opened the door to give him some directions about the purchase of some champagne glasses which she wanted for dinner. Besides this, there was a Frenchman, whose name was San Martin, who was also a favoured admirer of this lady, whose person was indeed so much considered public as that the possession of her actually gave rise to a challenge between Carlos and San Martin, which resulted in a combat in the Bois de Boulogne. Under these circumstances, painful and degrading as they were, the defendant denied his liability to maintain his wife, for the law held that no husband could be called on to supply a woman even with necessaries against whom so foul a charge as that of adultery could be brought home.

These facts having been proved by the two witnesses,

Lord ABINGER summed up the whole case to the jury, leaving it to them to say, whether the adultery of the wife had been proved to their satisfaction by the defendant, in which event he would certainly be entitled to a verdict; *for the law exonerated a man from all liability on account of a wife who had dishonoured the marriage-bed.* (o)

The jury gave a verdict for the defendant.

A husband is not bound to receive or to support his wife after she has committed adultery, even when *he has before committed adultery*, and turned her out of doors without any imputation on her conduct. See Govier v. Hancock, 6 Term. Rep. 603.

Nor is he liable under such circumstances to the penalty declared by the Stat. 5 Geo. 4. c. 83. s. 3. See Rex v. Flinton, 1 Barn. & Adolp. 227.

But, where a husband turns away his wife because she has committed adultery, and afterwards takes her again into his house, but afterwards turns her out again, he is liable for necessaries supplied her. See Harris v. Morris, 4 Exp. 41.

So where a wife commits adultery, and the husband leaves her in his house with children bearing his name, but without making any provision for her maintenance, and even though she under such circumstances continues in a state of adultery, the husband is liable for necessaries furnished her, unless it can be proved that the person supplying such necessities, knew or ought to have known the circumstances under which she was living. See Norton v. Fazan, 1 Bos. & Puk. 226.—ED.

HAMMON v. TIMMINS.

Joint Stock Companies.—*Their Books not Evidence of Agreements with their Officers, unless stamped.*

Mr. Kelly with Mr. Henderson for the defendant. This was an action against Mr. Timmins in his official character of director of the West Cork Mining Company, and was brought to recover from them a sum of money which the plaintiff claimed as a balance of accounts between them, and also for the amount of salary as their clerk during nine years and a half.

In order to make out the case of the plaintiff, Mr. Erle called for the books of the company, to produce which a notice had been given.

His Lordship, however, on its appearing that the notice was only given on the 8th, and that the books had been sent to Ireland on the 6th, under the exigency of a notice to produce them in the Court of Chancery there, ruled that secondary evidence could not be gone into to prove their contents.

In default of this the plaintiff then proceeded to put in a book, which purported to contain the minutes of the proceedings of the company as kept by their secretary, among which was an entry, that "a letter had been read at the board from the plaintiff, requesting some remuneration for past services and an increase of his future salary, whereupon it was ordered that 50 guineas should be paid to him for the former object, and that for the future his salary should be at the rate of 120*l.* instead of 80*l.* per annum."

Mr. Kelly then objected to the admissibility of this book. The entry can only be read by the plaintiff for the purpose of making it evidence of an agreement on the part of the defendants to pay him 50 guineas and a future increased salary of 40*l.* per annum, and in that view there is no doubt but that it comes within the operation of the revenue laws, and is not admissible without an agreement stamp.

Mr. Erle said, that he would remind his learned friend that this was an excepted case within those laws which did not affect agreements entered into between masters and servants.

Mr. Kelly replied, and cited the words of the acts themselves, which excepted only those contracts which related to "labourers, artificers, manufacturers, and menial servants," to neither of which classes did the clerk of a company belong.

Mr. Erle—This is moreover no agreement at all—it is only the mere entry of the defendants in their own books of what passed at a meeting, and may be used as such by the plaintiff against them without a stamp. The inconvenience of holding it to be otherwise would be great indeed, and would operate as a bar to the claim of almost every clerk of a public company.

Mr. Butt, on the same side, submitted that this only amounted to evidence of an account

(o) See Harr v. Toovey, 1 Selw. N.P. 278.

stated, and not an agreement between the parties.

Lord ABINGER—I must yield, however unwillingly to the objection which is urged on behalf of the defendants by Mr. Kelly, and refuse to admit this entry to be read without a stamp. In my opinion it is an agreement; but the least that can be said of it is, that it is used by the plaintiff as the evidence of one on which he seeks to found his case against the defendants, who are the company of course, though one of the directors is made the nominal defendant on the record. It is therefore at any rate either one or the other, and in either view of it requires a stamp, and cannot be read by the plaintiff for want of one. This case only proves how careful every one should be in dealing with these companies, for they enter their agreements with their servants in their own books, and then object to their admissibility for want of a stamp.

The book was therefore rejected, and the case proceeded upon some evidence under the Court for the account stated, on which the plaintiff recovered a small fraction of his whole claim, and a verdict was directed for him to that extent.

Verdict accordingly.

A *Juror* then asked his Lordship whether from what had passed just before, the world were to understand that no evidence could be given of any transaction which had been entered by a company in their own books, unless the books were previously stamped?

Lord ABINGER—Certainly, Sir; if the entry be sought to be read as the evidence of an agreement between the parties, as it is here, for a contract beyond 20*l.*: in that case a stamp is requisite, and if the plaintiff can produce no other evidence than the books, he cannot recover.

ARCHES COURT.—Dec. 12.

(Continued from p. 110.)

It would appear, according to the best authorities to which the Court had access, that the notion of purgatory was first introduced about the fifth or sixth century. Bishop Tontine, in vol. 2 of his “Elements of Christian Theology,” states that “the practice of praying for the dead began in the third century; but it was not till long afterwards that purgatory was even mentioned among Christians. It was at first doubtfully received, and was not fully established until the papacy of Gregory the Great, in the beginning of the seventh century.”

The doctrine then introduced, and which is declared by the 22d article of our church to be repugnant to the word of God, is described in the catechism of Trent:—“Purgatory is a fire, in which the souls of the pious are purged by torment for a definite period, that an entrance may be opened for them to an eternal home, into which nothing polluted can enter.” It was also a part of the doctrine that the pains of purgatory may be alleviated or shortened

by the prayers of the living, by masses, and by thanksgivings. This doctrine being declared by the church of England to be without warranty of Scripture, the question was, whether prayer for the dead fell under the same condemnation.

Now, the first argument that suggested itself against this supposition is, that prayer for the dead is a practice of a much earlier date than the introduction of the doctrine of purgatory, for it clearly appears that the doctrine of prayer for the dead prevailed amongst the early, if not the earliest, Christians, who had no notion of the doctrine of purgatory at that day. The object of prayers for the departed, offered by those who profess the Romish religion, is to relieve them from the pains of purgatory; but the object of the primitive Christians in their prayers for the dead was, that they might have rest and quiet in the interval between death and the resurrection, and that at the last day they might receive the perfect consummation of bliss. The learned Judge here cited the following passage from Bishop Tayler’s *Dissuasive from Popery*, vol. 10:—“There are two great causes of their mistaken pretensions in this article from antiquity. The first is, that the ancient churches in their offices, and the fathers in their writings, did teach and practise respectively prayers for the dead. Now because the church of Rome does so too, and more than so—relates her prayers to the doctrine of purgatory, and for the souls there detained—her doctors vainly suppose that whenever the holy fathers speak of prayer for the dead, they conclude for purgatory; which vain conjecture is as false as it is unreasonable; for it is true the fathers did pray for the dead—but how? ‘That God should show them mercy, and hasten the resurrection, and give a blessed sentence in the great day.’ But then it is also to be remembered that they made prayers and offered for those who, by the confession of all sides, never were in purgatory, even for the patriarchs and prophets, for the apostles and evangelists, for martyrs and confessors, and especially for the blessed Virgin Mary.” And he cites authorities, Epiphanius, St. Cyril, and others. “Upon what account,” he adds, “the fathers did pray for the saints departed, and indeed generally for all, it is not now seasonable to discourse; but to say this only, that such general prayers for the dead as those above reckoned the church of England never did condemn by any express article, but left it in the middle. But (he adds) she expressly condemns the doctrine of purgatory, and consequently all prayers for the dead relating to it.” And in the 11th vol. (p. 58.) he shows, that though the ancient fathers of the church did sanction prayers for the dead, they did not even know the Romish doctrine of purgatory. Again, Archbishop Usher says, “our Romanists do commonly take it for granted that purgatory and prayer for the dead be so closely linked together, that the one doth necessarily follow the other; but in so doing they greatly mistake the matter, for howsoever they may

deal with their own devices as they please, and link their prayers with their purgatory as closely as they list, yet shall they never be able to show that the commemoration and prayers for the dead used by the ancient church had any relation with their purgatory." Without reference to any other authorities, which were numerous on this point, it was clear that long before there was any notion of the doctrine of purgatory, prayers for the dead were offered by the primitive church. But it had been said, that whatever might be the case in the early ages, the church of England had taken a different view of the subject; and with reference to what had taken place in the earliest time of the Reformation, and subsequently, that though prayers for the dead were not considered in the first instance contrary to the principles of the Christian religion, in later ages they had been considered as opposed to the principles and doctrines of the church, which had been shown by the alterations made at different times in its liturgy. The learned Judge then referred to the alterations made in the Book of Common Prayer in the reign of Edward VI. It was true that the Prayer-book compiled for the public use of the church was prepared by persons of great eminence and learning, called together by the King to consider the alterations necessary to be made in the public service of the church, in consequence of the progress of the reformation of the established religion. It was not immaterial to see the manner in which the first Prayer-book had been compiled, and he could refer to no authority more satisfactory than the act of Parliament by which the book was established—namely, the 2d and 3d of Edward VI. cap. 1. which was entitled "An Act for the Uniformity of Service and Administration of Sacraments throughout the Realm." The recital set forth that to the intent a uniform, quiet, and Godly order should be had, his Highness, with advice of his council, had appointed the Archbishop of Canterbury, and certain of the most learned and discreet bishops, and other learned men of this realm, "to consider and ponder as well the premises, and thereupon, having eye and respect to the most sincere and pure Christian religion taught by the Scripture, as well as to the usages in the primitive church, should draw and make one convenient order, rite, and fashion of common and open prayer and administration of the sacraments to be had and used in His Majesty's realm of England and Wales."

These, then, were the views with which this book of prayer was directed to be drawn up, "having as well respect to the most sincere and pure Christian religion taught by Scripture, as to the usages in the primitive church," and they drew up the first Prayer-book of Edward VI. with reference to these principles. Now, in this Prayer-book prayers for the dead were still ordered to be used, (though they were in some degree altered from those in the Primer of Henry VIII.) and therefore it must be presumed that the compilers of that Prayer-

book did not consider that such prayers were necessarily connected with the doctrine of purgatory. This first Prayer-book of Edward VI. was afterwards revised, and some parts of it with reference to the communion service and the burial service were omitted, and amongst the passages omitted were those which related to prayers for the dead; and it had been argued from this omission, that the persons who were employed to revise the first Prayer-book of Edward VI. did not consider these prayers as consistent with the doctrines of the church as then established; and that, therefore, if there is no express prohibition of prayers for the dead, by necessary implication the church of England had decided that they were inconsistent with its doctrines. But what was the principle on which these prayers had been omitted? Various authorities had been referred to in support of the proposition that it was in consequence of a belief that the prayers were inconsistent with the doctrines of the church of England, and several writers did take that view of the subject. But all agreed that there had been no express prohibition of prayers for the dead; it must therefore be taken to be by necessary implication that they were prohibited.

(*To be continued.*)

MIDDLESEX SESSIONS.

Dec. 11.

(*Mr. Serjeant Adams Chairman.*)

Charge of the Chairman to the Grand Jury, occasioned by the public attention being very considerably drawn to the subject of Grand Juries.

Mr. Serjeant Adams said, that it then became his duty to give them their charge prior to their proceeding upon the business of the day, and as the subject of grand juries during the present day was drawing very considerable attention, and was one which had occupied, and still was attracting, the close consideration of the Government, as well as that of the public generally, he did not think that if he were on that occasion to revert to the matter, the remarks he might feel himself called upon to offer would be regarded as misplaced, especially as steps had already been taken by the judges of the land in connexion with the question. The gentlemen of the grand jury were aware that they were a secret tribunal—the only secret tribunal in the kingdom—who were sworn in either upon oath or a solemn affirmation to keep secret all that passed before them in the course of their proceedings, whilst they were at the same time without the means of bringing before them any witness whose testimony might be deemed necessary to enable them to arrive at the real merits and facts of a particular case. So that if a witness or a prosecutor did not choose to tell them all he knew about the matter, they were without the power either of making him, or of compelling the attendance of other persons whose

statements would supply the deficiency in the evidence. The evils arising from such a system, which had long been admitted, were every day becoming more and more apparent, but he trusted that they all would live to see the day when measures would be adopted by which they would be removed. The grand jury was the first hope of an accomplished and experienced London thief and offender; because if he chanced to be a rich man, or to have wealthy friends, it was in his power to tamper either with the poorer prosecutor, or the principal witness against him, so that when that party made his appearance before the grand jury he stated just as little, or just as much, of what the facts of the case were, as would render it a matter of some difficulty with them to find a true bill. That, then, being so, they did not possess the power to punish the individual, although they might have good reasons, from the manner in which he had given his evidence before them, backed too by the circumstance of the magistrate having deemed the evidence sufficient to justify him in sending the person for trial, to suspect that he had not told all he knew of the transaction. Well, then, when the indictment was afterwards brought into court, returned as "no bill," it not unfrequently happened that the grand jury were censured by the party presiding for not having found a "true bill" on evidence which, upon the depositions over which he had had an opportunity of looking, was probably of the most glaring and conclusive character. In order, however, to remedy that evil, and to put the grand jury in a better position with regard to witnesses who might perjure themselves, the judges at the late November sittings of the Central Criminal Court had considered it necessary and right to direct that there should be a gentleman appointed to attend upon that body during the progress of their inquiries, whose duty it should be to look over the depositions whilst the various witnesses were giving their testimony. The gentleman the learned judges had in their discretion thought fit to select to act in that capacity while the experiment was being made was Mr. J. Clarke, the clerk to the Central Criminal Court Commission, than whom it would have been a difficult task to choose a gentleman who was more competent or more experienced in criminal matters. He was, in fact, one of the most excellent and valuable officers the Central Criminal Court had ever possessed. Such was the gentleman to whom, for the present, had been intrusted the conduct of the new scheme. As yet the experiment had not been adopted at Clerkenwell; no person had been appointed, nor was that court in a situation to do so; neither would it be prudent to tread too hastily in the steps of the other court, for as yet it had not been ascertained whether the arrangement was one which, in its operation, was calculated to effect the end desired. He had no doubt, that if the assistance of such an officer as that of clerk to the grand jury were found to work well, that the court would meet with no difficulty in obtain-

ing the help of such a party. If, on the other hand, the experiment did not answer the object anticipated, of course no appointment of the sort would be desired. But the evil went beyond what he had stated, for there were many things which were made the subject of inquiry by a grand jury when, in point of fact, the operation of that body was not necessary. A great mistake as to the duties of a grand jury frequently prevailed in that body, inasmuch as the only duty they had to perform was to see whether in the cases that were brought before them there was sufficient evidence to justify the party accused being put upon his trial.

(To be continued.)

REVIEW OF NEW BOOKS.

The Case of the Queen v. D'Israeli, with an Argument in VINDICATION of the PRACTICE OF THE BAR. By JOSEPH STAMMERS, Esq. Barrister at Law. London, Richard Pheney, 89, Chancery Lane, 1838.

The offence against the bar committed by Mr. D'Israeli, in his letter to Mr. Austin, and stated in the proceedings of the criminal information, has called forth this spirited pamphlet in defence of the bar, which every member of that honourable body must admire. The author gives as a reason for his becoming the champion of his profession, that he has been impelled by a deep conviction of the very general misconceptions which exist as to the nature of the relation between counsel and their clients, the principles upon which it is founded, and the duties which arise from it to vindicate the character of a profession peculiarly jealous of the least deviation from high and honourable conduct in its members, but which has perhaps too long suffered the crude and shallow sophistries of unreflecting men to cast upon them as a body, the most unfounded imputations; and after stating the proceedings, when Mr. D'Israeli was brought up for judgment, commences his vindication. He says—

"For the purpose of enabling the advocate freely to perform his important duties, it is necessary that he should be invested with the privilege of boldly, fearlessly, and to a great degree, irresponsibly, investi-

gating facts, examining witnesses, addressing himself to the mind of the Court, and demeaning himself as one whose proudest boast it is to fear no consequences in the discharge of his duty to his client; nor until a man has been placed in the situation of needing the assistance of the bar, either in the protection of his property, or the vindication of his character, can the full and faithful performance of the duties of an advocate be sufficiently appreciated."

He very faithfully illustrates the right of permitting questions to be put to a witness as to any improper conduct of which he may have been guilty for the purpose of trying his credit, and as to the practice of the judges when a question of a criminatory nature was put to a witness, to inform him that he was not bound to answer the question, *but we have looked in vain* for the opinion of Lord C. J. Denman delivered this year at the Kent Assizes last summer, upon that important subject, and which is reported in our Guide. (o) There is also the case of Reg. v. Drew, 8 Carr. & P. 140. where Coleridge J. expressed an opinion upon the subject; and as the author professes to state what is the clear and indisputable practice of the Courts in Westminster Hall at the present day. We think these illustrations should have been given to make that statement perfect and conclusive.

We could have wished that upon so grave a subject the argument had been extended so as to have made the vindication more complete.

Business in the Courts.

COURT OF CHANCERY.

In re Latour, bankrupt petition, by order—Gore v. Masterman, to produce will—Gaunt v. Taylor, by order—Levy v. Prendergast, to be spoken to, by order—Hardham v. Ellames, cause by order—In re Davenport, by order—Moore v. Langford, further directions—Rickman v. Dike, exceptions—Trash p. Wood, cause—Carter v. Hargrave, ditto—Fairlie v. Hartwell, ditto.

(o) Reg. v. Arnold, ante, p. 3.

VICE-CHANCELLOR'S COURT.

Short Causes and unopposed Petitions.

After unopposed petitions.—Harding v. Harding—Newton v. Hazledine, by order—the Attorney-General v. the Mayor of Warwick, ditto—Waters v. Taylor—Ex parte Fawcett.

The petitions to the end.

ROLLS' COURT.

Motions.

After the motions remaining petitions.

After the petitions—Thorn v. Francis, to be spoken to—Delagarde v. Lempriere, further directions and costs by order—Hughes v. Hughes, to be spoken to—Thompson v. Rumbold, petition by order.

COURT OF QUEEN'S BENCH.

Middlesex Special Juries.

Doe dem. Palmer v. Johnson—Sims v. Thompson, M. P.—Paul v. Jones—Roden v. Sir G. Carroll—Hoppe v. Cocks and others—the Queen v. Vivian—the Queen v. Hazard—the Queen v. Vinier—The Queen v. Haward—the Queen v. S. Vinier—the Queen v. W. Vinier—the Queen v. Hayward.

COURT OF COMMON PLEAS.

London Special Juries.

Fawcett v. Frost—Graham v. Fretwell—Gibson v. Bennett—Edwards v. Scott.

London Common Juries.

Anderson v. Weston—Ingram v. Winks.

TO CORRESPONDENTS.

"Henrius" came too late for investigation this week.

"P. S."—Under consideration.

We are so pressed for room this week by an over abundance of interesting matter, as to be unable to notice the letters of "An Artioled Clerk"—"G. A. A. R. S."—"W. B." and "An Observer."

ERRATA.

Page 107—in Saintsbury v. Matthew, for "Same case" read "Power to amend quite discretionary in the Judge, and terms upon which a new trial will be granted," as a leader to the motion.

Same page—add to the cited case "Earl of Falmouth v. Thomas, 1 Cro. & Mee. 80."—"3 Tyr. 26."

Same page—for "Park v. Staniland" read "Parker v. Staniland."

The Legal Guide.

SATURDAY, DECEMBER 29, 1838.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 115.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

IT is by Sec. 28 enacted that when a mortgagor shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage but within 20 years next after the time at which the mortgagor obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person in writing signed by the mortgagor, or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment or the last of such acknowledgments, if more than one was given, and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more

than one mortgagor or more than one person claiming the estate or interest of the mortgagor or mortgagors, such acknowledgment signed by one or more of such mortgagors or persons shall be effectual only as against the party or parties signed as aforesaid; and the person or persons claiming any part of the mortgage money, or land, or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent, and where such of the mortgagors or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment with interest of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

This Section is peremptory, and declares that, 20 years from the time a mortgagor shall take possession, or from the time of the last acknowledgment made in writing, is to be

a decided bar *in equity* for ever to redemption by the mortgagor, or those claiming through him; and it should be observed that, the Section contains *no saving clause for persons under disabilities*.

There can, however, be no doubt but that Section 16 will apply here, so that persons labouring under the disabilities there described, will be entitled to a further period of ten years. It was the case before this Statute, when persons labouring under disabilities were allowed the same time to claim as they would have been entitled to in the case of a legal claim. See *Lytton v. Lytton*, 2 Bro. C. C. 441; *Cuthbert v. Crasy*, 4 Bl. 125; *Pim v. Goodwin*, id 133; *S. C. 2 Mer.* 240; *Foster v. Blake*, 4 Bl. 140; *S. C. 2 Ball & B.* 565; *Harrison v. Hollins*, 1 Sim. & St. 471.

The estate of the mortgagor *at law* is of course gone by breach of the condition of redemption, no remedy is left him after this limit. A mortgagor therefore should never allow his mortgagee to remain in possession for 20 years without requiring an account in writing or some acknowledgment in writing of the mortgage—it is quite immaterial in *what shape* the acknowledgment is made, so that it be made in writing. It may be by letter; see *Fenwick v. Reed*, 6 Madd. 8; or by the mortgagee's demanding the principal money or giving a receipt for interest money, see *Trash v. White*, 3 Bro. C. C. 289; or even by the settlement of an account between third parties, see *2 Cox's Ch. Ca.* 294; or by an answer in Chancery, see *Proctor v. Oates*, 2 Atk. 140; or by an assignment wherein the equity of redemption is recited, see *Smart v. Hunt*, 4 Ves. 478. n. a., *Hardy v. Reeves*, id. 466.; *Price v. Cooper*, 1 Sim. & S. 347; see also *Carew v. Johnson*, 2 Sch. and Lef. 295; or by a surrender by the mortgagee without the concurrence of the mortgagor or his heirs, where the mortgagee has treated his interest as a mortgage, see *Hansard v. Hardy*, 18 Ves. J. 455; or by a devise, see *Anon.* 3 Atk. 314; but see *Silberschilt v. Schiott*, 3 Ves. & B. 45; or taking notice by will, or by any other deliberate act reciting that he is mortgagee, see *Ord v. Smith*, Sel. Ca. C. 9. 2 Eq. Ca.

Ab. 609. *Perry v. Marston*, 2 Br. C. C. 399. As to accounts between mortgagor and mortgagee to save the statute, see also *Vernon v. Bethell*, 2 Eden 114; *Gould v. Tancred*, 2 Atk. 533; *Hodle v. Healy*, 6 Mad. 181; *S. C. 1 Ves. & B.* 526; *Baron v. Martin*, Coop. 192.

Even after a forty years' possession by the mortgagee, redemption has been allowed, where, within seven years of the bill, the mortgagee had contracted with the mortgagor for the purchase of the equity of redemption.

It was a rule of equity before this Statute, that, unless in the case of disability, twenty years' adverse possession was a bar to relief. See *Price v. Copner*, 1 Sim. & S. 347; *Cholmondeley v. Clinton*, 1 Turn. & Russ. 107. We are still shewing the *doctrine of acquiescence*, but with this difference, that instead of its being applied *by equity* it is here declared *by law*. Before this Statute, a court of equity acted with equitable rights by analogy to the Statute of Limitations in the cases of ejectment, and held that twenty years' possession by a mortgagee under certain circumstances was equivalent to twenty years' adverse possession at law. There is, however, this material difference between adverse possession at law and the possession of the mortgagee. *Adverse possession at law* is inconsistent with the title of the true owner; but the possession of the mortgagee is consistent with the equitable title of the mortgagor, twenty years' adverse possession gives therefore absolute title to the possession at law; but twenty years' possession of the mortgagee does not in itself give title against the mortgagor. If for twenty years the mortgagor has suffered the mortgagee to hold as if he were the true owner, without acknowledgment of the mortgage-title; and if for twenty years the mortgagee has considered himself as the true owner, and kept no accounts as mortgagee, a court of equity has held that this negligence of the mortgagor shall protect the mortgagee from the difficulty which, in such circumstances would attend the mortgage account; but if within the twenty years the mortgagee has acknowledged the mortgage-title, a court of equity imputes no negligence to the mortgagor;

or, if within twenty years the mortgagee has kept accounts, or otherwise dealt with the property as mortgagee, he is not protected from the account in respect of the mortgagor's negligence. See *Hodle v. Healy*, ante.

Adverse possession is recognised as a term of art by Lord Mansfield and by Mr. Justice Aston, in *Doe v. Prosser*, Cwyp. 217, where it was asked by the latter judge, "What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits without account for near forty years is not?" And the term "adverse possession" is used in this Statute as a recognised term of art, it is a relative phrase, meaning in plain terms such possession as is inconsistent with another's right.

Titles depending upon the Statute of Limitations can but in few cases be recommended. The bare receipt of rent is no ouster; for it is a contradiction in terms, that a man by wrong should have my right, so the non-payment of rent is no ouster, and therefore the operation of the Statute must frequently be prevented by the existence of a lease granted by the person whose interest or the interest of persons claiming under him is wished to be barred. So there may be a case where the circumstance of concealing a deed shall prevent the Statute from barring, but then it must be a *voluntary* and *fraudulent* detaining, for to say that merely having an old deed in one's possession shall deprive a man of the benefit of the act, is going too far, and would be a harsh construction of a statute made for the quieting of possession. (a)

In the case of *Hardman v. Ellames*, 5 Sim. 640; S. C. on appeal, 2 Mylne & K. 732. the plaintiff claimed an estate as heir at law, under an old ultimate remainder; the defendant pleaded that the title of the party through whom the plaintiff claimed accrued in 1759, and that the possession of the estate had been ever since *adverse* to the plaintiff, and to the persons through whom he claimed. These pleas were over-ruled by the Vice-Chancellor, because they did not state the particular facts on which the defendant

meant to rely as constituting the adverse possession, and therefore the plaintiff could not know what case he had to meet. A plea of adverse possession to a bill charging that the defendant has in his custody documents, shewing the plaintiff's title, must be accompanied by an answer denying that charge. The defendant then put in his answer, and a motion was made that he should produce and leave with the clerk in court the deeds referred to in that answer, which was granted by the then Master of the Rolls, (the present Lord Chancellor); against which order an appeal-motion was made before the Vice-Chancellor and Mr. Justice Bosanquet, sitting as Lords Commissioners of the Great Seal, on the 9th May, 1835, who ruled that if a defendant in his answer states the effect of documents admitted to be in his possession, but for his greater certainty craves leave to refer to the documents themselves when produced, the plaintiff is entitled to move for their production, although the answer positively swears that they form part of the defendant's title, and in no way assist or make out the title of the plaintiff; and it was observed by the Lord Commissioner Shadwell in delivering judgment, that it seemed to be consistent with justice that if a defendant makes a document a part of his answer, the plaintiff is entitled to know what that document is, because he has a right at the hearing to read such parts of the defendant's answer as he thinks fit, and that if the plaintiff should think proper to amend his bill, and require the deed to be set forth at length, it would be a matter of course that the deed should be so set forth. This case came before the Lord Chancellor last week, but judgment is postponed.

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

Middle Temple, Dec. 17th, 1838.

SIR,—I beg leave to forward you the enclosed answer to Problem VI. in No. 6, of the Legal Guide, and shall feel much obliged by your insertion of it in your next number, should you deem it worthy of attention.

My chief object in subscribing to your

publication was for the purpose of obtaining the very useful information which it contains; useful alike to the practitioner as well as to the student. The legal problems which are proposed in each of your numbers, will be, I am sure, the means of facilitating the studies of myself and fellow students, and the answering of them will lead us on to emulation.

I remain, Sir,
Your obedient servant,
HENRICUS,
A Member of the Middle Temple.

ANSWER TO PROBLEM VI.

What is an Action? (I)

An action is defined by Bracton, (a) in the same manner as by Justinian, viz. "Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur," and by the Mirror, (b) "to be the lawful demand of one's right, as an action is a right of prosecuting in a court of justice for that which is one's due, or a legal demand of one's right, so the suit till judgment is called an action, and not after."

As the object of mankind, in entering into society, was the protection and security of their persons and property; so they were, on becoming members of that state of civil or political society, under a tacit promise or compact to observe and abide by the laws of such community; and being so bound, they were necessarily obliged to apply to those laws for the redress of any injury they might suffer in their lives, their liberties, and their property. For were men allowed to be their own judges in their own causes; or to use force for the redress of their injuries; all social communities must then of necessity cease; and mankind would then return into that state of nature, which they had formerly forsaken for the benefits of civil society; and then (to use the words of Shakespeare, who in all his works, has the most just and strictest notions of justice, liberty, and government,) "

"Strength would be lord of imbecility,
And the rude son would strike the father dead.

(a) Lib. 3. c. 1.
(b) C. 2. s. 1.

Force would be right, or rather right and wrong,
Between whose endless jar discord resides,
Would lose their names, and so would justice too."

It would be the introduction of all those inconveniences, that were the prominent features of the state of nature; and which mankind in that primitive state endured; and for which governments and laws (II) were first invented to prevent. Hence, therefore, they were obliged to submit to the public the measure of their damages, and to have recourse to the law, and the courts of justice, which were appointed to give them ease in their affairs: and this application is what we call bringing an action.

Having seen that an action is "the lawful demand of a man's right;" and that in life, liberty, and estate, every one has a property and a right (if not previously forfeited); and that if they are violated, the law gives an action to redress that wrong, and to punish the wrong-doer; (c) we must now consider the diversity of actions, which are of two kinds, *Placita Coronæ, et Civilia.* (d)

Pleas of the Crown, are those which contain offences done against the crown and dignity of the sovereign. (e)

Civil Actions are divided into three kinds, viz. real, personal, and mixed. A real action is defined to be that whereby a person claims title to have a freehold in any lands or tenements, rents, or commons, in fee simple, fee tail, or for life.

Every Real Action is possessory, viz. of his own profession or seizin, or auncestrel, viz. of the possession or seizin of his ancestor: and real actions auncestrel, are possessory, viz. when the ancestor dies in possession, and the land descends; or rightful, when only the right descends from the ancestor. (f)

Personal Actions are such as concern the person only, by which nothing but damages can be recovered; and since an action is denominated either "real" or "personal," as the thing sought to be recovered is the

(c) Vau. 337.

(d) Co. Lit. 284. b.

(e) St. P. C. 1. a.

(f) 6 Co. 3. b.

one or the other; replevin is a personal action. When a personal action dies with the person, and when not. See Comyns's Digest, Title Administration, B. 13.

Mixed Actions are those in which the freehold is recovered, and also damages. (a) As in assize of novel disseisin, Co. Lit. 285. a. Lit. sect. 494. Quare impedit and darrein presentment, Lit. sect. 493. Curia claudenda, which lies against the tenant of the freehold, for not enclosing his land, to the nuisance of the plaintiff: and the judgment shall be, that he enclose the land and render damages. Warrantia Chartæ, in which the plaintiff shall have judgment for the warranty, and also for damages. Wast. Lit. Sect. 492. Writ of Annuity, Co. Lit. 285. a. Cro. Car. 171.

Having thus shown the nature and definition of actions, we come now to the inquiry of *Who may sue—who cannot sue—and, who may be sued.*

And, 1st. *Who may sue.* The king, though he is the chief and head of the kingdom, may sue as demandant, 3 Inst. 136, as in a writ of right. In a Writ of Escheat, 3 Inst. 136. and in a variety of other writs, for which see id. So, the king may sue in Chancery for a matter in Equity, 1 Roll. 373. l. 36. But the king shall not have an action, except when the principal cause of action belongs to the king; for upon the peace being broken, or any wrong done, principally to another, the king shall sue only by indictment, Th. D. l. 1. c. 3. s. 9, 10, 11; or, by information or other matter of record. 3 Inst. 136. The king of another kingdom may maintain an action in B. R. or other court, 1 Roll. 133. provided the cause in dispute is properly cognizable by them. 1 Roll. Rep. 133. 1 Roll. Abr. 532.

The Queen may sue by writ without naming the King. Th. D. l. 1. c. 4.

The Prince of Wales may sue by writ. Id. c. 5.; 1 H. 5. 7.

So may every other subject of the king who has no legal impediment. 2 Inst. 55, 56.

2ndly, *Who cannot sue.* See as to the

ability of persons, Comyns's Digest, Title Abatement, E. 1.

3rdly, *Who may be sued.*

The king might have been sued in all actions, as a common person, until the time of Edw. 1. But now no one can have an action against the king; but one shall be put to sue to him by petition. Th. D. l. 4. c. 1.

The Queen may be sued without the King her husband, in all actions; for she is a feme sole by the common law. She may be vouched. So the Queen Dowager may be sued by action without suing to her by petition. 10 Ed. 3. 508.

The Prince of Wales may be sued by writ. Th. D. l. 4. c. 2.

So may every other subject. 2 Inst. 55. 6.

HENRICUS.

(To be continued.)

(I.) In considering the question, what is the nature of an action, or the manner of procuring redress when a right is violated? we must look upon what its form depends.

1. Upon the nature of the several Courts established in a country.

2. Upon the forms of procedure adopted in those Courts.

3. Upon the nature of the right.

In entering upon this consideration, it is of the first importance to ascertain *what is a right?*

A right considered in respect to its different objects, may be reduced to four principal species.

1. The right we have over our persons and actions, which is called *liberty*.

2. The right we have over things or goods that belong to us, which is called *property*.

3. The right we have over the persons and actions of other men, which is distinguished by the name of *empire* or *authority*.

4. The right one may have over other men's things, of which there are several sorts.

There is also another particular signification of the word, by which it is taken for *law*; as when we say that natural right is the foundation of morality and politics,—

(a) Co. Lit. 284. b.

that it forbids us to break our word ; that it commands the reparation of damage, &c. In all these cases *right is taken for law*, which kind of right agrees in a particular manner with man.

Though a variety of circumstances has produced a great diversity in the governments, and particularly in the judicial establishments of different countries, we may at the same time observe that in this particular there is also a considerable degree of uniformity. Courts are established to defend an individual of a state against another, who offers injustice, and as the great similarity in the passions of man, and in their connexions with each other, produces similar violations of laws, so it is natural to expect that these should anywhere give rise to the same precautions in order to secure the peace of society. We may ever observe a great uniformity in the steps by which judicial establishments have been introduced and improved in different countries.—ED.

(II.) Law in general is human reason, inasmuch as it governs all the inhabitants of the earth. The political and civil laws of each nation ought to be only the particular cases in which human reason is applied.

They should be adapted in such a manner to the people for whom they are framed, that it is a great chance if those of one nation suit another.

They should be relative to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.

They should be relative to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have a relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners and customs. In fine, they have relations to each other, as also to their origin, to the interest of the legislator, and to the order of things on which they are established; in all which different lights

they ought to be considered. *Montesq. Sp. Laws*, B. 1. c. 3.—ED.

ANSWER TO PROBLEM VII.

By the common law no person interested in the event of any suit could be admitted at the trial as a witness on behalf of the party for whom he was interested; but he was not disqualified by a mere contingent benefit that might result to him in consequence of the decision, as if he were interested in a case similar to that in question: and unless he were actually interested in the event of the trial, however much he might be biassed in favour of one of the parties, his legal competency as a witness was not affected but only his credibility. But if he had a direct interest in the result of the suit, no matter how trifling, he was altogether disqualified from giving evidence. (*Burton v. Hinde*, 5 T. R. 174.) If his interest or liability were released before the trial took place, his competency would be restored. Where the witness was equally interested for both parties, his evidence was received. (*Evans v. Williams*, 7 T. R. 481.) Great inconvenience has frequently been experienced from excluding the evidence of witnesses interested in the event of the trial where justice between the parties could not be administered without this testimony; and although several statutes have been passed for admitting the evidence of common informers and the inhabitants of parishes and other districts in cases where they have been interested as parishioners, &c., no general legislative enactment was ever passed for remedying this evil until the Statute 3 & 4 Wil. 4. c. 42., which enacts (s. 26.) that any witness objected to on account of such incompetency shall be examined; but in that case a verdict or judgment in favour of or against the party on whose behalf he shall have been examined shall not be admissible as evidence for or against him or any one claiming under him. And the act then proceeds to direct (s. 27.) that the name of every witness so objected to shall at the trial be indorsed on the Record, together with the name of the party on whose behalf he was

examined, at the request of either party, and shall be afterwards entered on the record of the judgment, and such indorsement or entry shall be sufficient evidence, that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence. This enactment appears to have completely removed the inconvenience above-mentioned, enabling parties to avail themselves of the evidence of such interested witnesses, but at the same time shielding the witnesses from any liability which they might otherwise incur by giving such evidence; or preventing them from availing themselves of their own evidence, in their own behalf in any future transaction, leaving the degree of credit to be given to such evidence to the consideration of the jury, who are clearly as competent to form an opinion on this as on any other point referred to their decision.

P. S.

The above answer of P. S. extends only to the competency of witnesses, and not to the whole question raised by Problem VII.—ED.

PROBLEM IX.

PLEA OF Non Assumpit. How does it OPERATE?

IMPRISONMENT ENNOBLED.

Illustrations of the misfortunes of Men of real or assumed merit.

WHEN we enlarge on the misfortunes of mankind, it is easy to make a display of learning. Examples of these are so numerous, that before we pause to make a reflection, the page is filled with the history of the facts that crowd upon our recollection.

Persecution generally selects for its victims men of real or assumed merit; and none should hope to attain great celebrity, who have not courage to endure great injustice. It would be invidious to trace this remark to a vanity which I do not feel, and for which even the circumstances of my present situation would be no apology.

Sophocles was dragged before a tribunal by his own children; Aristides and Themis-

tocles suffered banishment; Phocion and Socrates were condemned to drink hemlock. The memory of the latter was insulted by Cicero himself, who treats him as an usurer in one of his familiar letters, in which he gives orders to have secretly brought for him the confiscated property of his friend Milo. The virtuous Plato was accused of envy, by Athenaeus; of lying, by Theopompus; of theft, by Ablugellus; of avarice, by Suidas; of immorality, by Porphyrius; and of impiety, by the rascal Aristophanes, who was paid by the good people of Athens for calumniating the most virtuous man of his age, and who well deserved the wages he got.

A volume might be filled with the mere names of the wise men, the men of learning and the philosophers, who have suffered imprisonment; the punishment, which, as being the subject immediately before me, I shall make the object of my present attention.

Anaxagoras was sent to prison for asserting that there was a God; Boethius for having been an honest minister; Buchanan, because he had spoken the truth; and Galileo, because he had proved that the earth revolved round the sun. Boethius composed his best works in prison, and Buchanan his excellent paraphrase of the Psalms of good King David.

Five years of imprisonment were inflicted on Pelisson, the most courageous and grateful of poets; it was in prison that he made verses worthy of posterity. The immortal author of 'Jerusalem delivered' died in a dungeon; and it was in a dungeon that Don Quixotte was called into being. 'Fleta' is among the best works upon jurisprudence, and it was composed in the Fleet-prison, by a lawyer who was sent there for debt, and who ended his days there. Louis XII. Duke of Orleans, was imprisoned before he ascended the throne. It was in the old tower of Bourges that he studied the art of reigning. It is worthy of remark, that the two best kings France ever had, Louis XII. and Henry IV., were educated in the same school of misfortune; and it is still more extraordinary, that they both learned wisdom théré.

In the gloom of a dungeon, Raleigh com-

posed his 'History of the World,' which is a model of eloquence and sound reasoning ; and he died for having been a hero. Selden wrote all his works in prison. Polignac sweetened his captivity by composing his *Anti-Lucrèce*. Freret studied Bayle during his long residence in the Bastile ; and it was there that Voltaire, the genius of ages, sketched the plan of our only epic poem.

The royalist poet, Davenant, whose life Milton saved in the reign of the Protector, and who rendered the same service to the English Homer at the period of the Restoration, finished his poem in a dungeon of Carisbrook Castle, where he was confined by the command of Cromwell.

The author of *Robinson Crusoe*, the only work that Rousseau thought fit to be put into the hands of his children, completed his narrative in Newgate. De Foe was imprisoned for having written against ministers who were a disgrace to his country : when he was set at liberty, his persecutors had lost their places as ministers, and he had established his fame as an author. Imprisonment seems propitious to the success of writers. The 'Gondebert' of Sir William Davenant was the only one of his works which deserved to survive him ; and the Review of De Foe commenced during his confinement in Newgate, and so happily imitated by Addison and Steele in their *Spectator*, was the origin of a hundred periodical essays, in a style which is the boast of England, and which I have attempted to introduce in France under the title of the Hermit.

The prisoner of Sainte Pelagie is proud to acknowledge himself indebted to the prisoner of Newgate for what success he has had in a species of literature, of which the latter was the inventor. Weigquefort was condemned to a state prison for a political crime, and it was there he wrote his ingenious treatise on Embassies. It is a circumstance little known, that an Italian of the name of Maggi, after having defended with courage and skill the town of Famagusta,—besieged by the Turks,—became their prisoner ; they treated him like Turks, for they burned his house, his books, and his instruments, and put him in a sort of well, where

he lived brutish for fourteen months. It was in this well that he composed his treatise *De Tintinnabulis*, which has been pronounced excellent.. It has been said that misfortune disarms envy, and that the envious are sometimes susceptible of pity. This observation is contradicted by experience. It is possible that the powerful may sometimes be softened into forgiveness of merit ; but people without power, who are the only envious people, never forgive it. A weak prince was satisfied with condemning to the flames the works of the Abbe Trithem, who was guilty of having invented a system of stenography ; but the unfortunate Virgilius, Bishop of Saltzbourg, was himself burnt at the instance of an envious theologian, for having dared to write, that, as the earth was round, there must necessarily be antipodes. It would be easy to add to this list of unfortunate authors, names collected from every class and from every species of talent ; but I leave that consoling research to candidates for the honours of Science and Polite Literature. Since it appears to be an invariable maxim in the science of government, to persecute philosophers and men of letters ; and since even in this enlightened age, the honour of a special prison is not allowed them, I would suggest (without detriment to any severities that may continue to be exercised against the living) that an expiatory monument should be raised in honour of the dead. In whatever form it may be the pleasure of the artist to mould this edifice, I would have represented there, without any distinction of time, country, or misfortune, the portraits of Camoens, who died of hunger in the streets ; of Otway, who expired upon a bed of straw in a garret, of which the only remaining furniture had been sold a few days before ; of Tasso, who borrowed fifty pence to support himself during a week,—

" Non avendo candele per iscrivere i versi suoi :" of Ariosto, who complains so bitterly in his satires of having no better covering than a ragged cloak ; of Dryden, who received all his life the wages of hire from the bookseller Thompson, and who sold to him for three hundred francs the ten thousand best verses in the English language ; and of Gilbert,

who died in an hospital. The most distinguished places there should be granted to the blind Milton, who sold his 'Paradise Lost' for ten guineas; to Le Sage, who ate in his old age the bread of charity; to Corneille, who wanted bread the evening before he died; to Vandel, who composed his tragedies at a stall, where he died at ninety years of age; to Voltaire, who passed in exile sixty years of his glorious life; to the wanderer, Jean Jacques; to the banished Davist; to Sydenham, who died in prison; to the learned Adamson, who apologised, at eighty years of age, for not being able to attend the Academy, for want of money to buy a pair of shoes. The inscription on this monument should be,—

"Here we may be at rest."

Law Reports.

COURT OF CHANCERY.—Dec. 22.

FARREND v. HAMER.

JUDGMENT.

Practice—Amending Bill before Answer, without prejudice to a Common Injunction. (a)

The Lord CHANCELLOR said, the point to be determined was, whether a plaintiff was at liberty to amend by an order of course, before answer, and without prejudice to a common injunction. In this case there were two defendants, and the one who complained of the order to amend was not restrained by the injunction; it therefore became unnecessary to determine the general question. The practice seemed to be in favour of such amendment, and there were *dicta* in favour of it, although there were no direct decisions. His Lordship affirmed the order of course, to amend which he said was correct.

ROLLS COURT.—Dec. 20.

TATE v. CLARKE.

JUDGMENT.

Construction of the word ISSUE as a word of Limitation.

This cause came on upon demurrer to the plaintiff's bill. The suit was by William Tate and Elizabeth, his wife, and John Kimber, the children of Mrs. Margaret Kimber, deceased, who was the surviving sister of George Williams, who died in 1784, who by his will devised his house at Hammersmith, and all other his freehold estates, unto his wife Lucetta for life, and after her decease to trustees, upon trust to pay the rents amongst

all and every his brother and sisters, who should be living at the time of the decease of his wife, *and to their issue*, male and female, equally share and share alike; and after making a specific bequest, he devised the residue to his wife, and appointed her executor. The testator left his wife surviving, and also his brother and two sisters, who all died in the lifetime of the wife; the brother and one sister without issue, but the other sister, Margaret, left issue the plaintiffs, Elizabeth, now Mrs. Tate, and John Kimber.

Lord LANGDALE said, "Issue" was a word of limitation, and the context of the will did not afford sufficient reason to construe it otherwise. It was in this will the same as "*heirs of the body.*" (b) The words of limitation must be applied to the brothers and sisters, who were intended to be the first takers. He was unable to find upon the will, clear indications of an intention that the technical words should receive a different construction. He must construe them according to their legal import, and his Lordship therefore was of opinion that the plaintiff had no interest in the estate. *Demurrer must be allowed.*

BULLMAN & OTHERS v. THOMAS & OTHERS.

Injunction.—Joint Stock Companies.

Motion for an injunction to restrain the defendants from disposing of the property of the Reeth Consolidated Mining Company, and to appoint a receiver.

Lord LANGDALE said, that the defendant Thomas in 1836, being, either by himself or by persons acting for him, the owner of certain mining property in the parish of Towednack, near St. Ives, Cornwall, was desirous of capital to carry on the mines, and by the establishment of a company to induce persons to become shareholders and advance money on their shares. He proposed that 100,000*l.* should be raised by 20,000 shares of 5*l.* each, on which the first deposit was to be 2*l.* a share, which would raise 40,000*l.* and he (Thomas) was to have a right to call for further payment up to 100,000*l.* He appointed himself and other persons to be directors, according to his own will and pleasure. He then caused a prospectus to be circulated to induce persons to come in and buy shares. The prospectus set forth the names of the directors and officers, and several reports received from persons inspecting the mines; and in it the directors said, they ought to state their reasons for allowing such valuable mines to be worked by a company, when they might turn them to so much individual advantage; they were intended to be worked privately, but several gentlemen having seen and had them inspected, and expressing a strong desire to be interested in so lucrative a concern, the proprietor had yielded to their wishes, and consented to the formation of a company.

(b) See Bagshaw v. Spencer, 2 Atk. 582; where it was held that the word *issue* is as strong as the word *heirs.*—ED.

(a) See ante p. 118.

The first instalment was to be 2*l.* on each share, to be paid on the delivery of the shares, and 100 shares were to be the qualification of a director. The shares would be to bearer, signed by three directors and a secretary. The original reports from the mines with the company's books were to be open for the inspection of the shareholders. All the contracts for purchases by the company were to be for ready money, to exempt the shareholders from liability beyond the amount of their subscriptions paid up. Upon this prospectus the plaintiff and other persons at and in the neighbourhood of Leeds became purchasers of shares. The company, as it was called, but in fact Thomas, appointed agents at Leeds to sell shares. The plaintiff Bullman bought 200, and others also bought who *bond side* advanced the deposit. The amount sold at Leeds was about 2,000 shares, and it was soon afterwards represented that the mines were to be worked. In 1837 there appeared an inflated statement respecting them, but however in the course of a year communications were made and hints were given that money was to be expended in buying up leases and grants. The gentlemen at Leeds said that this was not in conformity with the prospectus, for the money was to be applied in carrying on the works, and he (Lord LANGDALE) thought they were right. An explanation was desired, but it was evaded. A meeting was to be held in May, 1838, but there was none until August last, and then a balance-sheet was produced to the shareholders, certainly of a very extraordinary nature. The sums received on *bond side* transactions were 8,540*l.*, and 16*l.*. 16*s.* 7*d.* for tin. These were all the receipts, but the expenses of the company were 12,583*l.* 12*s.* It had been considered a matter of importance to hold out to the world that the concern was of extraordinary value, and it had been represented that various members had shares to a very considerable amount, that it was a very flourishing concern, and the directors had so high an opinion of it that Thomas had 6,000, Musgrave 1,000, and another director 400 shares, in all 7,400 shares. Twice that amount of pounds ought to have been in the hands of the directors, and if the prospectus had been carried into effect, this would have been the case; that is, if the directors had been *bond side* shareholders there would have been in the hands of their treasurer more than enough to pay all the expenses. But this was not the case. Thomas represented himself to be the owner of 6,000 shares, and he had advanced nothing at all. What a strange misrepresentation! Was it to be allowed that the person guilty of it should continue in the management of the property of other persons induced by him to make their advances? It appeared from the accounts that nothing had been advanced by any of the directors. There was a violation of the terms of the prospectus from the very beginning. Thomas, who got up the whole of it, afterwards alleged that he was entitled to appropriate to his own use no less a sum than 25,000*l.*, part of the money to be

raised from the shareholders for his property in the mines. The concealment of a matter of such importance constituted misconduct, which could hardly be expressed in language strong enough. What could be meant by holding out that the money subscribed was raised to carry on the works, and at the same time concealing from the subscribers that he was to have the power of applying it in payment of the 25,000*l.* upon an agreement wholly unknown to them? It was said the question was, whether that was a valid agreement, but he thought that was not the question, but that it was, whether there had been such a *bond side*, open, honest, declaration on the part of those who had assumed the management of the concern of the intended application of the money, that they had a right and were bound to continue in the same conduct. If so, the jurisdiction of this court would be useless; but he thought there had been no such thing, and therefore should order the defendants to be restrained from carrying on the concern, or dealing further with the property which they had by these means obtained. The next consideration was, what the Court were to do with respect to carrying on the business. If no person were employed, it was quite manifest that the property must perish. He thought he should be justified in appointing a receiver and manager. With respect to the mines, it did not appear that they were not well carried on, but as to the general superintendence, it had not been for the benefit of the shareholders.

QUEEN'S BENCH.

Sittings at nisi prius. Dec. 22.

BOURGET v. ROTHSCHILD.

Liability of Bankers.

This action was brought by the plaintiffs, who are the representatives of a Mr. Bourget, to recover a considerable sum of money from the defendants, who are the representatives of Mr. Rothschild. In 1834 Mr. Bourget came to London, and deposited in the hands of the late Mr. Rothschild foreign bank notes, which produced a sum of 3,163*l.* sterling, for which sum Mr. Rothschild agreed to allow 3 per cent., so long as it remained in his hands. Mr. Bourget afterwards died, and left a paper addressed to the chief magistrate of the City of London, and within the envelope was a sort of testamentary paper by which part of the property was given to various persons. Alderman Winchester was then Lord Mayor, and the parcel was therefore delivered to him, who, upon opening it and discovering its contents, took it to Mr. Rothschild, who, seeing that no executors had been appointed, thought he should be justified in paying the money to the Chief Magistrate of the City of London, and accordingly handed over to Alderman Winchester the principal and interest then due, and took his receipt for it. The plaintiffs now claimed this money and interest up to the present time, on the ground that Mr. Rothschild had no authority

to pay this money in the manner he had done.

Lord DEVONMAN was clearly of opinion there was no ground of defence.

Verdict was therefore taken for the plaintiff, for the full amount.

COMMON PLEAS.—Dec. 20.

Special Jury.

TOMLIN v. TURQUAND.

Stoppage in transitu—Fraud avoiding a Contract.

Trover to recover the value of a quantity of lead, to which the defendant pleaded that the lead was not the property of the plaintiff.

The plaintiff is the owner of lead-mines in Yorkshire, and in the month of December, 1836, he contracted, through his agent, with Mr. Maltby, a lead-merchant in London, to sell him the lead in question. In the following January, Mr. Maltby gave an order for the delivery of the lead; the order was executed, and the lead shipped at a neighbouring port, and conveyed to London. In the meantime Mr. Maltby failed, and the bills which were given in payment, on being presented for acceptance, were refused; the plaintiff consequently took measures to stop the lead before it was actually delivered to the purchaser, but after its arrival in London. The main question in the cause was, whether or not the plaintiff was justified under the circumstances in stopping the lead in transitu; and this being a question of law, it was agreed on both sides to turn the facts into a special case for the opinion of the Court above. But another question was raised by the plaintiff's counsel which ultimately went to the jury. It appeared that at the time when Mr. Maltby contracted for the purchase of the lead in question he was then insolvent to the extent of between 60,000*l.* and 70,000*l.*, and did not possess assets to pay above a third or a fourth part of his debts. It was contended, therefore, that he must have entered into the contract with the fraudulent intent to possess himself of the lead with the positive knowledge that he should not be able to pay for it; and that therefore the contract was void altogether. For the defendant, who is the assignee, it was argued that Mr. Maltby's circumstances were such at the time, that although he was not then solvent, he might still have expected to be able to pay for the lead which he purchased from time to time in the regular course of his business. It was not imputed to him that he had made any misrepresentation on the subject of his affairs to induce the plaintiff to enter into the contract in question.

The learned Judge left it to the jury to say whether at the time when Mr. Maltby entered into this contract he did so with the certainty that he should not be able to pay for the lead, and with the fraudulent view of thus obtaining possession of the plaintiff's property without payment. In his opinion nothing short of

that would amount to such a case of fraud as would avoid the contract.

The jury found a verdict for the defendant.

COURT OF EXCHEQUER.

Michaelmas Term, 1838.

Sittings in Banco.

BLINLEY v. TICKEL AND OTHERS.

Liability of a Constable in Trespass for overstepping his Duties.

Mr. Martin moved for a new trial, or for a non-suit, on behalf of the defendant Tickel, against whom a verdict of guilty had been returned, in conjunction with the other defendants. The facts of the case were, that the other defendants being about to execute the civil process of the law in the county of Lancaster, had, as was usual, procured the presence of the defendant Tickel, who, in his capacity of constable, might assist to keep the peace, and prevent the mob from attempting any obstruction. When, however, the party had reached the place of action, they proceeded to acts which gave rise to the present action against them, while the defendant Tickel assisted them by handing some of the furniture out of the house, &c. It was now submitted, that the constable, who was there in that capacity, was not liable with the other defendants; but,

Per Curiam.—There is no doubt but that the constable is liable. He goes to the house to keep the peace, for which purpose his presence alone is required: but when there, he not only performs the part of constable, but moreover takes an active part in the proceedings of the other defendants, which subjects him to an action of trespass at the suit of the plaintiff.

The verdict, therefore, cannot be disturbed as to Tickel.

Mr. Alexander, Q. C., also moved on behalf of the other defendants, and gained a rule *Nisi*; but upon other points unconnected with the above.

Rule accordingly.

EQUITY SITTINGS.—Dec. 17.

PEARCE v. EDMEOADES.

Joint Tenancy—Construction of the words "Respectively in equal shares," when controlled by words of severance, but combined with other words that make a tenancy in common inconsistent with the subsequent bequests of a testator.

Lord ABINGER delivered judgment in this case, and said, the only question in which turned on the construction of certain words in the will of a testator of the name of Thomas Wickins. The testator, by his will, dated the 19th of May, 1809, after subjecting his property to certain charges, directed his trustees to stand possessed of all the residue of his estate, and of the funds wherein it should be invested, in trust to pay the interest and divi-

dends to his daughter, Martha Foster, for her life, and after her decease, then upon trust to pay the interest and dividends unto and between his grandchildren, Elizabeth Goldsmith and George Goldsmith, during their respective and natural lives, in equal shares; and after the decease of Elizabeth Goldsmith and George Goldsmith, upon further trusts to pay, assign, and transfer such interest and dividends, and the stocks, funds, and securities in which the residue of his estate should be then invested, unto and between all and every the child and children of the said Elizabeth Goldsmith and George Goldsmith in equal shares, and if but one, to that child only; and if no children nor child of Elizabeth and George Goldsmith should be living at their death, or born in due time after the decease of George Goldsmith, then upon trust to assign the same equally amongst his legal personal representatives. Elizabeth Goldsmith died leaving children; George Goldsmith was still living and also had children; and the question now was, whether upon the words of the will the children of Elizabeth Goldsmith were entitled to their mother's portion during the lifetime of George Goldsmith, or whether George Goldsmith was entitled to the whole of the interest and dividends during his life. His Lordship was of opinion that George Goldsmith was so entitled. It had been settled by a series of decisions, that the words "respectively in equal shares," when unconnected by other words in a will, should be taken to indicate the nature of the estate or interest bequeathed, and should constitute a tenancy in common; but when those words were combined with, or followed by, others, which would make a tenancy in common inconsistent with the manifest design or the subsequent bequests of the testator, they might be taken to indicate, not the nature, but the proportion, of the interest which each party was to take. In the present case the bequest to George and Elizabeth Goldsmith during their lives was of the interest and dividends only of the residue of the testator's estate. The corpus of the residue was not to be divided or possessed by the legatees till after the decease both of George and Elizabeth, and then it was to be divided among such of their children only as should be living at the death of the survivor. It was clear, therefore, that the mass of the property was to be divided amongst the children who survived both the parties *per capita*, and not *per stirpes*. This would be quite inconsistent with a tenancy in common of George and Elizabeth Goldsmith. Again, the testator by his care in pursuing this property through three generations, and bequeathing it upon the failure of these to his then personal representatives, showed that he meant to die intestate of no part of it; but as the interest and dividends only were devised to his grandchildren, George and Elizabeth Goldsmith, and as nothing was devised to their children until the death of both, it would follow that if George Goldsmith was not entitled to the whole of the interest and dividends

accruing after the death of Elizabeth during his life, that portion of interest and dividends which she took during her lifetime would be undevised during the remainder of George Goldsmith's life. For these reasons he was of opinion that George and Elizabeth must be taken to be joint tenants for life of the interest and dividends; or in other words, that he, by implication, took an interest for his life in the whole after her death.

ARCHES COURT.—Dec. 12.

(Concluded from p. 126.)

It appeared, however, from writers and historians, that these alterations in the liturgy in the second Prayer-book of Edward VI., were principally acceded to at the instance of Calvin and Bucer, though he (the learned judge) had not been able to find the precise grounds on which the omissions were made in the writers he had referred to. But he thought that there was one authority at least to show that the surrender of this part of the first Prayer-book was not, that in the opinion of the majority of the persons employed in its revision, they were inconsistent with the doctrines of the Church of England. The act of Parliament by which the second Prayer-book of Edward VI. was established, the 5th and 6th Edward VI., c. 1, also entitled "An act for the Uniformity of Service and Administration of Sacraments throughout the realm," in its recital, which must be taken to express the sentiments of the majority of the Legislature, stated—"Where (whereas) there hath been a very godly order set forth by the authority of Parliament for common prayer and administration of the Sacrament, to be used in the mother tongue within the church of England, agreeable to the word of God and the primitive church," adopting the words of the former act, which enjoined "a regard to the religion taught by Scripture, and to the usages in the primitive church;" "very comfortable to all good people desiring to live in Christian conversation, and most profitable to the estates of the realm, upon the which the mercy, favour, and blessing of Almighty God are in nowise so readily and plenteously poured as by common prayers, due using of the sacraments, and preaching of the Gospel with the devotion of the hearers." And it goes on to state, that "yet notwithstanding a great number of people do wilfully abstain and refuse to come to their parish churches, and other places, where common prayer, the administration of the sacraments, and preaching the word of God is used," and in the fifth section it sets forth, "and because there hath arisen in the use and exercise of the aforesaid common service in the church heretofore set forth, divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the ministers and mistakers than of any other worthy cause; therefore, as well for the more plain and manifest explanation thereof, as for the more perfection of the said order of com-

mon service, in some places where it is necessary to make the same prayers and fashion of service more earnest and fit to stir Christian people to the true honouring of Almighty God;" and it goes on to set forth that the King and Parliament had caused the Book of Common Prayer "to be faithfully and Godly perused, explained, and made fully perfect." This act had been repealed by the 1st of Mary, which was itself repealed by the 1st of Elizabeth, c. 2, which restored the 5th and 6th of Edward VI. Now, up to this period of time, it seemed that at least there was not any express prohibition of prayers for the dead, nor any notion that they implied a necessary belief in the doctrine of purgatory, though, in consequence of professors of the Romish religion taking advantage of the practice as an argument to support their own doctrine of purgatory, it was thought proper that the form of prayer should be altered, and those prayers omitted in the public service of the church, as not being enjoined (which is admitted) or sanctioned by any warranty of Scripture. It seemed to him, that all the authorities went no further than this—to show that the church discouraged prayers for the dead, but did not prohibit them; and that the 22nd article is not violated by the use of such prayers. The ground on which the church consented to the omission of these prayers could not, perhaps, be better stated than by Mr. Palmer in his *Origines Liturgicae*, to this effect—"When the custom of praying for the dead began in the Christian church has never been ascertained. We find traces of the practice in the second century, and either then, or shortly after, it appears to have been customary in all parts of the church. The first person who objected to such prayer was Aerius, who lived in the fourth century; but his arguments were answered by various writers, and did not produce any effect in altering the immemorial practice of praying for those that rest. Accordingly, from that time, all the liturgies in the world contain such prayers. Some persons will perhaps say that this sort of prayer is unscriptural; that it infers either the Romish doctrine of purgatory, or something else, which is contrary to the will of God, or the nature of things. But when we reflect that the great divines of the English church have not taken this ground, and that the church of England herself has never formally condemned prayers for the dead, but only omitted them in her liturgy, we may perhaps think that there are some other reasons to justify that omission." And then this learned writer proceeded to state the probable reason of the omission of these prayers in the liturgy of the English church—namely, that they might be abused to the prejudice of the uneducated classes, to the support of the Roman Catholic doctrine of purgatory. He (the learned Judge) was therefore of opinion that in this case there had been no violation of the 22d article of the church, so as to call for punishment by ecclesiastical censure. The 22d article did not prohibit prayers for the

dead, unless so far as they necessarily involved the doctrine of purgatory, and he considered that the inscription had not been shown to be a violation of that article. But it was said that other articles of the church had been violated, and reference had been made to the 35th article, which was to this effect:—"That the second book of homilies contained 'a godly and wholesome doctrine', and necessary for these times, as doth the former book of homilies, which were set forth in the time of Edward VI., and therefore we judge them to be read in churches by the ministers diligently and distinctly, that they may be understood of the people." And it had been said that in the 7th homily, on prayer, the practice of praying for the dead was declared to be an erroneous doctrine, and therefore as the homilies were directed to be read in churches for the edification of the people, it must be necessarily inferred that they were forbidden and prohibited by the church of England. Now, if this were clearly so, it would seem somewhat extraordinary that many divines of the church should, in the face of these articles and of the homilies, have fallen into the error of believing that the church of England had not prohibited prayers for the dead, but merely discouraged them; but it was still more extraordinary, that considering the violent disputes which had occurred with respect to this point, there had been no express prohibition of the practice in the canons of 1562. If it had been the intention of the church to have forbidden the practice, surely there would have been an express and distinct prohibition of it. In looking to the homily it must be considered what was the purpose for which it was composed—namely, to discourage the practice of praying for the dead as connected with the doctrine of purgatory; but in no part of the homily was it declared that the practice of praying for the dead is unlawful—merely that it is useless—that prayers for the dead could have no effect in altering the condition of the dead, and that in the word of God we have no commandment so to do; and referring to St. Chrysostom and St. Cyprian, it is said, "Let these and such other places be sufficient to take away the gross error of purgatory out of our heads, neither let us dream any more that the souls of the dead are anything at all helpen by our prayers." It seemed clearly to have been the intention of the composer of the homily to discourage the practice of praying for the dead; but it did not appear that in any part of the homily he declares the practice to be an unlawful one. But supposing he had been of opinion that such prayers were unlawful, it is not to be necessarily inferred that the church of England adopted every part of the doctrines contained in the homilies. If it had been the opinion of the framers of the articles and canons of the church that prayers for the dead were opposed to the Scriptures, they would have expressly declared their illegality, as condemned by the Scriptures, and opposed to the doctrines of pure religion. On this

part of the case, then, he was of opinion that there had been no violation of any of the articles of the church. No other articles had been referred to specifically to make out the proposition that the church considered prayers for the dead as an illegal practice. But it had been urged in this case, that the person by whom the tombstone had been erected being a Roman Catholic, it must be supposed that the invitation contained in the inscription, to pray for the dead, had a necessary reference to the doctrine of purgatory as received by the church of which she is a member; and that the inscription must be taken in a Roman Catholic sense, because the quotation from the Maccabees was taken from the Roman Catholic version of the Bible, and not from that authorized by the church of England. Now he thought this argument not sufficient to authorize him to put any other construction on the inscription than the words would bear, according to their plain meaning. It was true that the version did not agree with the English translation (in fact, in our translation, there was not a 46th verse in the 12th chapter of Maccabees); but the question was not whether the version was correct or not, but whether the meaning was or was not inconsistent with that contained in the English version. Now, it was impossible to read the English version and not see that the sense of the quotation was the same in both; and that the reconciliation spoken of by Judas meant a reconciliation of the dead with a view to the resurrection. Whether the doctrine was taken from the text according to the Romish or English version, the question was whether it was a violation of the articles, canons, and constitutions of our church? Was it contrary to Scripture? That was the view he must take of the case, sitting there as an ecclesiastical judge. If any thing arose from the circumstances of the party being a Roman Catholic, or from the sense in which the words of the inscription were understood by the Romish Church, it should have been specifically pleaded; for the Court had no judicial information of the existence of a Roman Catholic Bible. He should conclude this part of the case with one observation—what had been the practice of eminent divines of the church of England? It was correctly stated in the argument, that an inscription was placed on the tombstone of Bishop Barrow, in the cathedral of St. Asaph in 1680, to this effect—"O ves, transeunte in domum Domini, in domum orationis, orate pro conservo vestro, ut inveniat misericordiam in die Domini." It was not possible to conceive that Bishop Barrow would have suffered such an inscription to be placed upon his tomb if he had believed that it was contrary to the doctrine and discipline of the church to which he had belonged. He was then of opinion, on the whole of the case, that the offence imputed by the articles had not been sustained; that no authority or canon had been pointed out by which the practice had been expressly prohibited; and he was accordingly of opinion, that, if the articles were proved, the facts

would not subject the party to ecclesiastical censure, as far as regarded the illegality of the inscription on the tombstone. That part of the articles must therefore be rejected. The other branch of the case was subject to different considerations—namely, the erection of the stone without the consent of the incumbent, which was an ecclesiastical offence. It had been suggested in the argument, that the proceedings on this branch of the case should have been in a civil form, by motion; but it seemed to him that this was the proper form of proceeding; he was not aware of any case in which a different form had been followed. But this offence had not been specified in the decree or citation served on the party. The only ground of illegality on the face of the citation consisted in the inscription; the erecting, or causing to be erected, a monument, without leave of the incumbent, was a distinct and separate offence, which should have been set forth in the citation, in order that the party cited might know what she was called upon to answer. He was clearly of opinion, that according to the law and practice of the Court, the citation was insufficient to raise the question whether the consent of the incumbent had been obtained or not; and on this part of the case, likewise, he was of opinion that the articles were inadmissible. The Court, therefore, on this view of the case, was bound to reject the articles altogether, and to dismiss the party.

Dr. Blake, on the part of the defendant, applied for the costs.

Sir H. JENNER said, if the costs were pressed, he was not aware that the Court had any discretion.

Dr. Blake was instructed to press for costs, and

Sir H. JENNER directed that the party should be dismissed with costs.

The *Queen's Advocate* wished to guard himself against misapprehension. He had not stated that the defendant was a Roman Catholic, or implied that there should be one law for one and another for another.

Sir H. JENNER.—No; I only understood you to argue, that as the party was a Roman Catholic, the inscription must be taken in a Roman Catholic sense.

MIDDLESEX SESSIONS.

(Concluded from p. 127)

A grand jury, it ought to be remembered, was not the trying tribunal, and if they conducted their inquiry with that view, they were greatly mistaken as to the nature of the task they had to perform. In this country proceedings of every tribunal (except that of the grand jury) were public; the courts were open to the whole world if they chose to go in and listen to what was going on, and the verdict of that tribunal must be the result of the unanimous opinion of the jury. Now, the grand jury did not possess one of those con-

comitants. Then it was only necessary that 12 out of the 23 should agree; neither had they the advantage of examining the depositions taken before the committing magistrate, nor of hearing anything of the defence a prisoner might think proper to set up against the accusation. In former times, when magistrates made no preliminary investigation into charges, the grand jury was the body by whom the inquiry was performed. The course of a criminal prosecution then was this:—A bill of indictment was preferred against a party before the grand jury, whose duty it was to inquire whether the evidence against the accused was sufficient to warrant them in sending him to a jury for trial; and then, if a true bill happened to be found, he was instantly taken into custody. The system of those days, however, had, since the appointment of local magistrates, become obsolete, and that when he informed them that there were in the county of Middlesex alone no fewer than 36 grand juries summoned every year, and that there were as many as 48 names in every pannel, so that between 1,600 and 1,700 gentlemen were drawn from their homes to discharge those duties, he thought it would be needless for him to say, that that of itself was an evil of no ordinary nature. He hoped that the amendments which had already been effected in the criminal proceedings of the country would be carried on so that some other course might be adopted with equal benefit to the prisoners, and with a diminution of the inconvenience which had been so long experienced by the public. He would next advert to another subject in consequence of what had occurred in the court that day—he meant that of capital punishments, a system which was established in barbarous ages, when blood was shed much more frequently, and with far less remorse, than when in aftertimes the people had become more civilized, and had had the benefit of a moral and religious education. In proportion, then, to the degree of an increased state of civilization, and of a moral and religious education, had the crimes which were attended with the shedding of blood decreased; and he rejoiced to tell those gentlemen whom he was addressing, that not only had the number of executions in the country astonishingly diminished, but the offences to which the penalty of death was attached were so greatly decreased, as that nearly all of them had been struck out of the statute-book: for at present—he was now speaking generally—there remained no offence which was punishable by death but that which was accompanied either with the death of the party attacked, or one which was attended with so much violence at the time as to cause death at a subsequent period. For instance, there was the crime of murder; there was that of burglary, attended with violence of such a description as that nothing but the merciful interposition of Providence saved life; and there was the offence of violence on a female. The capital offences, therefore, which in the present day remained upon the

face of the criminal code and punishable by death were, he was happy to say, reduced to the few he had mentioned. It at all times afforded him great satisfaction to see a gentleman of the Quaker persuasion on a jury; because he was convinced that the more individuals of their peculiar class associated with his fellows in the administration of the laws of the country, the more ready they would be to put aside many of the prejudices which they had long entertained. There was but one other subject to which he was anxious to direct the attention of the grand jury. They would not have much business before them on that occasion, but they would find, that amongst the persons who were indicted, there were several young children—one as young as ten, and others between that age and fourteen. The youth of those poor children, however, they must not permit to induce them to abandon their duty; for if the evidence were sufficiently clear and satisfactory, they were bound to send them for trial. The question, with regard to what was the best to be done with the large number of youthful thieves, had occupied very much of the consideration of the Court and the Administration; and in the course of the last year a most valuable measure was passed by the Legislature connected with the matter, by which a prison for the reception of juvenile offenders was established in the Isle of Wight, wherein a system of education was made to form, in part, a substitute for punishment, and where too it was intended to attempt the experiment of trying how far children of tender years who had been guilty of crime,—some of whom had never known the comforts of a home, or the blessing of having parents; whilst others had been led into the commission of crime by their parents,—might have the inclination, or early seeds of crime eradicated from their nature, and be restored to society with something like a respectability of character, through the instrumentality of a system of moral and religious education. Whether the authorities had acted judiciously in considering these children as criminals, and subjecting them to punishment equally with the man who, from his station in life, or from his years, had had an opportunity of knowing what were the benefits derivable from cultivation, or from experience, he would not at that moment take upon himself to say. His own opinion was, that many of them possessed minds as well constituted, though probably not so much cultivated, as any of the others; but that from circumstances they had been led into crime by third parties. At all events, let that be how it might, little, if any, wrong could be done by an endeavour to rescue a large mass of juvenile offenders from the abyss into which they had fallen. With a view of justifying the remarks he had made, if indeed there was any justification demanded, he might mention, that during the year 1837, there were no fewer than 500 children, from the ages of 7 to 12, who were incarcerated in the prisons of the county for

periods of from two to three months, or even longer, not one of whom had been tried by a jury. Having stated that fact, he need not say it was quite time that something should be done to improve the condition of such youthful violators of the law. He hoped soon to see the time when the criminal bar would not be disgraced by children being placed at them for trial. Everything, however, must have its time. Very much had been done during the past session towards effecting the object, and at the present moment Her Majesty's Government were alive to the evils, and were desirous of rendering all the assistance in their power with a view to the alleviation of the condition of the poor children.

REVIEW OF NEW BOOKS.

Short Hand for the People; being a comprehensive SYSTEM of STENOGRAPHY, founded on a new principle, by which any person who can write may quickly learn the art without a Master, and by which from four to five hours out of six may be saved in writing: to which is added SHORT ARITHMETIC, equally simple, easy and swift. By S. W. LEONARD. Cheltenham, published for the Author by John Lovesy, Imperial Library, and sold by Longman & Co.; Whitaker & Co.; Simpkin & Co.; and Hamilton, Adams, & Co. London, 1838. Price 3s. 6d.

This is a new Stenographic system, by which the common alphabet is written by only 26 motions of the pen, while in small hand it takes 105 motions. The Author thus sums up the leading features of his system:—

“ 1st. The representation of every letter in the alphabet by one simple mark, distinct from all the rest.

“ 2nd. The total abolition of the very defective method of substituting one letter for another; also, that of giving several meanings to the same mark, and the utter extinction of all ambiguity arising from those methods.

“ 3rd. The numerous rules and exceptions that encumber every other system, and draw so largely on the memory of the writer, are entirely done away in this; one general rule only, applying to, and pervading the whole; thus leaving the mind as free and undivided as in common writing.

“ 4th. It is entirely independent of grammatical rules or of any other science, save that which all systems require, viz. a correct formation of the characters. It is also independent of ruled lines, or any other aid, beyond common writing.

“ 5th. All the compound characters are formed upon, and in connexion with the simple characters of the alphabet and double letters; thus rendering the use of arbitrariness unnecessary.

“ 6th. Consequently, it depends less upon the memory than any other system extant, and is more easily acquired. It is as short without abbreviated words as some other systems are with them, and at the pleasure of the writer admits of being made much shorter.”

And by this system, he says, a letter which would take an hour to write in the common hand, may be written in ten minutes. We recommend the book to the notice of our readers.

TO CORRESPONDENTS.

“ Juvenal” in our next.

“ Henricus.”—His communications are under consideration.—In reply to his communication of yesterday, the Proprietors of this Paper spare no expense in having it conducted by such hands that *implicit reliance* may be placed upon its contents. All communications, therefore, are subjected to the revision and correction (when necessary) of the Editor. Answers to Problems left for the *Editor* on Monday will be in time for selection and insertion in the ensuing Number.

“ P. S.” will observe our note upon his answer to Problem VII.

ERRATA.

In Abraham v. Skinner, p. 119, lines 11 and 9 from the bottom, for “in operation” read “inoperative.”

A N ACT FOR THE AMENDMENT OF THE LAWS WITH RESPECT TO WILLS. (1 Victoria, c. 26.) With Explanatory Notes. Analysis, and a Copious Index.

By PETER LE NEVE FOSTER, Esq. M.A. Of the Mid. Temple, Barrister-at-Law. 12mo. 2s. Published by John Richards & Co. 194, Fleet-street.

Printed by ALEXANDER ELDER MURRAY, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West. London, Saturday, 29th December, 1838.

The Legal Guide.

SATURDAY, JANUARY 5, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 131.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

Spiritual and Eleemosynary Corporations Sole.

SECTION 29. enacts that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar-master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole or of his predecessor to make such entry or distress or bring such action or suit shall first have accrued, that is to say, the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years, taken together, shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years; then during such further number of years, in addition to such six years, as will, with the time of the holding of such two persons and such six years, make

up the full period of sixty years; and after the thirty-first day of December, one thousand eight hundred and thirty three, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

All eleemosynary corporations may be included under the names of hospitals, colleges or schools, see Phillips *v.* Bury, 1 Lord Raym. 6; and in respect to visitorship there seems no discrimination between colleges and hospitals, see *id.* and Kirkly *v.* Ravensworth Hospital, 8 East Rep. 221. The governors of a charity in whom the legal estate of the revenues is vested are not in right thereof visitors by construction of law, not being expressly so appointed, see Eden *v.* Forster, 2 P. Wms. 325; Attorney General *v.* Gaunt, 3 Swanst. 148 n.; Attorney General *v.* Foundling Hospital, 2 Ves. J. 47; Attorney General *v.* Dixie, 13 id. 529; see Gower *v.* Mainwaring, 2 Ves. 89.

Ecclesiastical and eleemosynary corporations are restrained from alienation of their lands in any way except by lease, and that under restrictions imposed by Statutes, for which see 2 Blackst. Com. 321; see also 6 W. 4. c. 20, and 6 & 7 W. 4. c. 64. The Statute 1 & 2 Geo. 4. c. 92. empowers corporations and other trustees holding lands for charitable purposes to exchange; so may ecclesiastical corporations by Statutes 55 Geo. 3. c. 147; 56 id. c. 52.

See on the subject of corporations, sole or aggregate, ecclesiastical or temporal, Co. Litt. 250 a.—342 a.—2 b.—2 Inst. 75; 1 Black. Com. 476; and as to the limita-

tions of claims to tithes, see 2 & 3 W. 4. c. 71 and 100. Before this act ecclesiastical corporations, and generally all ecclesiastical persons, seized in right of their churches were not within any of the Statutes of limitations, and therefore could not bar their successors by neglecting to bring actions for the recovery of their possessions within the time prescribed for other persons, but such neglect would bar themselves.

As to the intention of the ecclesiastical survey, see Cunliffe *v.* Taylor, 2 Price, 329.

Advowsons.

Sec. 30. enacts that after the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned: (that is to say) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time, as with the times of such incumbencies, will make up the full period of sixty years.

Advowson is the right of presentation to a church or ecclesiastical benefice. Advowson, *advocatio*, signifies *in clientelam recipere*, the taking into protection, and therefore is synonymous with patronage, *patronatus*, and he who has the right of advowson is called the patron of the church.

Advowsons are either *appendant* or *in gross*: the former are attached to manors, and were originally founded by the lords, who were the only patrons of churches. See Co. Litt. 119., and the right of patronage or presentation, so long as it continues annexed to the possession of the manor, is called an *advowson appendant*. See id. 121., and it will pass or be conveyed together

with the manor as incident and appendant thereto by a grant of the manor only, without adding any other lands. See id. 307.

Where, however, the advowson has been separated from the manor by conveyance, it is called an *advowson in gross*, or at large, and never can again become *appendant*: it then becomes annexed to the person of the owner and not to his manor or lands. See id. 120. See also 2 Blackst. Com. 21. et sup.

Advowsons are also either *presentative*, *collative*, or *donative*. See Co. Litt. 120.

Presentative, where the *patron* hath the right of presentation to the bishop, and this is the most usual advowson.

Collative, where the patronage unites with the bishopric, and as the bishop cannot present to himself, he does so by the one act of *collation* or conferring the benefit by both presentation and institution.

Donative is when the king, or any subject by his licence, founds a church, and ordains that it shall be merely in the gift or disposal of the patron subject to his visitation only, and is vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. See Co. Litt. 344. Fairchild *v.* Gayre, Mo. 765. Cro. Jac. 63. Degge, part 1. c. 13. Such *donatives* are exempt from the jurisdiction of the ordinary, except as to residence; and by the Stat. 57 Geo. 3. c. 99. s. 72. the ordinary can compel residence on donatives. They are subject to the visitation of the patron by commissioners to be appointed by him, and he, not the bishop, may accept of any such incumbent's resignation; but the Court of Queen's Bench will allow the Ecclesiastical judge to censure the incumbent of a donative for heresy and spiritual offences, though not to proceed to deprivation. See Colefalt *v.* Newcomb, 2 Ld. Raym, 1205.; Castle *v.* Richardson, 2 Str. 715. 1 Barnard. 5., and the patron may be compelled to collate some clerk that there may not be a defect in divine worship. See Fairchild *v.* Gayre. S. C. 1 Roll. Rep. 453. cit. where it is said that the ordinary may *sequester*. Where donatives have the cure of souls, they are within the restraint of the Statute of Simony. See

Bauderock v. Mackellar, Cro. Car. 331. 3 Lev. 83. cit., and also of pluralities, see Degge, part I. c. 13.

There is, however, a *distinction* between presentative and donative advowsons. If an avoidance takes place in the lifetime of the patron, and exists at the time of his death, then if the advowson be *presentative*, the right to present *pro hac vice* is in the executor; if *donative*, in the heir. See 2 Wils. 150.

An advowson *in gross* will pass by the words, tenements and hereditaments, but not by the word, lands:—it is assets by descent to satisfy specialty creditors. See Westfaling v. Westfaling, 3 Atk. 460. It is also extendible on elegit, see Tonge v. Robinson, 1 Bro. P. C. 114. S. C. 3 P. Wms. 401.; 2 Stra. 879. It is a rent within the statute of frauds. See Earl of Stafford v. Buckby, 2 Ves. 177. It does not pass by livery within view of the church without deed, there being an incumbent. See Pannell v. Hodgson, Cary, 52. A grant of from the crown excepted in a former grant under general words, will be presumed after a possession for 133 years, and three presentations. See Gibson v. Clark, 1 Jac. & W. 159. Sale of during a vacancy is not *simony*, but it is void at common law. See Grey v. Hesketh, Amb. 268.; Cro. Eliz. 811.; 3 Bur. 1510. Bl. Rep. 492—1054., but probably there would be no objection to the grant of an advowson when the church is vacant, if the next presentation to it were expressly reserved by the grantor. By the 12 Anne, c. 12. s. 2., clergymen are prohibited from purchasing the next avoidance or presentation of any ecclesiastical benefice so as to be presented and collated thereupon themselves; and by the 7 Anne, c. 18., no usurpation shall displace the estate of the patron, and that if co-partners, joint tenants, and tenants in common, are seized of an advowson, and a partition is made to present by turns, each shall be seized of a separate estate, and present accordingly.

Until this act, advowsons were not subject to any of the statutes of limitations.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM VI.

What is an Action? (I)

(Concluded from p. 133.)

HAVING thus shown who may bring actions, and against whom they may be brought, we must now consider where actions must be laid.

All actions are either local or transitory; local actions are those which relate to lands (such as real and mixed actions) and must be tried in the same county where the lands lie. (I)

Transitory actions (II) are those where no possession is awarded, (as actions for debt, detinue, assault and battery, false imprisonment, &c.) and may be brought in any county; but if the defendant will make affidavit, (III) that the cause of action, if any, arose in another county, the court will direct a change of the venue, and will oblige the plaintiff to declare in another county, unless he will undertake to give material evidence in the first.

All actions were originally tried in the counties in which they arose, pursuant to the maxim *vicini vicinarum facta presumuntur sciri*. No inconvenience arose from this practice; as anciently, all men being in *decenna*, they were easily come at, the *decenna* being responsible for their appearance; but as the custom of decennary began to get into disuse, men fled from their creditors, and from this arose the distinction between local and transitory actions.

Actions must be brought in due time, or they will be barred by the Statutes of Limitation.

The word "Limitation" signifies the time prescribed by statute, within which an action must be brought.

HENRICUS.

—
(I) See 3 & 4 Wil. 4. c. 42, s. 22.—ED.

(II) The venue in personal actions is in general transitory, except for penalties.—ED.

(III) The attorney in the cause may make the affidavit, but if the defendant is in this country it ought to be made by him, 2 Dow. P. C. 219. As to the contents of

the affidavit, see id. 54, 566—1 id. 256; see also Hil. T. 2 Wil. 4. R. G.—Ed.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM VIII.

What is an Estate Tail, and how is it created?

The interest which any one has in lands, or any other subject of property, is called *his estate*, and to denominate the time for which it is to continue, or the manner in which it is to be held, some adjunct or expression should be added, as an estate for years, for life, *in tail*, or in fee; to be held in joint tenancy, &c. The *estate tail* is derived, first, by the primary division of estates into *freehold*, and less than freehold; the *Estate of Freehold* (defined by Britton, c. 32., to be "the possession of the soil by a freeman") is divided into *Estates of Inheritance*, and Estates not of Inheritance. The former of these is again subdivided into *Inheritances Absolute*, or *fee simple*; and *Inheritances Limited*, from one species of which is derived the *Estate Tail*.

Inheritances limited comprise two sorts or descriptions; 1st, Qualified, or base fees; and 2ndly, *Fees Conditional*, Bl. Com. 2 vol. p. 110; from which latter, as before stated, came the estate tail. This *conditional fee*, was, at the common-law, a fee restrained to some particular heirs exclusive of all others, as described by Pelet. L. 3. c. 3. 5.—"donatio stricta et coarcta; sicut certis heredibus, quibusdam a successione exclusi;" as to the *heirs of a man's body*, by which only his *lineal descendants* were admitted in exclusion of collateral heirs; or, to the *heirs male* of his body, in exclusion both of collaterals, and *lineal females* also. It was called a conditional fee, by reason of the *condition* expressed, or implied in the donation of it; that if the donee died without such particular heirs, the land should revert to the donor, Bl. Com. vol. 2. p. 111. But if on the contrary, the donee had such issue, his estate was supposed to become absolute; at least for three purposes, by the performance of the condition; viz.; To enable the donee, or grantee, to *alien* and disinherit the

issue; and by the alienation to bar the donor of all possibility of the reversion; Co. Lit. 19. To make him *subject to forfeiture* for treason or felony, 2 Inst. 233., and to charge the estate with *rent and other incumbrances*, so as to bind his issue; Co. Lit. 19.; 2 Inst. 234. But by the statute, *de donis conditionalibus*, 13 Edw. 1. c. 1., this estate was considerably altered, and the powers of the donee greatly curtailed; it revived in some measure the ancient feudal restrictions, or alienations, by enacting—That the will and intention of the donor should be observed; and, that where the donee had a *conditional fee simple* before, he should now have but an *estate tail*, and the donor a *reversion in fee*, expectant upon that estate tail, thereby depriving the donee of the power he had before, of *aliening* after issue found, or of *forfeiting*, or *charging* the lands, longer than for his own life. The *estate tail*, being thus created out of the *former conditional fees* of the common-law, the next point to be considered, is, its several species, and how they are created.—*Estate tail* are either *general* or *special*, (which are farther diversified by the appellations *tail male* and *tail female*, *general* or *special*.)—*Tail general* is where lands and tenements are given to one and the *heirs of his body begotten*, thereby implying that his *issue in general*, either male or female, by any wife or wives, are capable of inheriting the estate tail, in successive order *per formam doni*, Litt. s. 14, 15.—*Tail male general*, would be, where lands and tenements are given to one and the *heirs male* of his body begotten, in exclusion of females.—*Tail special*, is where the gift is restrained to *certain heirs* of the donee's body, and does not go to them all in general, as where lands and tenements are given to a man, and the *heirs of his body on Mary his now wife* to be begotten; here, no issue can inherit, but such *special issue* as is engendered between the two; Litt. 16. 26 to 29.—*Tail male*, or *tail female*, *special*, would be, where lands and tenements are given to a man, and the *heirs male*, or *heirs female*, (as the case may be) of his body on *Mary his now wife* to be begotten; thus the terms, *tail male*, or *tail female*, (either *general* or *special*) are merely

used for the distinction of sexes in such entails; for both of them may be either tail male, or tail female; Bl. Com. v. 2. 114.

It is also to be observed, that in case of an *entail male*, the heirs female shall never inherit, nor any derived from them (either sons or daughters) nor, e converso, the heirs male, in case of a gift in tail female, Litt. 21, 22.; for the heir male must convey his estate wholly by males, and the heir female, wholly by females. But the inconvenience of this statute was greatly felt, children grew disobedient, when they knew they could not be set aside; and treasons were encouraged, as estates tail were not liable to forfeiture longer than for the tenant's life; so that about 200 years after the statute *de donis*, in the 12th year of the reign of Edward I., a common recovery (I.) was applied to bar estates tail; and in the 26th of Henry VIII., they were rendered liable to forfeiture for treason. (II.) But the final blow was given in the 32nd of Henry VIII., (after leases by tenants in tail were declared to bind the issue, but not those in remainder or reversion) by its being declared that a fine duly levied by a tenant in tail was a complete bar to him and his heirs, and all other persons claiming under such entail: all estates tail created by the crown, and of which the crown has the reversion, being excepted out of this statute; and the same with regard to common recoveries; Co. Litt. 372. And by the 33rd Henry VIII. c. 39. 75, all estates tail are rendered liable to the debts of the crown, or of a bankrupt. Thus it will be seen that estates tail, after various alterations, &c., are now reduced again to almost the same state, even before issues born, as conditional fees were in at the common-law, after the condition was performed by the birth of issue.

H. D. M.

December 26th, 1838.

(I.) The statute 3 & 4 W. 4. c. 74. s. 2. abolished recoveries; s. 14. declares that all warranties of land entered into by tenants in tail, are absolutely void against the issue in tail. Estates tail cannot therefore now be barred by fine or recovery, as heretofore; but sec. 15., creates a new bar by deed to

be enrolled. So that a tenant in tail may now, under such deed, alien the fee simple of his lands absolutely, or any life estate, or otherwise modify or dispose of the estate, as if he had the fee simple absolute, as he may think fit (s. 40.); except in the case of a woman tenant in tail seized *ex provisio viri*, under 11 Hen. 7. c. 20., under a settlement made before the act, (c. 16, 17.) where an assent is acquired as heretofore, and which deed will bar all remainders, even should the reversion be in the crown, sec. 15. & 21.; except remainders in the king, under 34 & 35 Hen. 8. c. 20., or tenants in tail after possibility of issue extinct. (s. 18.)

ED.

(II.) A tenant in tail is now subject to this liability.—ED.

H. D. M. has not answered the whole question raised by Problem VIII., which requires how an estate tail is created, and consequently extends to the words that are necessary to create such an estate.—ED.

PROBLEM X.

WHAT ARE THE INCIDENTS TO ESTATES TAIL, AND WHAT IS THE ESTATE CALLED 'TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT,' AND WHICH IS EXCEPTED FROM THE OPERATION OF THE STAT. 3 & 4 W. 4. c. 74. s. 18.?

TRUSTS FOR THE SEPARATE USE OF MARRIED AND UNMARRIED WOMEN.

Review of the Judgment of the Master of the Rolls in Tullett v. Armstrong, 3d Nov. 1838.

(Continued from p. 71.)

SINCE our last observations upon this inquiry, the case of Nedby v. Nedby (a) has been decided by the Vice-Chancellor whose judgment in that case has quite negatived the idea entertained by Sir Edw. Sugden, (b) that his "Honour had not altogether adhered to the opinion he had expressed in Davis v. Thornycroft," (c) and has again placed him

(a) S. C. ante, p. 86.

(b) Ante, p. 70.M.

(c) Ante, p. 69.

in direct opposition to the opinion of the Lord Chancellor given in *Massey v. Parker*.^(d)

In *Nedby v. Nedby* the Vice-Chancellor said, that as the case of *Massey v. Parker* had been alluded to, he would only observe, that his notion of the general point in that case was that *trusts created for the separate use of married women were trusts which the court had always recognised and preserved, and which he would always recognise and preserve, unless the legislature thought right to declare otherwise*. When he decided the case of *Davis v. Thornycroft*, he said he thought there had been no judicial decision on the point. The extra-judicial opinion of the Lord Chancellor in *Massey v. Parker* is expressed in very guarded terms, and his Honour, as a judge sitting to administer the settled law of the court, was not called upon to depart from that settled law, because the Lord Chancellor for the time being may be considered to have pronounced an extra-judicial opinion, which is contrary to his Honour's notion of that law, and in the course of the argument his Honour also observed, that in a conversation he had with the Lord Chancellor and the Master of the Rolls, on the first day of term, the Lord Chancellor distinctly stated that he *still retained the opinion* he had expressed in *Massey v. Parker*, and which seemed to hold out a notion that the effect of a marriage was to constitute a gift of the wife's *choses in action* in all cases to the husband.

The Lord Chancellor considered his view of the point as settled, by its having been so decided in *Newton v. Reid*,^(e) viz. that a trust could not be created for the separate use of an *unmarried woman*. Now, in *Benson v. Benson*, 6 Sim. & St. 131. the Vice-Chancellor observes upon the question whether an *unmarried woman* can be protected in equity by creating a trust for her separate use, that *Newton v. Reid did not interfere with that question*. There the married woman and her husband combined to assign her separate property, and no one doubted that they might do so, unless they

were prevented by the clause against alienation, and the decision only went to this, that the restriction or alienation was rendered ineffectual by the context of the will, but no opinion was expressed as to the effect or operation of the previous words. According to this shewing, the Lord Chancellor has no real foundation for disturbing the long settled practice of the court. The Vice-Chancellor also put a case,—suppose a father seized in fee devises to trustees and their heirs in trust for the separate use of an infant daughter, and she attains twenty-one and marries, could the husband file a bill against the trustees to have the legal estate conveyed to him, and so defeat the intention of the testator?—and observed, that it was very important to persons having daughters and female relations, for whom they wished to provide, and whose interests it might be necessary to protect that the principle contended for (the doctrine in *Massey v. Parker*) should not be established until the subject has been well considered, and that as far as practice went, trusts of the nature in question have prevailed for more than a century.

It was then contended, (in *Benson v. Benson*) that supposing the trust should be held to be good, then the marriage was in effect an assignment of the wife's property to the husband; but the Vice-Chancellor replied, that was not the law, for if the husband does not assign the chattels real of his wife during the coverture, they survive to her on his death. So if the husband does not recover during the coverture the *choses in action* of his wife, they will not go to his executor, but survive to her, and if she dies in his lifetime, he must take out letters of administration to her.

The cases of *Anderson v. Anderson*, and *Simson v. Jones* (before cited) were not brought to the attention of the Lord Chancellor in *Massey v. Parker*, and they were not then reported.

The former case, has the great authority of Lord Eldon to support it, and it is observed by Sir Edward Sugden,^(f) that it never occurred to him in the course of his practice, that the validity of gifts to the

(d) 2 Mylne & K. 174. S. C. ante, p. 38.

(e) See ante, p. 39.

(f) Treat. on Powers, vol. i. p. 207.

separate use of married women, extending to future coverture, would be held void, or be impeached—that such trusts do not prevent alienation. They are a creature of equity; a modification of power and property not unsupported by analogy to the rules governing the rights of married women over property. Where such a gift is in favour of an unmarried woman, it is no bridle upon herself; but if she do not alien and marry, the husband cannot complain; he should have enquired; and a settlement for the wife's separate use permitted to remain undisturbed should not be deemed a nullity. If the trust had been considered inoperative, the wife might have created a similar binding one before marriage? Why should not the subsisting one be allowed to remain operative, and be considered as adopted by the husband by the marriage. If he desired to have the ownership of the property, he should have required his wife, before the marriage, to renounce the trust for her separate use. She, by allowing it to remain undisturbed, manifested her intention not to relinquish the protection which it afforded to her.

Benson v. Benson decided, that although the trust was for the life of the lady, yet if the object is to protect the fund against the particular husband, the trust for her separate use will not extend to a future marriage. See also *Knight v. Knight*, 6 Sim. 121.

It should be observed, however, that it has not been denied that a restraint upon alienation in contemplation of a particular marriage, will be valid during the coverture. It is not essential to the validity of the settlement that it should be actually made during coverture, provided that it is created with reference to a marriage about to be solemnized. (b)

(To be concluded in our next.)

TO THE EDITOR OF THE LEGAL GUIDE.

Sir,—According to the letter and strict reading of sec. 9. of the "Act for abolishing Arrest," is it, or is it not necessary, that the Attorney subscribing as a witness to

the execution of a warrant of Attorney, should express in writing on the face of such warrant, that he subscribes as such Attorney?

Your attention and opinion will oblige;
JUVENAL.

OPINION OF THE EDITOR.

Sec. 9. of the 1 & 2 Vic. c. 110, requires that an attorney of one of the superior Courts on behalf of the party executing a warrant of attorney to confess judgment or a cognovit actionem, expressly named by him, and attending at his request, shall be present to inform him of the nature and effect of such warrant of attorney or cognovit actionem before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.

This is an enactment of the Rule H. 2 Wil. 4. reg. 1. s. 72. See 3 Barn. & Ald. 384.; 8 Bing. 298.; 2 Crompt. & J. 188., which heretofore applied to persons in custody only, and we are of opinion that it is not necessary that the attorney subscribing as a witness should declare in writing, on the face of the warrant of attorney, that he subscribes himself as such, though we advise every attorney to do so; the act is express upon the subject, and declares that by such subscription of the attorney's name, he declares himself to be attorney for the person executing the instrument.

In *Fisher v. Nicholas*, (or Papanicholas) 2 Dow. P. C. 251. Mr. Baron Bolland expressed an opinion that such a declaration should be made in writing, but the words of the Rule H. T. 2 Wil. 4. s. 72., are weaker or more equivocal than those of the statute where there is an absolute conjunction between the words thereby, and the act of subscribing the attorney's name. The word "thereby" is not in the Rule. The point under the Rule was determined in *Wilson v. Price*, 4 Dowl. P. C. 214., where the Court of Exchequer held that it was a sufficient compliance with the Rule if the attorney made the declaration

(b) *Sugden on Powers*, vol. i. p. 205.

there required, *viva voce*, and again so determined in *Robinson v. Brooksbank*, id. 396. See also *Tidds*, new pr. vol. i. p. 288.—ED.

Law Reports.

COURT OF BANKRUPTCY. Jan. 2.

JAMES CATHIE'S CASE.

Abolition of Imprisonment for Debt Bill, Sec. 8.
—*Bankruptcy Bail Bond*.

Mr. *Saunders*, of the firm of Makinson and *Saunders*, applied to the learned Commissioner under the 8th section of the 1st & 2nd Victoria, c. 110, "For Abolishing Arrest on Mesne Process," &c., for his approval of a bond entered into by a debtor and his sureties under this section, by which it is enacted, that if any creditor for 100*l.* or upwards of any trader shall file an affidavit in Her Majesty's Court of Bankruptcy that such debt is justly due, and that such debtor is a trader, and shall cause him to be personally served with a copy of such affidavit, and with a notice in writing requiring immediate payment of such debt, if such trader shall not, within 21 days after personal service of such affidavit and notice, pay such debt or secure or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum and with such two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve of, to pay such sum as may be recovered in any action brought or to be brought, together with costs, or to surrender himself into custody according to the practice of the Court, or within such time after judgment as the Court or a judge may direct, every such trader shall be deemed to have committed an act of bankruptcy on the 22nd day after service of such affidavit and notice, provided a fiat issue within two months from the filing of the affidavit. The solicitor stated that he was merely agent in the present case; that he had received the bond, and an affidavit of the execution thereof, from his client, Mr. *Foden*, of Leeds, attorney for James Cathie, the alleged debtor. The bond was entered into by James Cathie with two sureties, both residing at Leeds. The debt, as stated in the affidavit filed, was 173*l. 11s. 5d.* The affidavit was filed on the 8th of December, and a copy of the affidavit, with notice requiring immediate payment, was served on the 11th. The bond appeared to have been executed on the 29th of December. The penalty was for 347*l. 2s. 10d.*, and the bond appeared correct in form; but there was no affidavit as to the sufficiency of the sureties, nor was he in a situation to offer testimony upon the subject. He had nothing but the bond and the affidavit to lay before the learned Commissioner. He however contended, that notwithstanding this, in the absence of an objection to the sureties, the

learned Commissioner might certify his approval.

Mr. Commissioner *HOLROYD* asked if the creditor had been served with any notice of the debtor's intention to tender the bond, so that he might have attended to object if he pleased?

Mr. *Saunders* said, he was not aware that any such notice had been served.

Mr. Commissioner *HOLROYD* said, he much regretted that this was the last day for tendering the bond for his approbation, so as to avoid the committing of an act of bankruptcy under the clause of the act of Parliament referred to. But, as nothing more was laid before him but the bond and an affidavit of the execution, and none of the parties appeared before him, and no evidence was given as to the sufficiency of the sureties, or of the creditor having been served with notice of the intention of the debtor to tender the bond, he could not certify his approval of the sureties; he could not infer their sufficiency merely from the fact of their having entered into the bond. His Honour approved of the form of the bond, and of the sum for which it was entered into, but he had no means of forming any judgment whether the sureties were sufficient or not, within the meaning of the act. His Honour then certified to this effect upon the bond.

INSOLVENT DEBTOR'S COURT.

CASE OF MOSES SOLOMON.—Jan. 1.

Abolition of Imprisonment for Debt Bill.—*Its working in favour of Creditors, by Sec. 36—vesting order*.

This insolvent had been in prison since 1834, and was now brought before the Court under sec. 36, upon examination.

The insolvent said he had mortgaged an estate, for which he had given 1,250*l.* to a Mr. *Bousfield*, since he had been in prison, for money advanced before the imprisonment, and also that the same property had been mortgaged to his step-daughter, Julia Levi, for 260*l.*

His evidence was supported by the testimony of Mr. *Bousfield* and Julia Levi, but it was contended that the mortgage to the step-daughter was only a colourable transaction, and not *bond fide*.

The CHIEF COMMISSIONER said, that admitting the evidence on the part of the insolvent and his step-daughter to be true, it was clear on his own showing that he had made away with 200*l.* which ought to have been paid amongst his creditors. He had been in prison a long while, but his imprisonment had been voluntary; nevertheless the Court would to a certain degree take that into consideration. He should not be entitled to his discharge under the act until he should have been in prison six months from the date of the vesting order, for having made away with property to

the injury of his creditors, and he should be confined within the walls.

The insolvent had heretofore been residing within the rules of the prison.

JEREMIAH BOARD'S CASE.—Jan. 2.

Abolition of Imprisonment for Debt Bill, Sec. 66.—Power of the Court to commit Prisoners for contempt.

A Rule nisi (a) had been granted in this case, under the 66th sec. of the act, for committing the insolvent to Newgate for contempt of the Court, in not having filed a schedule in compliance with an order of the Court to that effect.

Mr. Cooks now applied to have the rule made absolute.

Mr. Woodroffe showed cause against it, and contended that there was nothing in the new act which enabled the Court to make the rule absolute; they had no power to enforce the removal prayed for by the creditor. The Court had a limited power of committal in particular cases of contempt, with respect to assignees and others under the 66th section of the new act, and that was all. The 36th section (the compulsory clause) empowered them to order a prisoner to file a schedule, and to appear for hearing, but no penalty was attached to disobedience of the order. In the 66th section, which related to assignees, the Court had a limited power in which assignees or "other persons" were mentioned. The eleven preceding clauses of the act referred to the duties of assignees, and by "other persons" were intended the representatives of deceased assignees or persons holding money. In this case his client was already a prisoner on a committal by a superior court, and the gaoler would not be justified in obeying their order for his removal. The learned counsel pointed out many defects in this act, and stated in reference to the power of the Court to commit for contempt, that there was the clause which related to the insertion of advertisements of insolvents in newspapers, to compel the proprietors to insert which advertisements, the Court was not furnished with any powers. He concluded by submitting that the Court would not in this case make the rule absolute.

Mr. Cooks admitted that it was not a very difficult task to show that the new act was very defective, but contended that under the 66th section the Court was furnished by the words "other persons" with the power of committal of the prisoner Board, and concluded a very long argument with a prayer to make the rule absolute.

The Chief Commissioner REYNOLDS and Mr. Commissioner BOWEN expressed their present view of the question. They concurred in opinion that the words "other persons" gave a power to commit generally for contempt,

but wished to consult their colleagues whether or not the 66th section gave them authority to remove a prisoner from one prison to another. Mr. Commissioner BOWEN being at present advised, that as the Legislature had not given them specific power in such cases, the clause was nugatory, as affecting insolvents already in custody.

PALACE COURT. Dec. 15.

Moses v. Deane.

Liability of Officer as the bona fide servant of the Court for the solvency of Bail taken by him on Arrest, and as to the responsibility of the Knight Marshal for the acts of his Officer.

The defendant had been arrested by an officer of the Court who had taken a bail bond, the cause had been removed by *habeas* into the Queen's Bench, when the same bail was put in. Afterwards the cause reverted by *procedendo* to the court below, whereupon the officer was ruled to bring in the body, when circumstances were disclosed, from which it appeared that the bail were insolvent, and the defendant had absconded to America.

Mr. Gaselee, for the plaintiff, moved for a rule nisi, calling upon John Vice, the officer who took the bail, to show cause why he should not be responsible to the plaintiff for the debt, and pay the costs of the application.

Mr. Knight showed cause against the rule, and said that due diligence had been used in making inquiries as to the solvency of the bail. From the plaintiff's delay in proceeding with the action, it was evident that there had been collusion between the parties, and that from the death of one of the bail the officer had been materially affected. But mainly, he resisted the rule on the ground, that by analogy to the practice in the Supreme Court, the knight-marshal who appointed the officers of the court, and required from them bonds for the due performance of their duties, could alone be made liable in this summary proceeding, which had been admitted to be analogous to an attachment against the sheriff. The knight-marshal was clearly to be considered a ministerial and not a judicial officer. A distinction existed between him and the steward of a court baron, inasmuch as that officer did not take bond from the bailiff, and that court was not constituted unless he presided in person, while there, in that court, the knight-marshal never presided, but either the steward or his deputy, who were independent officers, and the terms of the letters patent the Court was to be held before these two judges, or one of them, clearly showing that the knight-marshal had no judicial power. He was the real person against whom this rule ought to be obtained.

Mr. Gaselee, contra, contended that the officer was bona fide the servant of the Court, and the responsible person. This application was in accordance with and sanctioned by the

(a) *Ante p. 108.*

practice of the Court, and had only once before been called in question.

The learned Judge, Mr. BRENT, said that the question was whether the knight-marshal of the Court or the officer appointed by him was to be responsible to the suitors for the sufficiency of bail. He was of opinion that the latter was the responsible party, which was in accordance with the practice of the Court, and supported by competent authorities. In this case the officer had not used due caution.

Rule made absolute with costs.

MIDDLESEX SESSIONS.

Dec. 19.

(*Mr. Sergeant ADAMS, Chairman.*)
APPEAL.

THE GENERAL CEMETERY COMPANY against
THE PARISH OF ST. MARY ABBOTT'S, KEN-
SINGTON.

*Cemetery Companies.—Liability of, to Poor-
Rates, and how to be rated.*

This was an appeal by the proprietors of the General Cemetery in the Harrow-road against the poor-rate to which they had been assessed by the parish of St. Mary Abbott's, Kensington.

Mr. Adolphus and Mr. Bodkin for the appellants, Mr. Prendergast and Mr. Clarkson for the respondents.

Mr. Adolphus contended that the parish were not empowered to assess the premises of the General Cemetery Company in the manner which had been done. He did not however, deny that the company were not rateable to a certain extent, that they were not rateable for something or other. The question, therefore, for the consideration and determination of the bench would be, whether the company were justly rated in respect to the peculiar nature of their premises. The parish had thought fit to assess the Cemetery Company as the proprietors, owners, and occupiers of 54 acres of land, of which the gross rent was set at 2,465*l.*, and had rated them on an annual rental of 2,000*l.* That was the rate against which the company appealed. The simple question for the Court was merely as to what sum for rental they considered the appellants ought, in fairness, to be rated at. Until the last year the cemetery had been rated at 350*l.* per annum; but on a sudden that amount had been raised up to 2,000*l.* The General Cemetery Company had been established under the provisions of the 2d and 3d William IV., c. 110. Now, in assessing these grounds he contended that the parish were bound to have rated them according to what the land was worth by the year, to be employed in the common purposes of agriculture or horticulture, and not in any other way. The actual quantity of land was about 42 acres, upon a part of which the company had erected two chapels, not for the performance of divine service, but to afford accommoda-

tion, without the exposure to the chances of the weather, to the clergymen, and others engaged in the melancholy ceremony of the burial of the dead. It was impossible that those chapels could be held as liable to be assessed to the poor-rate, inasmuch as there was not one farthing of rent received from them, nor were they ever used except as the depository of a corpse during the period when the funeral service was being read over it. In addition to these structures, there was next the porter's lodge, which had been erected as a lodging for the sexton. But it might be said that there were a number of cemeteries or catacombs and vaults upon the premises. Now, if such a position were to be taken, he should then contend that those buildings were not liable to assessment. Under any circumstances the company could not be rated for the catacombs, inasmuch as having been sold by them to third parties, they had parted with all beneficial interest in them as occupiers. They had, at least many of them, been absolutely sold and parted with. So, too, was the case with a considerable number of vaulted and bricked graves, each of which had been disposed of in perpetuity to certain families. Besides that arrangement of a portion of their ground, the company had reserved an undefined space for the interment of parties whose friends had not thought it necessary or worth while to become the purchasers either of a catacomb, a vaulted grave, or a bricked grave. With respect to the general business of the company, that was carried on at their offices in town, the sexton being the only individual who resided at Kensal-green. The ground which had not been as yet used yielded about 60*l.* a-year in grass. With regard to his own opinion he was inclined to think that the 60*l.* was the amount on which alone the company ought in fairness to be rated, inasmuch as he considered that sum to be the whole amount of the interest the company held in the property, for it was perfectly clear that the catacombs and other graves which they had sold no longer belonged to them. He might ask why it was that the cemetery land was rated when it so happened that there was not another burial-ground in the parish assessed? It was also proper to state, that the company had about seven acres of land, which constituted part of the cemetery, but which had not been consecrated, for the reception of those corpses where, when alive, the parties had entertained an objection to be buried in accordance with the rules and forms of the church of England. He should call the clerk to the company, who would put in the annual report and statement of the accounts for the year, which were made up for the purposes of the proprietors, which, together with the explanations that gentleman would give, would enable the bench at once to see how much benefit the undertaking really yielded, and thereupon to say what they considered would be a fair and reasonable amount at which to set the rental.

Mr. Bowman, the clerk and solicitor to the

company, then stated that the account he was about to put in was made out for the year ending the 24th of May, 1838. He had drawn up two statements; the one showing what part of the property he considered the company ought not to be rated upon, and the other, that on which he was of opinion they ought to be exempt from the assessment. The former commenced with the item of money received for land sold for the purpose of burial.

Mr. Clarkson submitted, that by the provisions of the act of Parliament the company had not the power to sell.

Mr. Bowman, in reply to the chairman, said, that all the land was regularly conveyed by deed. The charge for a single grave was three guineas, and the charge for the interment of every corpse therein was two guineas. That sum included all fees for the performance of the service. The witness then went on to say, that the amount which had been received during the past year for the purchase of land was 2,384*. 12s.* The company also sold catacombs.

By the CHAIRMAN.—When a party had bought a piece of ground, he had a right to inter as many bodies in it as he thought fit, and to cover up the grave or vault with a stone, if he chose.

Examination continued.—The sum which had been received during the same period for catacombs was 1,487*. 15s. 6d.* The price for a catacomb varied from 4 to 17 guineas, according to the situation and size. They are conveyed in the same manner, and conveyed the same rights in every respect as in the case of the vaulted and bricked graves. The amount received for building vaults, brick graves, and monuments, was 920*. 6s. 7d.* There were next two other sums which had been received as interest on India Bonds and Consols, which, together with the items already mentioned, made a total of receipts of 4,870*. 8s. 11d.* The company did not derive any advantage from the catacombs although they were sold. On the other side of the account there was a list of disbursements for masons, for work to catacombs and graves, independent of the first cost of building the catacombs, draining and buildings, expense of watching the grounds, interest on capital, and other expenses, in all amounting to the sum of 3,213*. 0s. 5d.*, leaving a balance in favour of the company of 1,657*. 8s. 6d.* That was the state of the accounts as regarded what he conceived to be the non-rateable property. Then the second statement, or rateable property, was as follows:—Cash received for fees, for services of clergymen, clerk, sexton, grave-diggers, bellringers, and others connected with interment and funeral service, and for common interments where no right in perpetuity or for a term is granted, and for turfing and planting graves, 1,817*. 11s. 3d.*; ditto, for sale of crop of grass, 68*.;* making a total of receipts of 1,885*. 11s. 3d.* To be deducted from that sum there were disbursements for labour, stipend to the clergyman (200*.*), and other items, in all 1,460*. 13s. 3d.* Deducting the

latter from the former amount, there was a balance in favour of the company, consisting partly of rents and profits of trade, arising from the occupation of the land, and partly from the services of the different officers of the company at the cemetery and in London, of 424*. 18s.* When a corpse was deposited in one of the catacombs the company charged five guineas. The annual stipend paid to the clergyman was 200*.* If the family of a deceased party desired that any particular clergyman should perform the service, there was no objection made by the company. Their charge, however, was the same, because their own clergyman was compelled to attend to give the sanction.

The CHAIRMAN.—Then it is contended, that all the catacombe and land which have been sold for graves are not rateable?

Mr. Bodkin.—Certainly.

Mr. Clarkson said, that under the provisions of the 45th section of the act, the company had no power to sell the land; they could only grant a lease.

Cross-examined.—He could not form any idea of the quantity of land which was not sold. A single body was interred at the cost of 2*s.*

The CHAIRMAN.—In that case you have no conveyance?

Witness.—No. The charge made of two guineas is upon the private graves only. There were at present 2,000 catacombs sold, and there were as many as 3,000 or 4,000 more which had not as yet been appropriated. There were not any bricked or vaulted graves unsold. There were many of the catacombs which had been sold that had not as yet been used, and perhaps might not be. When a body was put into either of them the company would be paid five guineas. The 2,000 catacombs were sold in perpetuity, and not for a term of years. The gross capital of the company had been 60,000*.* The company had paid four dividends on the capital, one of 3 per cent., two of 5 per cent., and the last of 6 per cent. The last year, however, had been less profitable than its predecessors. The 2*s.* shares were at present worth 50*.*

The CHAIRMAN here interrupted, and said the difficulty the Court had was as to the occupation.

Mr. Bodkin submitted that the company were not in the occupation of the catacombs and the vaulted and brick graves. They were all sold.

The CHAIRMAN.—Upon the 45th section of the act it was clear the conveyance was not for the sale, but for the exclusive right in the graves, vaults, and catacombs, with power to assign that right to a third party. Then the effect of that proceeding was to take out of the company the occupation of all such catacombs, vaults, and graves, and to place it in the persons from whom the premium might be received for such sale, the company afterwards only deriving an advantage when a body is interred within one of those depositories. That subsequent payment might perhaps be

regarded as a rental. But if that were the proper view of the case, how was it possible to rate the company, even if it could be done at all, on more than two guineas?

Mr. *Prendergast* admitted that the point was not without very considerable difficulty.

The CHAIRMAN then said, that the parties, as the case was one of very great importance to the public in consequence of the vast number of cemeteries which were springing up in all directions, would not probably be satisfied with the decision of that bench, and therefore probably would be inclined to take a case to the higher court.

Mr. *Bodkin* was rather disposed to think, that by the local act under which the rate was made, the *cetiorari* was taken away.

Mr. *Prendergast* contended that the poor-rate was not made under a local, but under the provisions of a public act—a law of the land, if, indeed, it were otherwise, then no poor-rate could ever be brought before the Court of Queen's Bench. It was, in fact, the order made under the provisions of the poor-rate which was taken into the Court of Queen's Bench, and not the rate itself.

The CHAIRMAN, upon looking over the act, was doubtful whether the *cetiorari* was taken away. However, the question at present before the bench was one of so much importance that it ought to be decided in a court where judgment would be regarded as final.

Mr. *Prendergast* then proceeded at great length, in a speech of considerable ingenuity, to contend, that although the company might consider they had sold the catacombs, vaults, and brick graves referred to, still that they were the parties in occupation, and therefore liable to be rated. If it were to be decided that this description of property was not ratable, it would be the only land which was not subject to be assessed. It had been held that even land devoted to charitable purposes was rateable—why not, then, the land belonging to a public cemetery, which was a speculation? With very few exceptions, in all acts of Parliament relating to burial-ground, a clause was introduced regulating the amount of rating to the poor-rate to the amount at which it was previously assessed as grass land; whereas in the acts of this cemetery there was no mention of the subject, a fact which clearly went to show that it was intended by the Legislature that they should be subject to the rate. With respect, then, to the chapels, surely they were liable to be rated under the statute of Elizabeth. The learned gentleman, after some further comments, submitted that there had not been sufficient evidence offered to the bench of the transactions and proceedings of the company to enable them to determine how much of the land had been what they denominated sold, and how much they admitted themselves to be in the occupation of. The parish had not the means of going in to see what was being done, and therefore they had a right to take the whole property.

A Magistrate was of opinion that the company ought to be rated on their annual-rental.

If any portion of the ground were sold in perpetuity, how could it be said that that was an annual profit?

Mr. *Prendergast* observed, that that had been all considered. Annual value did not mean annual value with regard to value accruing annually, as in the case of underwood. He contended that the parish were bound to rate according to the act of Parliament—the Parochial Assessment Act. That the company were in a flourishing condition the value of the shares was ample proof, and there was no public body who under the circumstances would not give a rental for the premises as large as that at which they had been rated by the parish.

Mr. *Clarkson*.—There was, the Court would find on reference to the 49th section of the act, a power of re-entrance in the company. They were, therefore, in the occupation.

Mr. *Prendergast* submitted that in point of fact the parties buying merely had an easement in the fee simple.

Mr. *Adolphus* and Mr. *Clarkson* each addressed the Court, and the bench having consulted for some time,—

The CHAIRMAN said, the Court were unanimous in their opinion on this subject. He must confess, however, that he had at some periods of the proceedings wavered very much in his own mind, and even at the present moment, although he agreed with the other members of the Court as to the result of their deliberations, he much regretted that he did not feel a greater degree of internal satisfaction on the case. The principle of the poor-rate was that of rating on the occupier, and the objection here was that the company ought not to be rated in respect of the occupation of certain catacombs, vaults, and graves, said to have been sold. On the part of the parish, it was contended that the company continued in the character of occupiers, and that they had sold the exclusive right of burial only, and therefore that they were liable to be rated on the whole. The learned Chairman then proceeded through a careful detail of the leading points of the case, and said it was clear that the rental as it appeared on the face of the accounts which had been produced was 424*l.* 18*s.* To that sum ought to be added what might be fairly taken as a rental for the six or seven acres not disputed.

A conversation arose between the Bench and the learned counsel as to what that sum should be, and eventually it was fixed at 20*s.*

The CHAIRMAN then said, the order of the Court was, that the rate should be amended by substituting the figures 444*l.* 18*s.* for those of 2,000*l.*

COURT OF THE SHERIFF OF MIDDLESEX.—Jan. 3.

HOMAN v. BEETHAM, Esq.

Church-rates—Duties of Magistrates—Distress Warrant for illegal Rates.

Mr. Murphy, for the plaintiff, stated the

case:—Mr. Homan had a country residence in the parish of St. Mary, Stoke Newington. The defendant was a magistrate for the county of Middlesex, acting in the district where the plaintiff resided. The question brought forward on this occasion in the shape of a writ of inquiry, was that of church-rates, regarding which there had been of late much litigation. The damages prayed for were for an illegal distraint for church-rates. The question did not involve a disputed liability on the ground of conscientious scruple, but a disputed liability into which no sectarian or party difference intruded itself. The point was that the rate made was an illegal one, and that therefore the plaintiff ought not to have been called upon to pay it. A church-rate was made in the parish of St. Mary, Stoke Newington, in 1837, and in consequence of certain irregularities, persona, amongst whom the plaintiff was one, refused to pay it, and eventually it was determined not to press the receiving of the rate against them. In the month of January, 1838, a vestry was called, and a new rate (6d. in the pound) was proposed. A number of the parishioners attended the vestry, with whom was the plaintiff, to watch the proceedings. They asked to have a statement of accounts laid before them, but their request was not complied with, and they were told by the churchwarden that the rate was applicable to the same purposes for which the previous rate would have been applied. Objections were then taken to the levying of such a rate, yet the rate was allowed. The plaintiff refused to pay it on the ground of its illegality. Summonses were issued, some of which were returnable in March, and others in April. In obedience to the first of such summonses Mr. Bevan, the plaintiff's solicitor, attended in behalf of certain parties before the magistrates. He would not allude to this, but that the magistrates on a subsequent occasion acknowledged that objections to the rate had been made; and that Mr. Bevan was in a position to object, and so made the objections evidence for the present case. On the next occasion Mr. Bevan was absent from home, and his clerk (Mr. Ireland) attended. Mr. Beetham and two other magistrates were then present. Mr. Ireland prayed that the magistrates would leave the question to the Ecclesiastical Court, whose peculiar jurisdiction it was to deal with such cases. Originally, magistrates had no jurisdiction in matters of church-rates, but by the 53d Geo. 3, c. 127. s. 7, (a) a very important proviso was introduced, to the effect, that if the validity of the rate or liability of the party from whom the rate was demanded be

disputed, and the party disputing the same give notice thereof to the justices of the peace, the justices should forbear giving judgment thereon. There was a case in 5 Maule and Selwyn, 248, of "Rex v. the Chapelwardens of Millarow," (b) in which notice had been given not to give judgment. They, however, did give judgment, and an appeal was made to the Court of King's Bench, at which time Lord Ellenborough presided. Lord Ellenborough held, that a notice indicative of the intention of proceeding, and in the words, "I shall bring an action if distraint is made," which he could show were the words expressed by Mr. Ireland, were sufficient. The magistrates, notwithstanding this emphatic declaration of Mr. Ireland, determined upon acting, when Mr. Ireland further observed, "If you do so, and I do not intend it as a threat, I beg to say, as far as my client's interest is concerned, I shall feel it my duty to bring the matter before a court of law in the shape of an action." The defendant answered with apparent excitement that Mr. Ireland had made a threat, but that he was not to be intimidated, and he would do his duty. Warrants were issued, and the goods of the plaintiff taken to the amount of the rate.

R. Batteroy deposed, that he made a distraint on the goods of the plaintiff for church-rates. He seized a clock, which produced the sum of 34 6s., but the amount set forth in the warrant was 24. 15s. 1d. The sale of the clock did not defray all expenses, and the second distress was not made.

J. Webster, the parish beadle, said he thought the clock worth from 44. 4s. to 44. 10s. John Ireland stated, that in consequence of instructions he received from Mr. Bevan, he attended a meeting of the magistrates in the vestry-room at Stoke Newington, on behalf of thirty-two individuals, the plaintiff being one among the number. Mr. Beetham, the defendant, was one of the magistrates present. After the vestry-clerk had put the rate, he was asked what objections he had to it? Witness stated three:—first, that the rate was retrospective; secondly, that the estimate of the items for which the rate was required had been refused at the time of making the rate; and thirdly, that it was admitted the rate was for purposes similar to those for which the previous rate had been laid. He said, that if the magistrates adjudicated in the matter, he begged to state to them—and in so doing he wished them to understand it was not a threat—that an action would be brought against those signing the warrants. The defendant said the observation was a most improper one to make, and most disrespectful to the Bench, and that, if he found it necessary, he should sign the warrants without hesitation. His manner was rather warm.

(a) If any person refuse payment of a church-rate duly assessed upon him, and the validity of which has not been questioned in any ecclesiastical court, he may be brought before two justices, who may examine upon oath into the merits of the complaint, and order payment; but if the validity of the rate be disputed, and notice thereof given to the justices by the disputing party, they shall forbear giving judgment in the case.—ED.

(b) Lord Ellenborough, in this case observed, that if a person was merely to say before the Justices that he disputed the rate, it would not be sufficient, insasmuch as he ought to show something to manifest that he disputed it *bona fide*.—ED.

Mr. D. W. *Wire* spoke at great length in mitigation of damages. What did the question come to? Simply this—What amount of damages was the plaintiff entitled to on account of the complained illegal restraint? If the complaint were stripped of the warmth of colouring given by the learned gentleman, it would be found to be nothing more than error on the part of the defendant; and he felt satisfied that the jury, after carefully viewing all sides, would only give damages to the amount of the injury sustained by the plaintiff.

The Under-Sheriff observed, that the simple question was, as to the amount of damage sustained by the plaintiff, for which the defendant, it was contended, was liable. There was no evidence of hostile feeling on the part of the defendant, and he thought the observations of the defendant, that "he would do his duty," and "issue the warrant without hesitation," were such as a magistrate might make use of without having malevolent feeling. The question for the jury was this—Was the defendant on this occasion acting *bond fide* in the discharge of his duty as a magistrate, and without hostile feeling? If this appeared to be so, he took it that the jury would give such damages as would cover the amount of the injury really sustained by the plaintiff.

Verdict for the plaintiff. Damages 10l.
COPPER v. BEETHAM, Esq.—THOMPSON

v. SAME.

These cases were of the like nature as Homan v. Beetham, in which Mr. *Murphy* also appeared for the plaintiff, and offered to accept damages in each case, for the like amount as in the former case.

Mr. *Wire* wished the letter to be read. The magistrate's error in the case arose from a misunderstanding. The case in which the Mayor of Maidstone had been concerned, and which had lately been decided, was supposed to be completely analogous to the one in question, and the magistrates in this matter were under the impression that the objection would not be valid unless the party objecting gave it in writing. The magistrates, acting in the execution of their duty, and in error, for this was the extent of their act, considered they were bound to issue the warrants; and, to prove that they were not actuated by any ill-feeling, he wished the letter to be read.

Mr. *Murphy* said he was quite agreeable. He did not mean to insinuate for a moment that there was such a feeling.

Mr. *Wire* then read the letter:—

"21, Old Jewry, June 21.

"SIR,—The notice of action which I was instructed to serve upon you in this matter will expire on the 25th instant, and, in accordance with my directions, I shall have to issue writs on the following day. From the very polite attention I have received at your hands, whenever I have had occasion to appear before the magistrates in this matter, I feel anxious to execute this unpleasant part of my duty in a manner as respectful to you and as consonant to your wishes as possible. I shall,

therefore, be obliged by your informing me whether it is your desire that I should deliver the copies of the process to you personally, or whether I shall forward them to your solicitor for his undertaking to enter an appearance, and if the latter, be good enough to say with whom I shall communicate. I also take this opportunity of begging you to believe, that in the course we have been advised to adopt, neither myself nor my client is influenced by any spirit of hostility or unfriendly feeling towards you personally, but that, on the contrary, they entertain every feeling of respect and esteem towards you as a magistrate and a neighbour, and it is with regret they feel themselves compelled in maintenance of principles to enter into litigation with you, although you may be only nominally the defendant. I trust, therefore, that in trying the question of right, the proceedings on both sides may be carried on in an amicable and friendly feeling. Waiting your reply, I am, Sir, &c.,

W. BEVAN."

Verdict accordingly, in each cause for the plaintiffs.

EXAMINATION OF ARTICLED CLERKS.

(Continued from page 41.)

Questions put by the Examiners.

The three first questions appear to be always the same.

The following is a List of Questions given at the Examination last Easter Term.

COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS.

What are the different writs for commencing actions, and under what circumstances are they respectively applicable?

In a joint action against several defendants, can you insert all the names in one writ, or is there any number of names to which you are limited?

Can a declaration in ejectment be served on the wife of the tenant under any and what circumstances?

When the tenant cannot be met with, may a declaration in ejectment be served on any one of the family, without any thing further being done?

When may a trial be had before the under-sheriff?

Is it necessary to serve a witness with copy of a subpoena personally, or will it be sufficient to leave it at the dwelling house?

What is the meaning of the term "avowry?"

What do you understand by the expression of "cattle levant and couchant?"

If a witness in a cause be about to sail on a distant voyage, is it adviseable to detain him here till the trial, or is there any other way of obtaining his testimony?

If a document is to be produced at a trial,

should the expense of taking a witness to prove it be incurred, or is there any way of avoiding that expense?

Where a traveller is preparing to depart from an inn without paying his bill, may the landlord detain either his person or baggage until payment?

The property of a traveller at an inn is stolen by some person unknown, without any imputation of connivance or neglect in the landlord or his servants. Is the landlord liable to make good the loss?

When a warrant of attorney is executed by a person in custody, is any thing necessary to be done beyond what would be necessary if he was not in custody?

Is it necessary that a notice to quit should in all cases be in writing?

Does a half-year's notice to quit, refer to any particular period of the year of the tenancy?

CONVEYANCING.

What is a corporeal, and what is an incorporeal hereditament? and how are they respectively conveyed?

What is an escrow?

To whom will land, held according to the custom of Borough English, descend?

To whom will land, held according to the custom of gavelkind, descend? and where does that custom principally prevail?

What are the formal parts of a deed?

What is the difference between an use and a trust?

What requisites are now necessary for the due execution of a will devising real, and what of a will bequeathing personal estate? and from what period have such requisites been necessary.

What are the essential points to be attended to in the examination of an abstract with the title deeds?

What is a voluntary settlement? and can it be defeated in any and what manner?

Is there any, and what, advantage to a purchaser in taking an assignment of outstanding terms to trustees for the purchaser in trust to attend the inheritance, over a general declaration that all persons, in whom outstanding terms are vested, shall stand possessed of them in trust for the purchaser?

A. makes a mortgage to B., and afterwards agrees to grant a lease to C. By whom should the lease be granted?

(To be continued.)

REVIEW OF NEW BOOKS.

Remarks on COPYHOLD ENFRANCHISEMENT, freeing the Subject from its apparent complication and difficulty, and with given TABLES and RULES, enabling any Lord, Steward, or Copyholder, without previous study, to compute with the greatest ease, and with mathematical accuracy the value of Enfranchisement from Fines,

Rents, Reliefs, Heriots, &c. whatever may be the amounts or contingencies on which payable, with suggestions as to the points to which public attention should be directed in any Bill for general Enfranchisement, and as to the application of the Tables and Rules to the general valuation of limited and contingent interests in Property. By ROLLA ROUSE, Esq. of the Middle Temple, and of Melton, Suffolk, Conveyancer, Author of "The Practical Man," "Copyhold and Court-keeping Practice," &c. London, John Richards & Co. Law Booksellers, 194, Fleet Street, 1839.

These "Remarks" come very opportune, and the author appears to understand his subject, to do which thoroughly, he says, requires not a deep knowledge, but some practical acquaintance with two studies which are but seldom pursued together, viz. copyhold law, and the practical application of mathematics to the values connected with lives and with real property. The author has, however, treated more upon the latter than the former; he has entered upon the value of copyhold enfranchisement, or the comparative value of freehold and copyhold lands with great mathematical precision. The subjects occupied the serious attention of the Tithe Commission upon their enquiry into it, and the questions of law and of value are involved in considerable difficulties which makes the author's remarks and tables the more valuable: he says

"The great point to be guarded against is the allowing any bills similar to those introduced by the Attorney-General to become law, as they would only encourage enfranchisements by enabling tenants fraudulently disposed to deprive lords of a considerable portion of their income, and at the same time subjecting the tenants themselves to almost unlimited litigation."

Upon the mode of computing the value of enfranchisements, he says,

"The great point is, that clear and simple rules should be given in the act, under which all the questions likely to arise can be solved, giving the Commissioners discretion in those cases, where from special circumstances such rules would not be applicable."

These rules, he says should be based in mathematical accuracy, and that if tables be added, reducing the computation in all the usual cases to mere reference, an accurate computation can be made as rapidly as the

figures can be counted; and such a set of Tables the author has added to his work, calculated for every purpose that the subject may require. The Book is interesting, pending the question as to the general enfranchisement of copyholds, and merits attention, particularly by persons interested in copyhold property.

Business in the Courts.

COURT OF QUEEN'S BENCH.

Sittings at *Nisi Prius* appointed to be held in Middlesex and London, before the Right Hon. Thomas Lord DENMAN, Lord Chief Justice of the Court of Queen's Bench, in and after Hilary Term, 1839.

In Term.

MIDDLESEX.

Saturday	.	January 12
Wednesday	.	January 16
Tuesday	.	January 29
	LONDON.	
Wednesday	.	January 30
	After Term.	
Friday	.	February 1
Saturday	.	February 2

To adjourn only.

The Court will sit at 11 o'clock in Term, in Middlesex; at 12 in London; and in both at half-past 9 o'clock after Term.

N.B. Long causes will probably be postponed from the 12th and 16th of January to the Adjournment-day; and all other causes on the lists for the 12th and 16th of January will be taken from day to day until they are tried.

Undefended causes only will be taken on the 29th of January.

Defended as well as undefended causes entered for the sitting on the 30th of January will be tried on that day, if the plaintiffs wish it, unless there be a satisfactory affidavit of merits.

COURT OF COMMON PLEAS.

Sittings at *Nisi Prius* appointed in Middlesex and London.

Before the Right Hon. Sir Nicolas Conyngham TINDAL, Knight, Lord Chief Justice of Her Majesty's Court of Common Pleas at Westminster, in and after Hilary Term, 1839.

In Term.

MIDDLESEX.

Wednesday	.	January 16
Wednesday	.	January 23
	LONDON.	
Friday	.	January
Friday	.	January

After Term.

Friday	.	February 1
Saturday	.	February

N.B. The Court will sit at 10 o'clock in the forenoon on each of the days in Term, and at half-past 9 o'clock precisely on each of the days after Term.

The causes in the list for each of the above sitting days in Term, if not disposed of on those days, will be tried by adjournment on the days following each of such days.

On Saturday, the 2d of February, in London, no causes will be tried, but the Court will adjourn to a future day.

COURT OF EXCHEQUER.

Sittings at *Nisi Prius* in Middlesex and London.

Before the Right Hon. James Lord ABINGER, Chief Baron of Her Majesty's Court of Exchequer, in and after Hilary Term, 1839.

In Term.

MIDDLESEX.

1st Sittings.—Tuesday, Jan. 15.

By adjournment (if necessary).—Wednesday, Jan. 16.

2d Sittings.—Wednesday, Jan. 23.

By adjournment (if necessary).—Thursday, Jan. 24.

LONDON.

1st Sittings.—Monday, Jan. 21.

2d Sittings.—Monday, Jan. 28.

By adjournment (if necessary).—Tuesday, Jan. 29.

After Term.

MIDDLESEX.

Friday February 1

LONDON.

Saturday February 2

To adjourn only.

The Court will sit during Term, 10 o'clock.

TO CORRESPONDENTS.

"H. D. M." will observe our note under his answer to Problem VIII., our columns are open to his reply if satisfactory.

"F. J. C." is under consideration.

"E."—We would cheerfully give his letter insertion, if in so doing we could promote his object; his suggestion is good, but the remedy lies with the legislature.

"Henricus."—His further communication is under consideration.

"Legal Society."—The case referred to us shall be answered next week.

Just Published,

THE LEGAL GUIDE, PART II., price 2s. 6d., containing all the Nos. from the 1st Dec., 1838, to the last Number, both inclusive, and Table of Contents. **PART III.** will be published on the 1st of FEBRUARY.

JOHN RICHARDS & Co., 194, Fleet-street.

Printed by ALEXANDER ELDER MURRAY, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, London, Saturday, 5th January, 1839.

The Legal Guide.

No. 11.]

SATURDAY, JANUARY 12, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 131.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

Ecclesiastical Benefices,—when a Title accrues by Lapse.

SECTION 30. enacts a proviso, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation, or gift of the patron thereof, a clerk shall be presented, or collated thereto by his majesty, or the ordinary, by reason of a lapse, such last mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation, or gift of such patron as aforesaid; but when a clerk shall have been presented by his majesty upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.

LAPSE is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary, by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan; but where there is no right of institution there is no right of lapse,

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so that donatives are not subject to lapse; see *Fairchild v. Gayre*, before cited; *Britton v. Wade*, Cro. Jac. 515; unless it so ordained in their foundation, see *Co. Litt. 344, a.*; *3 Inst. 112*; & *Degge*, pl. 1. c. 13.; or unless they had been, with the patron's consent, augmented by Queen Anne's bounty; and when so augmented they are reduced under the visitation and jurisdiction of the ordinary, and are subject to lapse by *1 Geo. 1. St. 2. c. 10. ss. 6. 14. 15.* In case of no nomination within six months, see *Rex v. Bishop of Chester*, 1 Term. Rep. 404. & *Mutter v. Chauvell*, 1 Mer. 475. It is asserted in *Co. Litt. 344. (a.)* that if the patron in any one instance presents his clerk to the bishop for institution to such kind of preferment, it becomes ever after presentable, and no longer a donative, and *lapse* will occur as in other benefices; but the case of *Fairchild v. Gayre* seems to contradict the assertion.

Presentation must be made by a common person within six calendar months after the death of the last incumbent, otherwise the right accrues to the ordinary, which is called a *lapse*, see *3 Leon. 46*; *2 Inst. 273*.

The time in which the title to present by *lapse* accrues from one to the other successively, is six calendar months; but it has been doubted whether the day of avoidance is exclusive, as asserted in *2 Inst. 361*; see *15 Ves. J. 255*. The six months commence from the time the patron has notice of the avoidance, and if the avoidance be by resignation, or deprivation, the six months do not commence till the ordinary has given

notice to the patron. If the bishop be both patron and ordinary, he is not to have double time to collate in, see Gibbs. Cod. 769; because the forfeiture accrues by law whenever the negligence has continued six months in the same person; and if the bishop be guilty of negligence the patron may at any time take advantage of it; as, if the bishop does not collate immediately on avoidance to the living, and six months lapse, and the patron then presents, such presentation is good, see 2 Inst. 273; Hutt. 24; Hob. 152. 154. So if the bishop suffer the presentation to lapse to the metropolitan, and the patron presents before the archbishop, the presentation is good, but in the latter case the ordinary cannot collate his clerk to the prejudice of the archbishop, see 2 Roll. Ab. 368; and indeed this doctrine has been recently established, see 3 Moore & Scott, 114. So after a lapse to the king, although his prerogative intervenes and makes a difference, and by presentation the patron is absolutely defeated of his advowson, yet if the king do not present, and during the lapse the patron presents a clerk, who is instituted and inducted, and dies incumbent before the king has taken advantage of the lapse, his right is gone, see 7 Rep. 28; Cro. Eliz. 44; 119 Owen, 2. 5; the king may however turn out the patron's clerk, before he so dies incumbent, and present another.

Where a benefice becomes vacant by the incumbent's acceptance of another, a *lapse* is incurred from the time of institution into the second benefice against the patron, provided he had notice, otherwise not. See Wolferstan v. Bishop of Lincoln, 2 Wils. 174. This is contrary to the doctrine held by Sir Wm. Blackstone, (2 Com. 278.) who says, "in case the benefice becomes void by death or cession through *plurality of benefices*, then the patron is bound to take notice of the vacancy *at his own peril*, for these are matters of equal notoriety to the patron and ordinary; but in case of a vacancy by resignation or canonical deprivation, or if a clerk presented be refused for insufficiency, or from being under the proper age, these being matters of which the bishop alone is presumed to be cogni-

nizant, here the law requires him to give notice thereof to the patron, otherwise he can take no advantage by way of *lapse*, (see 4 Rep. 75. 2 Inst. 632; 44 Geo. 3. o. 43.) neither shall any lapse thereby accrue to the metropolitan or to the king, for it is universally true that neither the archbishop nor the king shall ever present by *lapse*, but when the immediate ordinary might have collated by *lapse* within the six months, and hath exceeded his time. If, however, neither the bishop or archbishop present, then the right goes to the crown, which is not confined to any time. See Cro. Car. 335; Plow. 498; nevertheless subject to our former observations, in case the crown does not take advantage of the lapse.

If an incumbent of a living of above 8*l.* a-year in the King's Books, accepts a second benefice *under* that value, it is an absolute avoidance of his first living, but where an incumbent of a living under 8*l.* a-year in the King's Books, accepts a second without dispensation, his first living is only *voidable* at the election of his patron. See Boteler v. Allington, 3 Atk. 455; and when such an incumbent is also the patron of such a benefice with cure of souls, and accepts another benefice with cure of souls, and presents a clerk to his *first* living, who is duly admitted, instituted, and inducted, the *latter* benefice is actually void from the time of presentation within the Stat. 28 Hen. 8. c. 11., and the succeeding incumbent is entitled to the tithes from such presentation. See Botham v. Gregg, 4 M. & Scott, 430.

When an incumbent is made a bishop, the right of presentation to livings held by him, is in the king, for that turn, and is called a prerogative presentation; and although this right was formally much doubted, see Wentworth v. Wright, Owen, 144., it is lawfully established; see 2 Black. Rep. 770; Rex v. Bishop of London, 1 Show. 464; S. C. Show. P. C. 185. After such right of turn being exercised by the king, the patron had the right to present on the next vacancy occasioned by the death or resignation of the king's presentee. See Calland v. Troward, 2 Hen. Black.

324., and by the present act the incumbency of such *presentees* for the purposes of the act is to be deemed a continuation of the incumbency of the clerk made a bishop.

A bishop must not neglect or refuse to examine and admit a patron's clerk without good reason assigned, or notice given; if he does, he abandons all title to present by lapse. See 2 Roll. Ab. 369.

And if the right of presentation be litigious or contested, and an action to try the title be brought against the bishop, no *lapse* is incurred till the question of right be decided. See Co. Litt. 344.

(To be continued in our next.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM VIII.

(Concluded from p. 149, in reply to the Editor's note there.)

What is an Estate Tail, and how is it created?

The estate tail being thus created, the next point to consider will be, the words that are necessary to create such an estate. As the word "heirs" (or "heir," in a special case may be used in the singular,) is necessary in a grant or donation, in order to make a fee, or inheritance; Co. Lit. 8. 15; Plow. 28. So in farther limitation of the strictness of the feudal donation, the word "body," or some other words of procreation, is necessary to create an estate tail, in order to ascertain to what heirs in particular the fee is limited; as it is a constant rule, that in the creation of an estate tail, it must appear of what body the persons to inherit must issue, and it is the essence of the estate, 1 Pr. Wms. 72. Co. Lit. 27. b. And the omission of either the words of inheritance or procreation, will destroy the estate; Bl. Com. 2. 115, (with the exceptions hereinafter contained). For if there be a grant to A, *et semine suo, et eritibus vel prolibus de corpore suo*, he hath but an estate for life, for though the statute enacts, that *voluntas donatoris secundam formam in charta doni sui manifesti expressam de cetero observetur*, yet that will and intent must agree with the rules of law, Cro. Eliz. 121; Shelley's case, 1 Co. And of this opinion was Lord Coke himself,

when he holdeth,—that, if a man giveth land to A, *et ex iibis de corpore suo legitime procreatis, or, semine suo*, he hath but an estate for life, there being wanting the words of inheritance "*his heirs*," 1 Ro. Ab. 837; Co. Litt. Lib. 1. c. 2.

So on the other hand, a gift to A, *et heredum masculorum suorum legitime procreatorum* is an estate in fee simple; for there are no words to ascertain the body, out of which the heirs shall issue. Litt. 31. Co. Litt. 27.; but if it were the "heirs of mine lawfully begotten," it is an estate tail, 7 Rep. 41. Bedell's case, Dormer's case, H. 38. Eliz. B. R. note 739. Yet, with regard to the word *heirs*, if a man give lands to A, *et heredibus de corpore suo*, and the remainder to B in *forma predicta*, this is a good estate tail to B, for that *in forma predicta* includes the other; 1 Ro. Ab. 839. But if the gift had been to A for life, to B in tail, and remainder to C in *forma predicta*, this remainder is void for uncertainty; but if it had been, remainder to C in *eadem forma*, this would have been a good estate tail; for *idem semper proximo antecedenti refertur*, 1 Co. 103 b. There is this to be observed as to the words "*his body*" in a gift or devise, they may be expressed by other words that amount to the same meaning; for we find in the statute of Will. 2. s. 7. Co. 91; "*Cum aliquis dat terram suam alicui tiro et ejus uxori et heredibus de ipsis viro et muliere procreatis*, in which *heredibus* is used for *de corpore*. And the same in a gift to B *et heredibus quos idem B de prima uxore sua legitime procrearet*, 3 E. 3. til. Breve. 743. This is a good estate in special tail, without the words *de corpore*, though B have no wife at that time. So also in a gift to a man, *et heredibus de carne sua*, 37 H. 6. 15. or, *et heredibus de se*. 5 H. 5. 6. The greatest indulgence allowed, is in the case of a *last will or testament*, where an estate tail may be created, by a devise to a man and *his seed*, or to a man and his *heirs male*. (I) A fee may also be conveyed without words of inheritance, 2 Black. Com. p. 108; and, according to the celebrated case of *Perrin v. Blake, Burr. 2579*. (II) an estate tail may be conveyed without words of procreation,

for though it is a rule that *quoties in verbis nulla est ambiguitas, illi nulla expositio contra verba fienda est*, 2 Saund. 257; yet where the original import of the words is doubtful, the construction most in favour of the grantee shall be made, Perrin v. Blake. Shepherd's Tonct. 1. 5, provided it appears to have been the will of the devisor, who, for want of advice or learning, it is concluded, may have omitted the legal or proper phrases; and therefore many times the law dispenses with the want of words in devises, that are absolutely necessary in all other instruments.

H. D. M.

Lincoln's Inn Fields, Jan. 9th, 1839.

(I) Or other irregular modes of expression. See Co. Litt. 9. 27.—Ed.

(II) The question in this case remained undecided in the House of Lords in May, 1776. See Blacks. J. argument in this case, Hargraves Tracts, 489.—Ed.

ANSWER TO PROBLEM VIII.

What are the different species of Estates Tail, and how are they created?

Estates tail are divided into two kinds, general and special.

Tail general is, where lands and tene- ments are limited to a person and the heirs of his or her body; and is so called, because as often as the tenant in tail marries, the issue general of all and every such respective marriages is capable of inheriting, in suc- cessive order, the estate tail *per formam doni*.

Special tail is, where lands and tene- ments are limited to a man and his wife, and the heirs of their bodies, or to a man and the heirs of his body by his present wife, or to the wife and the heirs of her body by her present husband. In these cases no issue can inherit but such as are engendered between them; neither can any issue which the husband may have by another wife, or the wife by another husband. (I)

Estates tail general, or special, are further distinguished; as where lands are limited not only to the issue of the donee, but more par-

ticularly to one sort of issue, exclusive of others; as if lands are given to a man and the heirs male of his body, this would be an estate in tail male general; but if to a man and the heirs male of his body by his present wife, this is an estate in tail special; or if the word "female" had been inserted instead of "male," then in the first case it would be an estate in tail female general, and in the latter an estate in tail female special.

The issue male or female can only inherit according to the limitation, and the will of the donor. Litt. s. 21, 22.

The donor has the ultimate fee simple of the lands, expectant on the failure of issue; which expectant estate is called a reversion. 2 Bl. Com. 112. (II)

The words necessary to create an estate tail in a deed or gift, are those of inheritance joined to words of procreation. For as the word "heirs" is necessary to create a fee simple, so the word "body," or some other words of procreation, are necessary to make it a fee tail. For if either the words of inheritance, or words of procreation, are omitted, although the others be inserted in the grant, this will not make an estate tail; as if the grant be to a man and his issue of his body, to a man and his seed, or to a man and his children or offspring, these would only be estates for life, there wanting the words of inheritance (III) "his heirs." Co. Litt. 20. Therefore great care must be taken to insert words of inheritance as well as those of procreation; for if lands be given to "a man and his heirs male," this is a fee simple, Co. Litt. 13. So if the limitation had been to the donee and his "heirs female," or to the donee and his "heirs male" or "female," Litt. s. 31, there being no words to ascertain out of what body they shall issue. Litt. s. 3. Co. Litt. 27.

As great indulgence is allowed in last wills and testaments, an estate tail may be created by a devise "to a man and his seed," or "to a man and his heirs male," or by any other irregular mode of expression. (IV)

All corporeal hereditaments whatever; and all incorporeal hereditaments which savour of realty, that is, which issue out of

corporeal ones, or which concern or are annexed to or may be exercised within the same, as rents, estovers, commons, and the like; also, all offices and dignities which concern lands, or have relation to fixed and certain places, may be entailed. Co. Litt. 19, 20. 7 Rep. 33. But mere personal chattels which savour not of the realty cannot be entailed; nor can a copyhold estate be entailed but by the special custom of the manor. A copyhold may be limited to the heirs of the body, 3 Rep. 8; for here the custom ascertains and interprets the lord's will. Until very lately estates tail might have been barred or destroyed by a fine, a common recovery, or by lineal warranty descending with assets to the heir; but as fines and recoveries are now abolished by the 3 & 4 Will. 4. c. 74. s. 2, and by sect. 14. all warranties of lands entered into by tenants in tail are absolutely void against the issue in tail: they cannot now be destroyed by either of those means, but they may be aliened by tenants in tail, by virtue of a deed enrolled under that act, (s. 15,) either absolutely or by way of mortgage, and thereby defeat the interest of his own issue, though unborn, as also of the reversioner, though the reversion be vested in the crown. See ss. 15 & 21.

Tenant in tail may also charge them with reasonable leases, and they will be liable after his death to the payment, as well of his simple contract as his specialty debts. See 3 & 4 Wil. 4. c. 104. He may commit waste without being impeached or called to account for the same.

Tenant in tail is liable to forfeit his estate for high treason.

All persons capable of holding estates of inheritance in land, may be tenants in tail. This estate may be limited to any person, or to two persons being husband and wife, or who may lawfully intermarry. 2 Prest. Est. 255. (V)

This estate is subject to courtesy and dower, and also to the bankrupt laws, 21 Jac. c. 19. s. 12. 6 Geo. 4. c. 16. s. 65. (VI) And where a bankrupt is tenant in tail in possession, the commissioners may pass the fee simple, Pye v. Daubuz, 3 Bro. C.C. 595. (VII) But when tenant in tail in

remainder, a base or qualified fee only passes to the assignees. See Jervis v. Tayleur, 3 Barn. & Ald. 557. (VIII)

HENRICUS.

(I) So also if it be to the heirs male of the body of any person.—ED.

(II) Women seized of estates tail of the gift of their husbands are, by the statute, 11 Hen. 7. c. 20. prohibited from alienating those estates after the death of their husbands, without the concurrence of the heirs next inheritable, except for their own lives; and the statute 3 & 4 Wil. 4. c. 74. s. 16. does not extend to married women within the former statute, except with the consent of their husbands.—ED.

(III) The answer of H. D. M. in our last does not extend to the words necessary to create this estate, which have not been overlooked by this writer, and consequently entitles him to the insertion of this answer as having the greater merit.—ED.

(IV) Co. Litt. 224.—ED.

(V) But an estate to a man and his heirs for the life of another cannot be entailed over, 2 Vern. 225.; for, not being strictly an estate of inheritance, it is not within the statute *de donis*, but though not strictly entailable under this statute, yet limitations of such an estate to a man and the heirs of his body have been made, and such a quasi entail may be barred by the ordinary mode of alienation of real estate, or in equity by articles. See 1 Atk. 523. 2 Vern. 225. 1 Bro. P. C. 457.—ED.

(VI) We fear that our correspondent has not yet read up the bankrupt laws,—this statute (6 Geo. 4. c. 16.) so far as relates to estates tail, is repealed by the 3 & 4 Wil. 4. c. 74; sect. 55, of which also to the same extent repeals the 1 & 2 Wil. 4. c. 56. s. 26.; and sec. 56 empowers the commissioners under any *statu* to dispose of lands, of which the bankrupt is tenant in tail.—ED.

(VII) See 1 & 2 Wil. 4. c. 56.—ED.

(VIII) See stat. 3 & 4 Wil. 4. c. 74.; ss. 56, 57, 58.—ED.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM IX.

Plea of non-assumpsit—how does it operate?

To shew how the plea of non-assumpsit operates at the present time, it is necessary to give a short account of the extent of its operation before the rules of H. T. 4 Wil. 4. were made, and then to shew how it has been limited by them. The action of assumpsit lies for the recovery of damages upon promises expressed or implied without deed, and the general issue or common plea of denial is non-assumpsit; and this plea was formerly holden to be proper when there was no contract between the parties, or not such a contract as the plaintiff had declared on; and the defendant might have given in evidence that it was void in law by coverture, 12 Mod. 101; by gaming, 1 Lord Raym. 87; by usury, 1 Str. 428, &c.; or that it had been performed or discharged before breach, &c., or voidable by infancy: in short, the question in assumpsit upon the general issue was, whether there was a subsisting debt or cause of action at the time of the commencement of the suit. But, by the late statutory rules of pleading, H. T. 4 Wil. 4. it is declared, that the "plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law," and then gives several examples, for which *vide* the Rules. It is then declared "that in all actions upon bills of exchange, and promissory notes the plea of non-assumpsit shall be inadmissible" (I); and "in every species of assumpsit all matters in confession and avoidance including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, &c."

In considering the operation of the plea of non-assumpsit—subsequent to these rules coming into practice—it may be proper to take a view of the several cases determined on the subject. The non-joinder of plaintiffs where there is a joint contract, may be taken

advantage of on the plea of non-assumpsit, 1 Chit. J. Pl. 204; so want of consideration, on an *implied contract*, may be given in evidence on this plea; but not so when the action is on an *express contract*, *Passenger v. Brooks*. 1 Bing. N. R. 587. A special contract, the conditions of which have not been complied with, may be given in evidence under this plea, *Gardner v. Alexander*, 3 Dow. Rep. 146; so in an action of assumpsit by an attorney, a special agreement may be proved under this plea, that the plaintiff should receive no remuneration, only his disbursements, *Jones v. Nanny*, 1 Mee & W. 333; or that the contract was void on the ground of *Champerty*, Com. Dig. tit. Attorney (B 14); or that the charges in plaintiff's bill were brought upon his client by his inadvertence, *Montriou v. Jefferys*, 2 Car. & P. 113; or that the attorney agreed to do the business for the money out of pocket, *Jones v. Read*. 5 Dow. Rep. 216, 1 Nev. & P. 18. S. C. Evidence of partnership subsisting between plaintiff and defendant, at the time the action accrued, may be given in evidence on the plea of non-assumpsit, *Worrall v. Grayson*, 1 Mee. & W. 166; and in an action for goods sold and delivered, defendant may prove on plea of non-assumpsit that the time of credit given had not expired when the action was brought. *Taylor v. Hilary*, 1 Cromp. M. & R. 74; *Groundsell v. Lamb*, 1 Mee. & W. 352. S. C. over-ruling *Edmunds v. Harris*, 2 Ad. & E. 414. (II)

In *Waddilove v. Barnett*, 2 Bing. P. C. 538; it was determined by the Court of Common Pleas that, on the plea of non-assumpsit, defendant might give in evidence that the plaintiff had mortgaged the premises before the defendant came into occupation, and that the mortgagee had given notice to the defendant not to pay plaintiff any rent becoming due after such notice, and in *Cousins v. Paddon*, 2 Cromp. M. & R. 547. On the general issue it was decided that defendant might give in evidence that the goods supplied by plaintiff were worthless, and the work useless. In *Hayselden v. Staff*, 6 Nev. & M. 659, 2 Har. & W. 204. S. C., it was decided that on the plea of non-assumpsit evidence might be given,

that plaintiff had agreed that he should receive no remuneration for his services, if, as the event was, they should prove unsuccessful. This action was brought on indebitatus assumpsit, for work and labour as a builder, to which the defendant pleaded non-assumpsit, and under that plea was permitted to give in evidence that the work was done to a chimney of the defendants, to prevent it from smoking, upon an agreement between the parties, that if plaintiff did not succeed, he was not to be paid for his trouble.

In an action for use and occupation under an agreement, the plea of non-assumpsit put plaintiff to proof of the agreement, and that it was properly stamped, *Wallis v. Brodibent*, T. T. 1837; in this case Patterson, J. says, "The plea of non-assumpsit puts in issue all facts from which a promise can be implied." So in a later case on this plea, defendant may contend, that the agreement upon which the action was brought is void under the Statute of Frauds, *Elliott v. Thomas*, Exch. Pleas, H. T. 1838; also on assumpsit for money paid, laid out, and expended on this plea, defendant might give in evidence that the plaintiff had taken a bill of exchange as security for his debt, and which bill of exchange was not then due, *Maude v. Neasham*, Exch. Pleas, E.T. 1838; (III) and where plaintiff in one count of his declaration declares generally for work and labour, without referring to a special contract set out in another count in answer to such count, defendant may give in evidence, under the general issue non-assumpsit, the payment of a certain sum as sufficient for the services done, *Baillie v. Kell*, T. T. 1838.

From the cursory view above taken of these cases, it may be seen that the Judges have somewhat relaxed the severity of the rule, "that the plea of non-assumpsit shall operate only as a denial in fact, of the express contract or promise alleged," and it is very probable that still greater latitude will be given to this plea, in order to remedy the inconvenience and expense of having so many special pleas on the record. (IV)

F. J. C.

(I.) In these actions a plea in denial

must traverse some matter of fact, *ex. gr.* the drawing, making, endorsing, accepting, presenting, or notice of dishonour.—ED.

(II.) In an action of *indebitatus assumpsit*, for goods sold and delivered, the plea of *non-assumpsit* will operate as a denial of the sale and delivery in fact.—ED.

(III.) In an action for *money had and received*, this plea will operate as a denial, both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.—ED.

(IV.) Where actions are brought on Policies of Insurance, the interest of the assured may be averred by this plea: thus—"that A B and C, or some or one of them, were or was interested, &c." and it may be also averred, "that the insurance was made for the use and on the account of the person or persons so interested." *Assumpsit*, Reg. 1. sec. 4. See 10 Bing. 470, and 2 Crompt. & M. 23.—ED.

PROBLEM XI.

WHAT ARE THE PROVISIONS INTRODUCED BY THE STAT. 1 & 2 W. 4. c. 58., CALLED THE INTERPLEADER ACT, AS WELL TO THE RELIEF OF PRIVATE INDIVIDUALS AS TO SHERIFFS, WHEN LIABLE TO BE SUED IN CASES IN WHICH THEY ARE NOT PERSONALLY INTERESTED? AND WHAT IS THE PRESENT STATE OF THE LAW IN RELATION TO THOSE PROVISIONS?

TRUSTS FOR THE SEPARATE USE OF MARRIED AND UNMARRIED WOMEN.

Review of the Judgment of the Master of the Rolls in Tullett v. Armstrong, 3d Nov. 1838.

(Concluded from p. 151.)

The concluding observation in our last, that a restraint upon alienation being made in contemplation of marriage shall be good during the coverture, leads us to an opinion expressed at law by the late Lord Tenterden, C. J., when giving Judgment in *Dean v. Brown*, 2 Carr. & P. 62. In that case his lordship said, "by the laws of this

country, a married woman can have no property distinct from her husband, and by her marriage all property that she had before belongs to him, and is liable to his debts; but *in another mode* the property of even *movable articles* may be secured to a wife, by conveying such property previously to marriage to trustees, to hold to them for her sole and separate use. In *this way*, though the wife herself can *by law* have no separate property, yet the trustees may hold it for her, so that it shall not be subject to the control of her husband, nor be liable to his debts. With regard to *real estates*, this was done very many years ago, and in mere *personal property* has often been so secured."

The case was one where a woman previously to, and *in contemplation of, marriage*, assigned her household furniture and effects to trustees upon trust for her separate use. The sheriff, under a writ of *fieri facias* issued against her husband, had seized some of the goods, which the wife by her trustees resisted, and they obtained a verdict in her favor. See also *Elliston & Bloxham*, 2 Mont. & A. 365.

The cases of *Woodmeston v. Walker*, *Jones v. Salter*, and *Brown v. Peacock*, (all before-cited) were not upon the question of limitations to the separate use of married women, but upon the effect of clauses restraining alienation by married women by way of anticipation. *Barton v. Briscoe*, Jac. 603., was to the same effect; and the Master of the Rolls there took a large view of the question which, in that case was, whether a clause *against anticipation* of property settled upon a *married woman* to her separate use, became of no effect *by the coverture being determined*.

Sir Thomas Plumer, M. R. observed that "such a restraint was considered an obligatory and valid mode of preventing a married woman from depriving herself of the benefit of property settled upon her for her separate use. In the case of *a male*, a similar attempt to restrain alienation would be of no effect: that was decided in *Brandon v. Robinson*, (a) (before-cited). In this

(a) See ante p. 23. Very many modern cases

case *there is no gift over*, no other person having any interest; the equitable interest is absolute in the plaintiffs who were the married women that had become *discovert*, and was entitled for life to the interest of the fund, and the party entitled to the fund after her decease. It is not distinguishable from *Brandon v. Robinson*, except by the sex and coverture; and it cannot be said that the law will permit restraints upon the rights of property, in the case of females, which it will not permit in the case of males. It is, however, to be considered that this is a case of separate property, and that *restraints may be imposed on the alienation of separate property, is now settled more upon authority than principle*, beginning with what was done by Lord Thurlow in the case of *Miss Watson's settlement* (before cited); at that time there was considerable doubt about it, for if a *feme covert* is permitted to hold separate property in the same manner as if she were a *feme sole*, it would seem that it ought in equity to have those incidents which all other property has. It is difficult to conceive how they can be taken away from it, particularly when it is remembered that the protection which Courts of Equity afford to married women with respect to their property not in settlement, they may if they please, give up: why then should a larger protection be extended as to that over which a power of disposition is from them? *It is however too late to doubt the validity of these restraints.* (b) The question is, whether they must not be confined to the coverture?

The power over separate property, being a creature of equity, it is said that equity may modify that power; that reasoning however only applies during the coverture: *when the married woman becomes discovert, she has the same power over her property as other persons. The restraint therefore ought not to continue.* The attempt to impose upon the power of alienation a fetter unknown to

have fully established this point, that no direction or condition can prevent a man disposing of property either acquired by him by purchase, or by will or settlement, unless the instrument through which he claims contains an absolute *gift over* upon alienation by him.

(b) See ante p. 38.

the common law of England may be permitted to the extent to which that power is created by equity but not further; when the coverture is gone, the reason on which the restraint is founded no longer exists."

It should, however, be recollected that this case was confined to property settled upon a *married woman*, and does not decide that the protection against alienation is to be confined to those cases *only* where coverture actually exists when the restriction is imposed and takes effect.

We did think, looking at the merits of *Massey v. Parker*, that too much importance was placed upon the extra-judicial opinion given by the Lord Chancellor, inasmuch as it had been tortured and made to bear upon the question of *separate use*, whereas it is confined to *restraints upon alienation*. Our high respect for the Lord Chancellor, and admiration of his great talents, led us at all events to hope so; because if his lordship's doctrine be ever acted upon, it will disturb the property of a great portion of the women of England who have property so situated. The restrictions so long enforced by Courts of Equity upon the marital rights of a husband are at once at an end; and the principle of law that the whole of a woman's property, on her marriage, vests in her husband, and is liable to his debts, will become the doctrine of the Court of Equity.

This opinion of the Lord Chancellor, in opposition to that of the Vice-Chancellor, underwent much discussion in *Johnson v. Johnson*, 1 Keen, 648., where a legacy of stock had been bequeathed to trustees in trust for a female infant, the dividends to be accumulated until she should attain twenty-one, and then the stock to be transferred to her for her own sole and separate use and benefit, absolutely.

The point involved in this case, it was argued, was not the principle laid down by the Lord Chancellor, that a woman to whom separate use in property is given, may, if she marries at a time when she has the power of alienation, give that property by the act of marriage to her husband; but the plaintiff having *married while an infant*, it was contended that she had married when she had not the power of alienation,

and that, consequently, the act of marriage did not transfer the fund to the husband, and the *Master of the Rolls* considered the general point as one of so much importance as to have the case re-argued; after which his Honour, in giving judgment, said "he was of opinion that the general point did not arise in this case. The opinion of the Lord Chancellor expressed in *Massey v. Parker*, seems to have been founded upon this, that the right and interest of the woman, to whose separate use the property was assumed to be given, were absolute before the marriage; that the trustees holding the property absolutely for her, she might take it for herself, or give it for any one, and there was no reason, therefore, why she might not give it by the act of marriage to her husband. In the present case no one of these circumstances occurs. The estate and interest of the woman were not absolute before marriage; the trustees did not hold the legacy absolutely for her, and she could not take the legacy for herself, or give it to any one. She could not, from her infancy, assign or dispose of her contingent interest; and when the legacy became vested and payable, that is, when she attained the age of twenty-one, and first acquired the right of disposing of the property, she was a married woman in whose favour, according to all the authorities, a trust for separate use will be valid. I could not decide against the validity of this trust in the events which have happened, without overruling the case of *Simson v. Jones*, (before-cited) which was decided by *Sir John Leach*, upon much consideration. I consider that when the plaintiff attained her majority, she acquired an absolute interest in the legacy to her separate use, and that she is entitled, therefore, to have the fund transferred to her for her separate use, according to the prayer of the bill."

How many cases are to be found, where property limited to the separate use of an *unmarried woman* has not been interfered with by settlement upon her marriage, but left to remain, upon the confidence that the Court of Equity would protect the limitation in need, and save the property from the control, debts, or engagements of the hus-

band. This was the case in *Anderson v. Anderson*, when that protection was found, and confirmed afterwards by Lord Eldon. It is no fraud upon the marital rights of the husband, because it must be taken for granted, that he knows of the limitation before his marriage, and consents that the property shall remain to the separate use of his wife.

How many cases are there also where the limitation is, that the *trustees* shall pay the interest of the property to the wife for life, for her separate use, which according to the doctrine *ascribed* to the Lord Chancellor, ought to have been paid to the husband, thus making the trustees answerable to the husband for a breach of trust, and liable to pay, from their own pockets, the monies they have so paid to the wife.

The insecurity such a doctrine imposes upon property that has been limited to the separate use of an *unmarried* woman, leads us to draw the conclusion, that the opinion of the Lord Chancellor has been overstrained and misinterpreted, and that his lordship did not mean to express as an opinion which *he would act upon*, when a case should come before him for judgment, that prospective trusts for the separate use of an *unmarried* woman are wholly void *ab initio*, and that the husband by the act of marriage alone obtains an absolute interest in the property previously limited to the wife's separate use.

Lord LANGDALE, in deciding upon *Tullett v. Armstrong*,^(a) followed the doctrine so long held in the Court of Equity, and however extravagant the anomaly, that a husband is bound to maintain his wife, and to pay her debts, whilst she is not bound to bring any part of her separate property into the common stock for their mutual benefit, yet until the legislature shall declare the law to be otherwise, the doctrine, we submit, should be maintained.

We think that for the purposes of this paper we have now said sufficient in explanation of the present uncertain and insecure state of the law as it affects property settled

to the separate use of *unmarried women*, and every person must feel the misfortune in which the women of this country will be involved by the circumstances of two Judges of the same Court deciding upon their right to property in direct opposition to each other.

TO THE EDITOR OF THE LEGAL GUIDE.

Sir—The case forming the subject of the present communication is one which I hope you will deem worthy insertion in your "Legal Guide," as it involves not thereby the rights of an individual, but that of the public.

Suppose, in the first place, a public footway leading out of a public street or highway, and that an *individual has property* to which this footway also leads; now, supposing the owner of the ground, over which this public and private way goes, obstructs it; what remedy has that individual got for the obstruction? He can *indict*, I imagine; but it has been said by some of my fellow students, that he could not sustain an *action*, because his private right is merged in his public one, and an action for an obstruction of a public way will not lie unless special damage be proved.

(Q. What amounts to special damage?)
I hope to invoke your solution of my problem.

Yours, &c.

IN STATU PUPILLARI.
Temple, 7th Jan. 1839.

OPINION OF THE EDITOR.

For obstructing a passage in the highway without more, an action on the case will not lie, for it is a public injury punishable by presentment and indictment; *besides* such a remedy would lead to a multiplicity of actions, because if one man may have an action upon such occasions, all men may. (Co. Litt. 56. a.) There must be some *special damage* to maintain an action. See *Greasby v. Colling*, 2 Bing. 263. 1 Salk. 12.

There are many sorts of *injuries* which "amount to special damage," and will sustain an *action* for obstruction. It must be a *par-*

(a) See this case fully reported (upon an interlocutory motion in the cause), 1 Kees, 428.

icular injury. See *Rex v. West Riding of Yorkshire Justices*, 8 Term Rep. 142. *Rex v. Stead*, 1 Str. 686. S. P. It must be direct and not consequential. Bull. N. P. 26. a.

Formerly the remedy for obstructing a private way, was generally by assize of nuisance; but in the reign of Elizabeth, action on the case was introduced, and subsequently, indictment and action were both adopted. See *Dyer*, 250. n. Cro. Eliz. 466. S. C. id. *Cantrel v. Church*, 845. Actions have been maintained in many cases of *particular* injuries. See *Bendlows v. Kemp*, cited Cro. Eliz. 664. *Fowler v. Sanders*, Cro. Jac. 446. *Maynell v. Salt-marsh*, 1 Keb. 847. *Hubert Groves*, 1 Esp. 148. *Iveson v. Moore*, 1 Ld. Raym. 486. All these cases showed some *special* injury more than the public at large had suffered. Very little injury will amount at the present day to *special damage*. A person driving three laden asses, was delayed four hours through another keeping a gate shut across a public highway, and it was held that an action on the case would lie against the person who raised the obstruction as the plaintiff had sustained an *individual* injury or inconvenience. *Greasly v. Codling*, 2 Bing. 263. 9 Moore, 489.

In the case put by our correspondent, he has not stated the *right* the *property* has to the footway, and the question was, and indeed now is one of considerable importance; we must therefore assume a grant of an *occupation way* into the high road, which attached to the property from which the occupation way led, as an *easement*, and which is the "public footway," and taking that assumption to be correct, an action on the case will lie against the owner of the land over which the way leads for obstructing it: this was decided in *Allen v. Ormond*, 8 East, Rep. 4., although there it was proved that the *public* in general had used the way without denial for twelve years, and it was contended that consequently, it had become a common highway, and the plaintiff's private right had merged in the public right, and that in this form of action where the plaintiff sued only as one of the king's subjects against a stranger,

he could not complain of the nuisance without showing *special damage*. The Court holding that where a party has a certain *special right of way* granted to him, he may rest upon that title, and need not resort to a general right, especially in a case of a *public right of way growing out of an occupation way*.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR,

I shall be much obliged for your advice on the following point—

A B was articled to C D, and his articles expired 1st instant, (the full term of five years having elapsed from the *date* thereof). During such articles C D took the benefit of the Insolvent Act, and remained in prison four months—A B, during that time having continued in his (C D's) office as clerk.

A B has given notice of admission next term, and it is contended—*First*, That as C D was in prison four months, A B could not serve him as clerk, and therefore has not completed his *clerkship*, and consequently is not entitled to apply for admission.

Second, If such *objection* be valid, that he cannot now be assigned (his articles having expired, but must be re-articled in order to entitle him to be hereafter admitted an attorney) as there is no *unexpired* term in such *original* articles, under which to complete his five years' service.

Yours obediently,

X. Y. Z.

OPINION OF THE EDITOR.

The above case does not state all the facts sufficient to enable us to give a decided opinion.

If A B continued in C D's office as *his* clerk, we may assume that C D had not discontinued practice during the time of his imprisonment, and that A B carried on his business under his directions and *as his clerk*.

The 2 Geo. 2. c. 23. enacts that no person is to act as an attorney or solicitor, unless he has *served a clerkship of five years to an admitted attorney or solicitor under a contract in writing*; and by the assumption

we have raised, we are of opinion that A B has complied with the statute, and is entitled to admission.

If, on the contrary, our assumption be incorrect, and that C D did discontinue his practice during the time he remained incarcerated, then in strictness A B has not complied with the statute, which requires that the attorney must not have left or ceased to practice during the five years of service.

The court has, however, recently placed an equitable construction upon the statute, and we think that by A B serving an additional four months with C D, under the same articles, (although expired,) the court will hold him entitled to be admitted. We do not consider such a service to be within the statute; but the court, in a case when the clerk had been absent part of the five years with his master's consent, but had served on at the end of the five years under the same articles, an equivalent additional time, held him entitled to be admitted; see *Exp. Frost, 3 Dowl. P. C. 322; 1 Har. & Woll. 111.*

There is no case in the books of a similar nature, and many must have arose if there had been anything in the objection. The interruption of service is by the act of the law, and is to be dealt favourably with on the application of the clerk; see *Hodge's case, ante, p. 27.*, and see also our opinion upon another case of defective service, *ante, p. 101.*

Law Reports.

ROLLS COURT.—Dec. 12.

BOULTER v. BOULTER.

Mortgagors.—Injunction to restrain Proceedings on Bill of Foreclosure in the Exchequer.

Mr. Pemberton applied for an injunction to restrain the representatives of Mr. John Ireland, deceased, from proceeding on the equity side of the Court of Exchequer in a suit to foreclose certain mortgaged estates of William Boulter, deceased.

Lord LANGDALE said, it was a motion by Mrs. Homan, who by order of the Master had obtained leave to prosecute the suit in the plaintiff's name, to restrain further proceedings in a suit for foreclosure in the Exchequer. The present suit was for establishing the will

of William Boulter, and there was a decree for that purpose in February, 1827, which directed an inquiry under what circumstances Henry Boulter took possession of the testator's estates, and what incumbrances were upon them. The estates were subject to mortgages to a considerable amount, vested in various persons, but the mortgages had become the property of Hill, who had brought ejectments. In that state of things, Ireland, who was the father of the testator's widow, interposed and obtained an assignment of the mortgages. One of the facts alleged was, that Ireland took possession of the estates, and afterwards put Mrs. Boulter in possession. Ireland was also a bond creditor of the testator, and proved his debt through his own solicitor, who was not the solicitor of the plaintiff. The Master reported that there were several mortgages, that Ireland paid them off, took an assignment of them, and had consented to have the mortgaged premises sold. The Lord Chancellor's order confirmed the report, and there was an order to sell the estates out and out, and to bring the purchase-money into court, which order could only have been regularly made with the consent of the mortgagee. It proceeded on the supposition that the mortgagee did consent, and it was so stated in the Master's report. In October a variation was made in the order, and then the sale took effect. On the particulars of sale it was stated in manuscript that the mortgagee was willing to let the whole or any part of the mortgage-money remain on the whole or any part of the lots. By the biddings it appeared that Phelps, the solicitor of Ireland, bid for lots 1 and 3, which were not sold, and also for lot 4, which was sold to himself, and he swore that he attended the sale by the authority of Ireland expressly for the purpose of consenting to, acquiescing in, and superintending the sale. In his presence three lots were sold, and the purchasers became entitled to the benefit of their purchases, which they would not have been unless some person was present from the mortgagee. Soon afterwards Ireland died, and the respondents on this motion were his representatives, and it appeared that Henry Boulter died insolvent. Against him the suit was directed, and it had since slept. It was instituted by persons beneficially interested in the estate, who could get nothing for themselves until the creditors were paid. The suit not being prosecuted, Mrs. Homan, a creditor, obtained from the Master an order to conduct it. She married Mr. Harris, who purchased lot 7, and was now his widow. From 1837, when she obtained the conduct of the cause, she must be considered as cognizant of all the proceedings. The first question was, whether he (Lord Langdale) was to attribute to Ireland a consent to the order of sale. Ireland was cognizant of the order, and his solicitor attended to consent to the sale and to carry it into effect. Having acquiesced in it, Ireland was not at liberty to treat it as a nullity. If the order were not properly prosecuted, his course was clear, to apply to the court for leave to avail

himself of his legal remedies as mortgagee, notwithstanding the order; for a mortgagee was entitled to all the remedies his legal estate gave him. His representatives were in his situation, and after much delay they filed a separate bill of foreclosure in the Exchequer in Trinity Term, 1836, when this suit was not in prosecution at all; for it was half a year after that that Mrs. Homan obtained the conduct of the case, and she desired to prosecute the order of this Court; but Ireland's executors refused their consent, and prosecuted their suit of foreclosure. This was between April, 1837, and June, 1838. All the information necessary for this motion was obtained in April, 1837, or soon after. The application should have been made as soon as the parties discovered the institution of the suit in the Exchequer; but if that suit proceeded, the order of this Court of September, 1837, which had been so far executed that there were three purchases under it, would be entirely upset. That could not be allowed. There must be an injunction to restrain further proceedings in the Exchequer suit; but the plaintiffs in that suit were entitled to costs by reason of their not having been earlier prevented from proceeding.

QUEEN'S BENCH.—Dec. 12.

Sittings at Nisi Prius.

EDWARDS v. PERRY & UX.

Husband and Wife—Liability of Husband to debts contracted by Wife before Marriage—effect of receipt in full of all demands by an Agent.

Mr. Kelly and Mr. Channell, for the plaintiff, and Mr. Price and Mr. Addison for the defendant.

This was an action brought by the plaintiff against the defendant, to recover 25*l.* 17*s.*, the balance of an account due to the plaintiff from the wife of the defendant before her marriage. The defendant pleaded that the wife was not indebted, and that she had paid the plaintiff.

It appeared that Mrs. Perry, before her marriage, was a Miss Grace Rivers, and had purchased a mare of the plaintiff for 40*l.* in the year 1834. The mare was taken to Allen's riding school, where the lady at that time was receiving riding lessons; it was kept in Allen's stables for some time, and was then removed to Stamford Street, Blackfriars, the lady occasionally riding it in the park, and it was suggested that on this removal the plaintiff had paid 5*l.* 17*s.* for the keep of the mare at Allen's stables. After the mare had been some time in the possession of Miss Rivers, she caused it to be taken to Tattersall's, where it was sold for 50*l.* Captain Perry subsequently took the benefit of the Insolvent Debtors' Act, and in his schedule he mentioned the mare as having been the property

of his wife, as having been sold for 50*l.*, and further, that as the mare had been his wife's property, she was permitted to take the money.

A witness proved that he had paid the plaintiff 20*l.* for Miss Rivers, and a receipt was put into his hands, in which he admitted having received of Miss Rivers 20*l.*, which he had paid to Mr. Edwards as the balance of account for a mare which Miss Rivers had bought of him. But he had no authority from the plaintiff to give any such receipt. He had written it at the dictation of Miss Rivers.

Mr. Price contended that the receipt evidently showed that the plaintiff had been paid in full, and that he could not now recover.

The Jury returned a verdict for the plaintiff for the amount claimed.

Lord DENMAN then said that there was no imputation on Captain Perry for defending this action, as he was fully justified in supposing that the witness who had given the receipt was the authorized agent of the plaintiff.

A husband is liable to his wife's debts, contracted before marriage, whether he has any portion with her or not, because by the marriage, the husband acquires an absolute interest in the personal estate of the wife, and the receipt of the rents and profits of her real estate during the coverture; and whatever accrues to her by her labour or otherwise, during the coverture, belongs to the husband; so that in favour of creditors, and that no person's act should prejudice another, the law makes the husband liable to those debts with which he took her attached; but if a *feme sole* indebted marries and dies, the husband is no longer liable, and the debts must be recovered in the life-time of the wife, and if the husband dies before the debt is recovered, the wife surviving is liable.

Where a man marries an administratrix to a former husband, who in her widowhood wasted the assets of her intestate, he makes himself liable to the *debts of the intestate* during the life of the wife, and it has been held that in equity the creditors of the first husband may follow the assets in the hands of the second husband *after* the death of the wife.

And where the husband and wife (executrix) admit assets in a suit, the assets become a debt due from the husband, and may be

proved under a fiat of bankruptcy against him.

In an action of this nature (debt due from the wife before marriage), the husband and wife must be joined as defendants.—ED.

COURT OF EXCHEQUER CHAMBER,
Sitting as a Court of Appeal.—Jan. 9.

TYSON v. SMITH.

Writ of Error.

Trespass upon a Manor by holding a Fair—Plea of Justification—Ancient usage.

A writ of error before the Judges of the Common Pleas and the Barons of the Exchequer upon a judgment given by the Court of King's Bench in an action of trespass. The lord of a manor in Cumberland brought his action against the defendant, who, with other persons, had entered upon the manor, and erected stalls and booths, and committed other trespasses without his leave. The defendant pleaded a justification, which was founded upon the authority of a custom in that place, alleging, that from all time it had been usual to hold a fair upon the common in question, that such fair commenced upon the first Monday after Pentecost, and was continued upon every alternate Monday, until the feast of All Souls; that every victualler who resorted to the fair had the privilege, from ancient usage, of entering upon the common the day before the fair and of erecting booths and stalls for the purpose of accommodation and refreshment, and that such persons possessed on the same authority the right of continuing until the day after the final conclusion of the fair, upon the condition of paying to the lord of the manor a rent or acknowledgement of 2d., if reasonably and lawfully demanded. As this plea went to the justification of the whole trespass, and was considered by the Court of Queen's Bench a sufficient answer to the action, that Court gave judgment in favour of the defendant.

The ground upon which the judgment was impeached was that the alleged custom was unreasonable in its nature, and therefore invalid in law.

The Lord Chief Justice TRNDAL delivered the judgment of the Court of Error.

His Lordship said that a custom was a usage which had obtained the force of law, and that it must therefore be certain in its character, reasonable in its nature, and must have existed from time beyond memory, without any interruption. The reasonableness of the custom was the only point here in controversy, and that question it belonged to the judges to decide. A custom was not to be deemed unreasonable merely because it was in opposition to some general rule of law, as the custom of Borough-English, which was opposed to the law of descents; and the custom of Kent,

which was in opposition to the law of escheats; still less was it to be thought unreasonable upon account of its being in opposition to the interests of a private individual, as the custom which entitled one man to turn his plough upon the headlands of another. But if the custom was in opposition to the public good, or if it was only good for one and bad for many, it then wanted the qualities which alone could entitle it to rank as a portion of the common law of the land. Of this kind was a custom that a commoner should not put his beasts upon the common until the lord had put in his; or that the lord should be entitled to a fine of 3*l.* upon every pound-breach committed within his manor by a stranger; or that the lord, finding strange cattle in his demesne, may seize and detain them until he received whatever fine he should demand for the injury. These and all similar customs were void and illegal, as being such to which it was impossible to suppose that the public, or any portion of it, would voluntarily consent, and as being, therefore, founded upon wrong and usurpation. The custom had not, however, in the present case, been objected to upon any of the grounds already mentioned, but upon three grounds altogether distinct. First, that the custom as alleged was so general as to be a part of the common law; secondly, that by reason of such generality it was incapable of being executed; and thirdly, that what the parties claimed in the case was an actual profit out of the land, and not a customary easement in the soil of another. With regard to the first objection, the Court did not consider that the custom was too general in respect of the class in whose favour it had been set up, as it was only available for such victuallers as came to keep the fair, and came at a fixed and definite period of the year. The term "victuallers" did not now include so large a class as in former times, and the word must be understood in the sense which it bore at the present day, namely, as only applicable to those persons who were licensed by law to keep houses of entertainment for the accommodation of the public. It had been said, that the number even of these may be so large as to occupy all the ground allotted for the fair, and to exclude all other persons having a right to set up booths upon the common, as well as the public at large. But this was an observation which would also apply to all other classes of dealers who resorted to the fair, and was not an objection, properly speaking, against the custom itself, but an intimation of an inconvenience which may result from its enjoyment. The inconvenience was one very unlikely to occur, and if it ever should occur at all, it would certainly cure itself, and never happen a second time; and no inconvenient result of a custom could render the custom void, unless such result were certain, real, and of general extent. With regard to the objection that the right claimed was that of making a profit of the ground, and not a mere accom-

modation upon the soil of another, the Court did not think it had any weight. A right on the part of the landlord to receive by custom a certain payment for stallage, and to distrain for it in the event of a refusal to pay, was a perfectly valid custom—any right, and there seemed no reason why a converse privilege should not also exist upon the part of the public to have, according to ancient usage, a right to erect the stalls in the locality in question, upon the payment of the fee.

The Court, upon the whole case, were of opinion, that the custom was legal and valid, and founded upon agreement evidenced by assent from the earliest period to the present, and therefore decided that the judgment of the court below ought to be affirmed.

TO THE EDITOR OF THE LEGAL GUIDE.

Sir—Knowing your willingness to give every information to assist Article Clerks in preparing to pass their examination, I am satisfied you will readily advise me the best course to pursue under the following circumstances. I have served three years of my time, which have been employed entirely in the practical part of the profession, and as there are now but two years remaining, I beg to be informed, so as to devote that period to the best advantage, what books (on the five different branches) you would recommend me to study, so as to enable me to pass my examination with credit.

I am, Sir,

Your obedient and humble servant,
D. R.

If our laws be not again altered, D. R. will do well to read up the following books, first getting beside him a Common Place or Practice Book, and *write* up as he goes,—Begin with Western's Commentaries, which comprises *all the new laws*—particularly the chapters on the administration of justice, civil and criminal—B. 1. Chapters 9 to 14, inclusive, also B. 2. c. 9. & 2.; and the Index, which is very copious, will guide him to other points. The Appendix contains all the new Real Property Laws—for *Conveyancing*. Take Sugden, Watkins, Atkinson, and Hayes's works—for *Common Law* and *Bankruptcy*; Archbold's and Tidd's works—for *Commercial Law*; Chitty's works—for *Equity*; Fonblanche's Treatise, and Grant's Practice—for *Cri-*

minal Law; Sergeant Stephens's Summary, and Archbold's work by Jervis. Take also Woodfall's *Landlord and Tenant*, and Phillips on *Evidence*. These are quite enough to occupy two years.—ED.

Business in the Courts.

CHANCERY SITTINGS.

Hilary Term, 1839.

LORD CHANCELLOR, at Westminster.

January.

Friday 11.—Cause, Hardman v. Ellames, part heard.

Petition.—In re Poor Knights of Windsor. Appeal Motions.—Andrews v. Walton—the Same v. the Same—Nedby v. Nedby—Curtis v. Cutts.

Saturday 14.—Petitions and Appeals.

Monday 14, Tuesday 15, Wednesday 16.—Appeals and Causes.

Thursday 17.—Appeals, Motions, and ditto.

Friday 18, Saturday 19, Monday 21, Tuesday 22, Wednesday 23.—Appeals and Causes.

Thursday 24.—Appeals, Motions, and ditto.

Friday 25, Saturday 26, Monday 28, Tuesday 29, Wednesday 30.—Appeals and Causes.

Thursday 31.—Appeals, Motions, and ditto.

VICE-CHANCELLOR, at Westminster.

January.

Friday 11.—Motions.

Saturday 12.—Petition day.

Monday 14, Tuesday 15, Wednesday 16.—Remaining Petitions; Attorney General v. Ellison, part heard, and Pleas and Demurrers.

Thursday 17.—Motions.

Friday 18.—Short causes, unopposed Petitions previous to General Paper.

Saturday 19, Monday 21, Tuesday 22, Wednesday, 23.—Pleas, Demurrers, Exceptions, Causes, and further Directions.

Thursday 24.—Motions.

Friday 25.—Short Causes, unopposed Petitions previous to General Paper.

Saturday 26, Monday 28, Tuesday 29, Wednesday 30.—Pleas, Demurrers, Exceptions, Causes, and further Directions.

Thursday 31.—Motions.

MASTER OF THE ROLLS, at Westminster.

January.

Friday 11.—Motions.

Saturday 12.—Petitions in General Paper.

Monday 14, Tuesday 15, Wednesday 16.—Pleas, Demurrers, Causes, further Directions and Exceptions.

Thursday 17.—Motions.

Friday 18, Saturday 19, Monday 21, Tuesday 22, Wednesday 23.—Pleas, Demurrers, Causes, further Directions and Exceptions.

Thursday 24.—Motions.

Friday 25, Saturday 26, Monday 28, Tues-

day 29.—Pleas, Demurrs, Causes, further Directions and Exceptions.

Wednesday 30.—Petitions in the General Paper.

Thursday 31.—Motions.

At the ROLLS.

Friday, Feb. 1st.—Short Causes after swearing in the Solicitors.

Short and consent Causes, and consent Petitions every Tuesday at the Sitting of the Court.

COURT OF EXCHEQUER CHAMBER.

Errors from the Queen's Bench to be taken in the first Monday after term; from the Common Pleas upon the second; and from the Exchequer upon the third; and the Court on each occasion will proceed *de die in diem* until the whole of each particular class of cases shall be disposed of.

TO CORRESPONDENTS.

Among our many correspondents, we find some pains-taking men who have talents, which, well directed, will lead to their future good, and whom we are quite disposed to assist as far as in us lies: we, at the same time, must do *even justice*. Such men, therefore, must not feel disappointed, or neglected, if they do not see their works inserted *immediately*. Our space is limited, and we have exceeded our promise in order to be useful—a very unusual benefit granted by Editors of periodicals, who gain nothing in return for additional labour, and in this Journal that is of no ordinary kind. We promised but one original article,—we now give two, sometimes three, besides annotations upon the current business of the courts.

The Answers to the Problems also require from us much time and attention; we spare neither, that this paper may be of such utility to Articled Clerks, that, in the course of time, it shall become their text book for passing their examinations; and to the profession at large a useful Table book for daily practice, upon the contents of which implicit reliance may be placed.

"H. D. M."—We have complied with his request, though his communication has arrived at the eleventh hour—his industry deserves encouragement.

"F. C." is under consideration.

"S. B. V." shall be answered in our next.

"Sarisburiensis" is under consideration.

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ERRATUM.

Page 158, Examination of Articled Clerks, for "continued from page 41," read "Questions put at the Examination in Hilary Term, 1838."

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THE USE OF JUSTICES OF THE PEACE, GUARDIANS OF THE POOR, and PARISH OFFICERS IN AND OUT OF UNIONS, By WILLIAM ROBINSON, LL.D., of the Middle Temple, Barrister-at-Law.

Just Published, Price 5s. No. 51 of

THE MIRROR OF PARLIAMENT,
Session 1 Victoria, 1837-8.

Published at No. 22, Cockspur Street, Charing Cross; and also by Longman, Orme, Brown, Green, and Longmans, Paternoster Row; John Murray, Albemarle Street; and John Richards and Co., 194, Fleet Street.

Subscription, Five Shillings a Week during the entire Session, (exclusive of the Index, Abstract of Parliamentary Papers, &c. &c.)

"This is a periodical of very great use to that part of the Legal Profession who have parliamentary practice. To the member of parliament and general reader it affords abundant information of the transactions in the House of Lords and Commons."—*Legal Guide.*

London: JOHN RICHARDS & Co., Law Bookseller, &c. 194, Fleet Street.

Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 12th January, 1839.

Price 6d. *Stamped Edition, 7d.*

The Legal Guide.

No. 12.]

SATURDAY, JANUARY 19, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(*Continued from p. 163.*)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

Ecclesiastical Benefices,—Quare Impedit and other Ecclesiastical Writs.

SECTION 32. enacts that in the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit* action or suit shall be limited accordingly ; and by sec. 33. it is provided, that after the 31st day of December, 1833, no person shall bring any *quare impedit*, or other action or any suit, to enforce a right to present to, or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived

under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title ; and by sec. 34. it is enacted, that at the determination of the period limited by this act to any person for making an entry, or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land-rent or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished. These sections are very important as regards the title that must now be required to advowsons.

We have before stated that heretofore no statute of limitations ran against the title to advowsons ; and it was declared by the statute 32 Hen. 8. c. 2. that it should not extend to any writ of right of advowson, *quare impedit*, or assign of *darrein presentment*, or *jus patronatus*. The reason for this exception was, because it might happen that the title to an advowson might not be called in question, or the right be tried within the sixty years prescribed as a limitation to other actions by that statute. The same reason led to the limitation of 100 years by the present statute ; and in all purchases of advowsons now the vendor must shew a title of at least 100 years. There are many instances where two successive incumbents

have continued for upwards of 100 years. Sir Edward Coke, in his 2 Inst. (115.) relates that there was a parson of one of his churches that had been incumbent there above 50 years; nor were instances wanting to prove our last position, and that had, therefore, the last of these incumbents been the clerk of a usurper, or had he been presented by *lapses*, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back *above* a century in order to have shewn a clear title and seizin by presentation and admission of the prior incumbent. Sir W. Blackstone, in his Commentaries, vol. iii. p. 250., also relates an instance of two successive incumbents of the rectory of Chelsfield cum Farnborough, in Kent, that continued 120 years, of whom the former was admitted in 1650, the latter in 1700, and died in 1751. Every abstract of title to an advowson should contain all presentations and admissions, and by whom made, as the patron or owner of the advowson.

The present limitation will render advowsons of greater value than heretofore; when they were of a very precarious nature, owing to the want of some limitation upon which a purchaser might rely, no person was absolutely safe in purchasing an advowson.

Under a writ of *quare impedit* (which is an ancient writ) the patron only, and not the clerk, is allowed to sue the disturber. It commands the latter, the bishop, the pseudo-patron and his clerk to permit the plaintiff to present a proper person (without specifying the particular clerk) to his vacant church, and which he alleges the defendants obstruct him in doing; and unless they do so then, that they appear in Court to shew cause why they obstruct him. F. N. B. 32. 2 Inst. 356. Booth, 223. Mallory's *Quare impedit*. Com. Dig. tit. *Quare Impedit*, D. tit. *Pleader*, 3. I. 1. 3 Chit. Pl. 1301. 1 Rose, 100.

After this writ, if the plaintiff should suspect that the bishop will admit the defendants, or any other clerk pending the suit, he may have the prohibitory writ called a *ne admittas*, (F. N. B. 37.) and

should the bishop, after service upon him of this writ, admit any clerk, although the patron's right may have been found in a *jure patronatus*, then after getting judgment in the *quare impedit*, the plaintiff may remove the incumbent if the clerk of a stranger, by writ of *scire facias*, (2 Sid. 94.) and may have a special action against the bishop, called a *quare incumbravit*, to recover the presentation, as well as for damages for the injury done him by incumbering the church with a clerk pending the suit, and after the *ne admittas* received. (F. N. B. 48.) But if the bishop has incumbered the church by instituting a clerk before the *ne admittas* issued, no *quare incumbravit* lies; the patron is in that case left to his *quare impedit* merely.

This writ is excepted out of sec. 36 of this new Statute of Limitations, which abolishes real and mixed actions, nor is it affected by the Uniformity of Process Act, 2 W. 4. c. 39.

If upon the trial the plaintiff should get judgment to recover the presentation, and the church be full, he may remove the clerk, unless it were filled *pendentis lice* by *lapses* to the ordinary, he not being party to the suit, and in such case the plaintiff loses his presentation *pro hac vice*, but he is entitled to recover from the pretended patron defendant, two years' full value of the church, as a satisfaction for the time lost by his disturbance, or in case of his insolvency he may be imprisoned for two years. (stat. Westmr. II. 13 Ed. 1. c. 5. s. 2.) Should however the church remain void at the end of the suit, then the party getting judgment may have a writ directed to the bishop *ad admittendum clericum*, (F. N. B. 38.) and if the bishop does not admit the clerk of such party, he may sue the bishop by writ of *quare non admisit*, and recover damages. (F. N. B. 47.)

When *single* damages are given by a statute subsequent to the statute of Gloucester, (6 Edw. 1. c. 1. s. 2.) in a new case, wherein no damages were previously recoverable, it has been doubted whether the plaintiff shall recover costs if they are not mentioned in the statute. The rule in *Pilfold's* case, (10 Coke, 116.a.) is, that he

shall not, and accordingly it was holden, that the plaintiff was not entitled to costs in *quare impedit*, wherein damages were given by the statute Westm. sec. 3; but it having been found that the delay and expense of recovering advowsons, and the rights of patronage and presentation to ecclesiastical benefices by actions of *quare impedit* were much increased, by reason of the defendants in such actions not being liable for the payment of costs, and the true patrons were thereby frequently deterred from the prosecution of their just rights; and it being deemed expedient to afford further protection to incumbents of advowsons, from vexatious and unfounded proceedings to disturb them in the enjoyment thereof, the statute 4 & 5 W. 4. c. 39, enacted, that in all writs and actions of *quare impedit* issued or to be brought in England, Wales, or Ireland, where a verdict shall pass or be given for the plaintiff in any such writ or action, in addition to the damages to which he is by law now entitled, shall also have judgment to recover his full costs and charges against the defendant therein, to be assessed, taxed, and levied in such manner and form as costs in personal actions are now by law assessed, taxed, and levied. And where in any such writ or action, the plaintiff therein shall discontinue, or be nonsuited, or a verdict shall be had against him, that then the defendant in every such writ or action shall have judgment to recover his full costs and charges against the plaintiff therein, to be assessed, taxed, and levied in manner aforesaid; provided always that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent; if the judge who shall try the cause, or if there shall be no trial by a jury, the court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron, or incumbent, had probable cause for defending such action; but in no case, when the defence to any such action shall be grounded upon a presentation or presentations, collation or collations, previously made to any benefice, shall such presentation or presen-

tations, collation or collations, be deemed or considered probable cause for defending such action.

The Costs in Quare Impedit have also been much lessened by the new rules of pleading. Now, where a title is deduced through a number of successive links, the court will only allow the defendant to traverse the material allegation, and not to take issue on every distinct averment of fact immaterial to the decision of the cause. See *Whale v. Lenny*, 5 Bing. 12, 13. In *Gully v. the Bishop of Exeter*, 2 Moore & P. 105; 4 Bing. 525; 5 Bing. 42. S. C. in *Quare Impedit*, the plaintiff in the declaration set out his title to an advowson, commencing in 1603, and which was principally founded on a deed of 1672, and the defendants claimed under a subsequent deed, executed by the same party in 1692, and traversed every material allegation in the declaration in *forty-three* several pleas. The Court of Common Pleas, after nonsuit and a rule absolute for a new trial, rescinded the original rule to plead several matters, and ordered *twenty-two* *pleas* to be struck out; and, eventually, confined the defendant to *two only* which went to dispute the validity of the deed of 1672.

Quare Impedit may still be commenced by *original* writ, 2 Tidd's Prac. 62; the process is by summons, attachment, and distress. *Tyrell v. Jenner*, 3 Moore & P. 648; 6 Bing. 283. And it is a question whether more than one count will be allowed in a declaration. See *Shepherd v. Bishop of Chester*, 4 Moore & P. 130; 6 Bing. 435.

The same observation applies upon sects. 33 & 34, as we have before (*a*) had occasion to make upon sect. 28.

The time limited as a bar to the recovery of an advowson is peremptory, and *there is no saving clause for persons under disabilities*. We are, however, of opinion that sect. 16 will apply, in which case, persons labouring under disabilities, will be entitled to a further period of ten years (*b*).

(*a*) *Ante*, p. 130.

(*b*) See our observations and the case before cited upon this subject, *ante*, p. 130.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM X.

What are the incidents to Estates Tail, and what is the estate called " Tenant in Tail after possibility of issue extinct," (I) and which is excepted from the operation of the Stat. 3 & 4 W. 4. c. 74. s. 18 ?

The incidents attendant on a *tenancy in tail* under the Stat. of Westminster II., are principally the following; viz. 1st, To be disipnisable for waste, (a) i. e. that a *tenant in tail* may commit waste on the estate tail, by felling timber, pulling down houses, or the like, without being impeached or compelled to account for the act. 2ndly, *That the wife of the donee, or tenant in tail, shall be endowed of the estate tail*, viz. be entitled on the death of her husband to a third part of the lands and tenements to which he was solely seized at any time during the coverture, (b) for the term of her natural life, and to which estate in the lands and tenements, the issue of such widow might by possibility have inherited. (c) 3rdly, *That the husband of a female donee after issue born, may be tenant by the courtesy of the estate tail*, which is where a man marries a woman seized of an estate of inheritance; and has by her issue, born alive, which was capable of inheriting her estate; upon her death the husband shall hold the lands for his life as tenant by the courtesy of England. (d) And 4thly, (until very lately) That an estate tail might be barred, or destroyed by a fine, by a common recovery, or by lineal warranty, descending with assets to the heir. But now (e) as shewn by your Problem VIII, (f) estates tail cannot be barred either by fines or recoveries, or by lineal warranty,

(a) Co. Litt. 224.

(b) 9 Viner's Ab. 210; 3 Comyn's Dig.

(c) This must be attended to, for if lands be limited to a man and the heirs of his body, by his *then wife*, and she die, leaving her husband, and he marry again, *the second wife shall not be endowed*, for her issue could not by possibility inherit. Litt. s. 53.

(d) Litt. s. 35. 52.

(e) 3 & 4 W. 4. c. 74. s. 14.

(f) Ante, p. 149.—ED. n. I.

though they may be barred by virtue of a deed enrolled under this act. (g)

An estate tail cannot be transferred to another; but as the tenant in tail, as well now, as before the stat. of 3 & 4 W. 4. c. 74., has a fee (though restricted) in him, he *may convey* a base fee to another, by estate, or bargain and sale enrolled; viz., if he make such conveyance to A and his heirs, he or they shall have a fee simple qualified; that is, so long as the issue of the tenant in tail continues; under this statute, (h) where an estate shall have been barred, and converted into a base fee, such base fee may be *enlarged* into an estate in fee simple. (II.)

It seems, therefore, with the exception of the abolition of fines and recoveries, and the substitution of other forms of the same effect in their stead, that the incidents to estates tail are much the same now as before the statute. (i) I will now proceed to consider the *estate tail after possibility of issue extinct*. By the 18th sec. of the same statute it is "provided, enacted, that the power of disposition hereinbefore contained, shall not extend to tenants of estates tail, who by an act passed in the 34 & 35 of Henry 8., or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct." I endeavoured, in the former part of my answer to Prob. VIII. p. 148., to explain the derivation of estates tail from the primary division of *estates of freehold* into *estates of inheritance*, and *estates not of inheritance*. I will now turn to the latter, which are *estates for life* only, and of these *estates for life* some are *conventional*, (expressly created by deed or grant, or by the special acts of the parties), and others are merely legal, (rising by construction of law), and of this latter kind is that of the *tenant in tail after possibility of issue extinct*—the subject of the present enquiry.

This estate arises, according to Lord Coke, (k) " *Tenements sont donés à un home*

(g) Ibid. s. 15.

(h) 3 & 4 W. 4. c. 74. s. 19.

(i) Id.

(k) Co. Litt. lib. 1. c. 3.

et à sa femme, *en especiall taile*, si l'un de eux devy, *sans issue*; celui que survesquist, est tenant en taile après possibilité d'issue extinct; and again, *s'ils avoient issue et l'un devise comentque, durant la vie d'issue* celui qui survesquist ne sera dit tenant en taile après possibilité d'issue extinct, encore si *l'issue devy sans issue donc celui qui survesquist de les donees est tenant en taile apres possibilite d'issue extinct.*"

So where A has an estate to him and his heirs on the body of B *his present wife* to be begotten,(a) in this case B hath nothing in the tenements, and A is seized as *donee in special tail*, which in the event of B dying without issue cannot descend to any one, and A becomes *tenant in tail after possibility of issue extinct.*(b) Now, supposing ex. gr. A to have been donee in general (instead of special) tail, he could not, on the death of B his wife, have become tenant in tail after possibility of issue extinct, *car le donee en general taile, ne poit estre unique dit tenant en taile, apres possibilite d'issue extinct.*(c) because being tenant in general tail, his issue by any wife or wives would inherit by force of the same entail.(III) This estate must always be created by the act of God, and not by limitation of the party,(d) for in case of a divorce *causa consanguinitatis* or *affinitatis*, the former tenancy in tail special of A and B being altered by their own act, their estate of inheritance is turned into a joint estate for life, and they are *not* tenants in tail after possibility of issue extinct, but merely *tenants for life*. This estate thus produced partakes partly of the estate tail and partly of the common estate for life,(e) for though it has many of the privileges of the tenancy in tail, as not being under the former donee in tail, now tenant for life, punishable for waste (except it be malicious)(f) (IV); yet it is tempered by many of the restrictions of a tenant for life, for the donee or tenant will forfeit his ceteate if he alien it in fees simple;(g)

again, it is not privileged from merger as an estate tail is.(h) The privileges of this tenant (viz. the former donee in tail, against possibility of issue extinct, after separation or divorce) are enjoyed in respect of the priority of estate and inheritance *once in him*; and therefore if he assign his estate to another his privity is gone, and his grantee will be a mere tenant *pour autre vie*, and it should seem punishable for waste. Lord Coke mentions four qualities of this estate, in which it is similar to a *mere tenant for life*: 1st, *it is liable to forfeiture*; 2ndly, *it will merge in an estate in fee, or in tail*; 3rdly, *he in reversion or in remainder shall be received upon his default*; and 4thly, *an exchange between him and a mere tenant for life is good.*(i) Thus it appears that the law in general looks upon this estate as equivalent to an estate for life only; and as such will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made with estates that are equal in their value.(k) (V)

H. D. M.

(I) The law supposes always a possibility of issue to exist, unless extinguished by the death of the parties, even though the donees be each of them an hundred years old.—ED.

(II) Our correspondent should have explained this enlargement under the statute. As where A tenant in tail, with remainder to B, and there is a protector to the settlement, makes an assurance under the act, without the consent of such protector, it will not bar the remainder in B, but bars only the issue in tail, and a *fee is acquired determinable on failure of such issue*, the remainder in B continues to an estate expectant on the failure of such issue, and this is what is termed a *base fee*. If A afterwards, by any means, acquires this reversion of B's, the law before this statute was, that the determinable fee merged in that reversion, and A had then a fee simple, the *title* to which was founded upon the reversion. Now, the determinable fee does not so

(a) Litt. s. 32.

(b) Co. Litt. s. 28.

(c) Co. Litt. lib. 1. s. 34.

(d) Litt. s. 32.

(e) Watkins, p. 99.

(f) 16 Ves. 430, Williams and Williams.

(g) Co. Litt. 28.

(h) 3 Prest. Convey. 263.

(i) Co. Litt. 28. a.

(k) Belom, p. 126.

merge, but by this statute it is enlarged, and A has a fee simple, the title to which is founded upon the *estate tail*; this is a highly important distinction, and should not be overlooked.—ED.

(III) Or if lands are limited to a man and woman and the heirs of their two bodies, and one of them dies without issue, the survivor is tenant in tail after possibility of issue extinct; and this estate may exist in remainder; it will arise if there be issue born, and such issue shall die without having issue.—ED.

(IV) But see *Herlakenden's case*, 4 Co. 63, which is denied to be law by Lord Coke.—See 1 Roll, Rep. 184.—ED.

(V) The privileges of such a tenant are, in respect of the privity of estate and inheritance once in him; and therefore if he assign his estate to another, the privity is gone and the grantee will be merely tenant *pour autre vie*, and, it should seem, be punishable for waste. Co. Litt. 28 a. This estate is not privileged from merger as an estate tail is, and the law looks upon it generally as equivalent to an estate for life only.—ED.

PROBLEM XII.

WHAT IS AN ESTATE IN DOWER? AND
WHAT ARE THE REQUISITES TO DOWER?

SPECIAL OCCUPANCY.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—One of the questions put by the Examiners a short time since was—

What is Special Occupancy?

I have in vain looked over the works I have access to for an answer to that question—I have asked several gentlemen who are generally considered as tolerably well versed in conveyancing, but without receiving a satisfactory answer.

The last answer I received is the one which I most rely on, and which is this—

Where an estate is limited to A, his exec-

tors and administrators, for the life of B, and A dies before B, the executors or administrators of A are *special occupants*; therefore special occupancy can only occur in estates *pour autre vie*.

This same difficulty may have occurred to several others of your young subscribers. Will it be too much to ask you for your answer to the question—What is Special Occupancy? with a reference to any work on the subject. I am, SIR, your very obedient servant,

S. R. V.

OPINION OF THE EDITOR.

By the Common Law, if lands be limited to A and *his heirs* during the life of B, and A dies in the lifetime of B, the heir is entitled, not as heir, but as *special occupant*. It is in fact simply an estate *pour autre vie*, to which the Statutes 29 Car. 2. c. 3. s. 12; the 14 Geo. 2. c. 20. s. 9; and the 1 Vic. c. 26. s. 6. are directed.

It has been much doubted whether, if lands be limited to A, his *executors and administrators* during the life of B (as put by S. B. V.) the executors or administrators, could take as *special occupants*, in the event of A dying in B's lifetime; but the question was at length finally settled by Lord Eldon, in *Ripley v. Waterworth*, 7 Ves. J. 425; in that case lands were limited to A, his *executors, administrators, and assigns* for the life of B. A died in B's lifetime, having made a will disposing of his personal estate, and appointing an executor; there were three claimants,—the heir-at-law, the residuary legatee, and the next of kin. The heir-at-law contended it was real estate, viz. a *descendible freehold*, and that an *executor could not* at common law take as *special occupant*. The residuary legatees and next of kin contended, on the contrary, and Lord Eldon, C. held, that it could in no event go to the heir—that as between the next of kin and residuary legatee, the executor was in equity a trustee for those to whom the testator had given his personal estate. This settled the question that *executors or administrators* may take as *special occupants*. Such was also the decided opinion of Lord Hardwicke. See also Duke of Marlborough

v. Lord Godolphin, 2 Ves. 61; Williams *v.* Jekyll, id. 681; Westfaling *v.* Westfaling, 3 Atk. 460; 7 Ves. J. 446, cited from Lord Hardwicke's notes; and the new Statute of Wills in the section before referred to, particularly recognises such an estate.

Lord Redesdale considered that the old authorities led the other way: his Lordship said, in Campbell *v.* Sandys, 1 Sch. & Lef. 281, that "if the case were before him he should feel great difficulty in determining according to the *apparent* opinion of Lord Hardwicke, and referred to two cases stated in 2 Ro. Ab. tit. Occupant, (G) 2 & 3; the first of which is reported in Dyer 328 b. pl. 10, and in 3 Leo. 35. (Lord Windsor's case), and is stated by Rolle as a determination, that if a lease be made of land to a man and *his executors*, *pour autre vie*, the *executor shall be* special occupant, although it be a freehold; whereas in Comyn's Digest, Estates (F 1.) tit. Occupant, the case in Dyer is stated as a decision that the *executor shall not* have the land as special occupant, for an occupant has the freehold, which an executor cannot take; and Comyn also refers to the second case stated by Rolle as an authority for this point; that case, his Lordship said, was long subsequent to the case in Dyer, and was in conformity with the opinion of Comyn, and according to Salter *v.* Buller, Moore, 664; Cro. Eliz. 901; Yelv. 9, and that the law seemed to have been understood by P. Williams, 3 P. W. 264 *n.* (D), as so settled, though he did not appear satisfied with it."

However, at this day, no point in practice is considered more clear than that an executor or administrator may take a freehold as special occupant. Lord C. B. Comyn appears to have confounded the cases in Dyer, Leonard, and Rolle, the one being upon an *incorporeal hereditament*, (a rent) of which there *cannot* be any occupancy, (alldoubts upon which have been recently settled,) and the other being upon a *corporeal hereditament*: no two cases can be more distinct. Salter *v.* Butler, referred to by Lord Redesdale, was also the case of an *incorporeal hereditament*. P. Williams's opinion extended to the principle, that an executor might be a special

occupant of even a rent, as well as an heir. Lord C. B. Gilbert lays it down as clear, that an executor may take a freehold as special occupant, but not so a rent. Lord C. J. Tindal, in Bearpark *v.* Hutchinson, 7 Bing. 178. (in delivering the opinion of the Court of Common Pleas) said that, although there could not be a *general occupancy* of a rent before the statute, (29 Car. 2. c. 3. s. 13.) nor in strictness *special occupancy*, because there could be no occupancy of any thing which lay in grant, yet upon the authority of Lord Coke, and other early writers, it was said there might be a *quasi special occupancy*; and as the statute was remedial, it was the soundest construction of the second branch of the 15th section, to hold that it included not only all such estates *pour autre vie*, as were so in strictness, but also all such as were, in common parlance, held to be the subject of occupancy.

We think we have shewn "*what is special occupancy*," in almost all its shades: one other occurs to us.

An estate is limited to a man, his *heirs, executors, and administrators*—he dies intestate. In Atkinson *v.* Baker, 4 Term. Rep. 229., the point arose and was argued in favour of creditors for the administrator, but the Court decided for the heir as special occupant. Lord Kenyon said, the first limitation is to the heirs, and in the ordinary course of this species of property, it goes to the heir at law, because it is real estate.

In conclusion, we think it necessary to call attention to the modern case of Doe dem. Jeff *v.* Robinson, 8 Barn. & C. 296; 2 Manning & R. 249., where it was inadvertently held that, for want of words of limitation, or equivalent words in the devise of an estate *pour autre vie*, the devisee took only an estate for the joint lives of herself, and the *cestui que vie*. Mr. Manning's note, id. 263., shews this decision to be irreconcileable with the Common Law and Statute Law.

Law Reports.**COURT OF CHANCERY.—Jan. 11.****NEDBY v. NEDBY.****APPEAL.*****Trust for the separate Use of Unmarried Women.***

This appeal was against the order made in this cause by the Vice-Chancellor, (a) which was supported by Mr. Wakefield and Mr. Rogers. The husband claimed the fund by virtue of his marital rights, and by an appointment made by the wife in his favour. But, without discussing the general question, they urged that the Court would not confirm an order amounting to a decree.

Mr. Jacob and Mr. Tenant, on the part of the wife, contended that the fund was settled to Mrs. Nedby's separate use.

The LORD CHANCELLOR said, if the fund had been in the hands of trustees, the order could not have been made for payment to a litigant party, and its being paid into court did not vary the case. The order must, therefore, be discharged. His Lordship added, that if the cause would afford an opportunity of determining the general question referred to, he would himself hear it.

This is an illustration of the observations we concluded in our last, upon the uncertain and insecure state of the law, as it affects property settled to the separate use of *unmarried women*. We have found one of the Judges of the court making an order strictly in accordance with the doctrine held for half a-century, and the superior Judge of that court we find discharging it. This is a state of things that ought not to exist. Some immediate means ought to be taken to remedy the evil, or, to use the words of Lord Eldon, (b) when a case involving a point of much importance stands on contrary decisions, in two courts, it is impossible to estimate the mischief that would ensue to property (rather say individuals) if it were left in doubt. It is said, indeed, that the policy of the law favours alienation; that property should carry with it the incidents of property, and that the restriction is therefore to be discountenanced. But this argument has a double aspect when the owner is prevented from creating an in-

alienable trust; the proprietary right is circumscribed. That right is then most ample and most free when the donor may prescribe the terms of his donation, and make his will the only measure of his bounty. But, without some limit, the indulgence would defeat itself; for the mass of property would be strictly settled. That limit is fixed in this country by the rule against perpetuities, (c) and as to the income by the statute against accumulation. (d)

Practitioners are now placed in a position of some difficulty, unless they take especial notice of the new doctrine, until the question shall be finally settled by solemn adjudication.—ED.

QUEEN'S BENCH.—Jan. 12—14.**THE CANADIAN PRISONERS.**

Habeas Corpus—Power of a single Judge to sign this writ in vacation.

The prisoners names were Finley Malcolm, John Grant, John G. Parker, Robert Walker, Paul Bedford, Randal Wixon, Leonard Watson, William Reynolds, Lynus Wilson Miller, James Brown, Ira Anderson, William Alvis.

The Attorney-General, the Solicitor-General, Sir F. Pollock, and Mr. Wightman, appeared as counsel for the Crown, and Mr. Hill, Mr. Roebuck, and Mr. Faulkner for the prisoners.

The *Attorney-General* begged to be allowed to make a motion with respect to the Canadian prisoners. Their Lordships were aware that, during the vacation, Mr. Justice Littledale had granted 12 writs of *habeas corpus* to bring up these individuals, they being on their transit from Canada to Van Dieman's Land. The writs were returnable before a single judge, but the term having now come round, on the part of the Crown, he was most anxious that the prisoners should have the advantage of their case having the most solemn discussion. He was perfectly ready to adopt any step their Lordships might think right.

Lord DENMAN said, it was evidently desirable that the case should be discussed before the full Court. Indeed, if the matter had occurred in vacation, the judges of the court had determined to attend at chambers.

Jan. 14.

The *Attorney-General* said, the keeper of the gaol of Liverpool, in obedience to Her Majesty's writ of *habeas corpus*, was now in attendance with the body of John Grant.

(a) *Ante*, p. 86.

(b) 4 *Bligh's Parl. Rep.* O. S. 105.

(c) *Cadell v. Palmer*, 7 *Bligh's Parl. Rep.* N. S. 202.

(d) 39 & 40 *Geo. 3.* c. 98.

The return to the writ of *habeas corpus* having been placed in the hands of the officer of the Court,

Mr. HILL said he appeared on behalf of the prisoner. He apprehended, with submission, that it was his right, on the part of the prisoner, to elect which case they would proceed upon; his prayer, therefore, was that the return in the case of Leonard Watson should be read.

The *Attorney-General* apprehended that these cases were to be taken *seriatim*; there were twelve several writs of *habeas corpus* awarded, and a separate return had been made to each. There was a return made in the case of John Grant; John Grant was now brought up under that writ of *habeas corpus*, and he moved that that return might now be read, and he apprehended he was now at liberty to make that motion on the part of the Crown.

Mr. HILL said, that the course of proceeding was this,—returns were made to the writs of *habeas corpus*. Those returns might be read—there could be no objection to that; it was for him to move for the reading of such return as he should please to adopt.

The return to the writ in the case of John Grant was then read.—It certified that, at the assizes of oyer and terminer and general gaol delivery, held at Niagara on the 18th of July, 1838, before the Hon. Jonas Jones, Her Majesty's justice, duly assigned to take the assizes, he having due authority to hear and determine all offences, John Grant was duly convicted of the crime of high treason against Her Majesty, and thereupon judgment of death was passed upon the said John Grant for the said offence; and after the conviction of the said John Grant, Her Majesty, on the 22d of October, 1838, by letters patent under the great seal, did pardon John Grant from all punishment that might be inflicted upon him for and by reason of the said conviction upon condition that he should be transported to the penal colonies of Van Dieman's Land during the term of his natural life; and he certified that there had been no means of transporting the said John Grant from Canada, so that it became necessary to take him to Quebec, and eventually to England, in order that he might be conveyed to Van Dieman's Land, and that he was lodged in Liverpool gaol for safe custody; and he further certified, that he now had his body ready, as he was by the writ commanded.

Another return was read in the case of Leonard Watson, from which it appeared that the prisoner had confessed his guilt, and had petitioned for mercy, which was granted on condition of his being transported for life.

The *Attorney-General* stated, that the whole of the remaining returns were exactly the same. Some of the prisoners had been transported for life, some for 14, and some for 7 years.

Mr. HILL said, the term of the transportation was to commence, not from the date of

the pardon, but from the time of their arrival in Van Dieman's Land.

Lord DENMAN said, the Court thought the most convenient course would be for Mr. Hill to bring forward first what he thought fit.

The *Attorney-General* said that for the information of the Court and his learned friends, he would state, that in the course of the discussion he should feel it his duty to draw the attention of the Conrt to the question as to whether this was a case in which there could be a writ of *habeas corpus* issued in vacation by a single judge. He, of course, could not give their lordships jurisdiction by waving any objection he could take. There were two statutes that allowed an application to be made for *habeas corpus*; they were those of Charles II. and the 56th of George III. The first applied only to criminal cases.

Lord DENMAN observed, that the point about the issuing of the writ in vacation appeared to be a preliminary objection, and ought to have been made before the return was read. The other side were in possession so far as that went. On the other hand there would be another writ immediately.

The *Attorney-General* admitted there would be another writ at common law, upon which the points would have been stated by the counsel who moved for that writ, for the information of the Court and the counsel for the Crown. Their lordships were aware that Lord Tenterden laid it down that it was by no means a matter of course granting such a writ, and that the reasons must be stated to the Court. Their lordships would find that laid down in the fullest manner in 3d Barnewall and Alderson. The learned counsel then read the judgment of Mr. Justice Abbott in the case of Sir John Hobhouse.

Lord DENMAN said this was in the nature of a preliminary objection, and if the *Attorney-General* took it, the Court must hear him first on that objection.

The *Attorney-General* said it appeared on the returns.

Lord DENMAN stated that this was in the nature of a preliminary objection. Upon going into that question the *Attorney-General* said, it appeared to be a case in which a writ ought not to be granted. It had been issued in vacation, they were in possession, and it was for the *Attorney-General* to dispossess them.

The *Attorney-General* then stated the grounds of the objection. At common law a writ of *habeas corpus* would only be granted by the Court of Queen's Bench in term time upon motion, like a writ of *mandamus*, or any other writ that might be issued by the Court at common law. The Lord Chancellor might grant a writ of *habeas corpus* at any time, his jurisdiction not being confined to the term. There was no term or vacation in the Court of Chancery; but in the courts of common law these writs could only be granted in term time upon motion.

Mr. Justice COLERIDGE asked whether he

must take that for granted, for Blackstone had laid it down exactly the contrary. Blackstone had decided, that writs of *habeas corpus* could be granted at common law, not only in term, but during vacation, upon application to the Chief Justice, or any of the judges.

The *Attorney-General* said it was made returnable in term time.

Mr. Justice COLEBRIDGE stated, that if the writ was issued in vacation, it was usually returnable before the judge himself, unless the term intervened; then it was returnable to the full Court.

The *Attorney-General*, this was a writ returnable before a single judge.

Mr. Justice COLEBRIDGE, it was agreed to be taken to the Court.

The *Attorney-General*, that was undoubtedly the case, but it was to be taken in court, as if heard before a single judge. That was, their lordships were then to be considered as sitting at chambers disposing of this writ. It was his duty to draw their Lordships' attention to this point—whether in this case there could be such a writ of *habeas corpus* issued returnable before a single judge in vacation. He humbly conceived that until the 31st Charles II., chap. 2, it could not have been done in a case like the present, where there was a commitment for a criminal matter. He submitted to their Lordships that the 31st Charles II. did not meet a case of this sort. That act was to serve as a remedy for a grievance which had been carried to a great extent in that and the preceding reign, which was the delay of the trial of those persons who were committed to be duly tried. They were sent to distant gaols, their trials were postponed, and the greatest oppression was practised. To remedy that evil the act of 31st Charles II. chap. 2, was passed. That act was the great bulwark of national liberty. By the 2d section of that act of Parliament, a power was granted to a single judge, during the vacation, to issue a writ of *habeas corpus*, but he submitted to their lordships that, looking to the language of that section, it was only in a criminal matter where there was a commitment with a view to trial. The third section enacted, that if any person or persons should be committed for any crime, unless for felony or treason, in vacation time, it should be lawful for him or any person on his behalf to apply to the Lord Chancellor or any of the justices or barons of the common-law courts for a writ of *habeas corpus* returnable in eight days afterwards; that the return was to state the true cause of commitment, and within two days after the parties were to be brought before the judge, who was to discharge the said prisoner, taking his or their recognizance, with one or more sureties, in any sum, according to the discretion of the judge, having regard to the quality of the prisoner and to the nature of the offence, for his appearance in the Court of King's Bench, the assizes, or any other court where the offence was to be tried. Then followed the important section, by which it was provided that all persons com-

mitted should be brought to trial within a certain time. This contemplated a case where the prisoner had been committed by legal authority upon a criminal matter with a view to trial; not where, as in the present case, he was in the execution of his sentence. He apprehended therefore that this could not be brought within what was generally called the *Habeas Corpus Act*.

(*To be continued.*)

COURT OF EXCHEQUER.

Hilary Term.

Sittings in Banco.

STEWART v. — and Another.

Where one of two defendants has suffered judgment by default, it is still competent to the other to move for judgment, as in case of a nonsuit against the plaintiff for not proceeding to time.

Mr. Keating moved for judgment as in case of a nonsuit in this case, and stated that there having been two defendants originally, one of them had suffered judgment by default. The other, however, contested the action, and issue having been duly joined and notice of trial given, the plaintiff had made default in not having proceeded to trial in pursuance thereof. That defendant therefore now moved for judgment, as in case of a nonsuit for such default.

Lord ABINGER—Can you do so when there is judgment by default already on the record against one of the defendants?

Mr. Keating—With all submission, such a course is open to my client, upon the authority of *Jones v. Gibson*, 5 B. & C. 768, and of *Murphy v. Donallan*, in page 178 of the same volume. There it was clearly held that where one of the defendants had suffered judgment by default, the plaintiff might be nonsuited by the other at the trial; and, by parity of reasoning, it is submitted that he is in a situation to move for judgment as in case for nonsuit.

Per Curiam—You may take your rule.

DOE D. HERVEY v. FRANCIS.

All applications for a review of taxation in causes heard in error, ought to be made to the Court of Error, and not to the Court where the causes are taken.

Mr. Smith moved that the Master should review his taxation in this cause, which having been originally tried before Mr. Justice Patterson, a bill of exceptions was tendered to his summing up; whereupon the case was argued in error before the Exchequer Chamber. This application arose out of the refusal of the Master to allow treble costs on two items, as awarded by the 13 C. 2. c. 30, which says that where parties take a case into error, and are beaten, they shall pay treble costs. The question was, whether these particular items were costs in error, or whether they were to

be considered as costs below—the plaintiff claiming them in the former view, while the Master dissented from that position. One of these items was the charge of 8*l.* 8*s.* for settling the bill of exceptions.

Lord ABINGER—Is not that a part of the expense of the trial below? Is it not supposed to be settled before the judge at *Nisi Prius*? Suppose no error is ever brought upon the bill of exceptions, is it not part of the costs below?

Mr. Smith—At first sight that might appear to be so, but there is a case of *Gardiner v. Bayley* in 1 Bos. & P. page 32, which is mentioned in Tidd, page 865, 9th ed., which distinctly lays it down that they are costs in error, and not below; for the bill of exceptions is no part of the costs below.

Baron PARKE—Are not the costs a part of the judgment in error? and if so, then we have nothing to do with them but to enforce the judgment when pronounced above and notified to us. The taxation of costs and the judgment are one and the same act of the court, and till the amount of the costs is ascertained by taxation, the judgment is incomplete, for there must be a blank left for costs. It is clear, therefore, that we cannot do anything in the matter at present, as we have no ground to proceed upon. We are only to enforce the judgment of the Court of Error when finally pronounced, and the application must therefore be made to the Exchequer Chamber, which Court alone has any power over the matter.

The other Judges concurring in this view of the question, the *Rule was accordingly refused.*

ISAAC v. BELCHER.

Practice.—Pleading.

Mr. Kelly moved for a new trial. This case was tried at the last sittings at Guildhall, when a verdict passed for the plaintiff. The facts of the case were, that the plaintiff having occasion to part with some property, consisting of furniture, wine, and other chattels, employed an auctioneer named Jowell to sell a portion of it, while the rest was left in his possession with a view to a future disposition of it. Shortly after, however, Jowell became a broker, as well as auctioneer, and sold other portions of plaintiff's property, some of which had been kept by him among his own stock; and the residue, such as the wine, in a back room, leaving a considerable quantity of the goods still in hand. This new speculation not answering, Jowell became a bankrupt, and all the goods on his premises having been sold by his assignees, the defendant, Mr. Isaac, brought the present action of trover against them to recover the value of the unsold property, which had been seized amongst the bankrupt's effects, and disposed of for the benefit of his estate. To this the defendant pleaded, first, that the plaintiff was not possessed of the goods in question; and, secondly, not guilty, on both which issues the parties

went to trial, when the defendants offered to show in evidence under the first plea, that Jowell had become a bankrupt in due course of law, and the assignees had become possessed of the goods claimed by the plaintiff under the statute of bankruptcy, by reason of the plaintiff having allowed them to remain up to the failure of Jowell under his order and disposition. This evidence, however, was rejected by the learned Judge, who did not think the defendants were at liberty to go into such various and distinct matters under the first plea, and unless they had been specially pleaded. This was an error on the part of the noble Judge, inasmuch as it was quite competent to his clients to have gone into each and all of these subjects under the plea in question. This had been so ruled by the Court of Common Pleas in *Owen v. Knight*, in 4 Bing. New Cases, p. 54, in so express a manner as to leave no doubt upon the subject. Under these circumstances it was contended that the defendants were entitled to a rule for a new trial.

Rule accordingly granted, nisi.

EXCHEQUER EQUITY SITTINGS.

Jan. 11.

ROTHSCHILD v. THE QUEEN OF PORTUGAL.

As to the compelling a foreign sovereign power to make a discovery after coming within the jurisdiction.

A demurrer to a bill of discovery filed by the plaintiff, calling upon the defendant to discover upon oath with respect to the matters mentioned in the bill.

Sir F. Pollock appeared to-day to oppose the demurrer. He said that the demurrer had been attempted to be supported on two grounds;—first, that the plaintiff had not shown by his bill that he was entitled to the discovery which he prayed; and secondly, that the defendant, as a sovereign power, could not be compelled to make a discovery.

Mr. Baron ALDERSON said that the learned counsel need not address himself to the latter point. If the sovereign prince of another country came into the courts of this kingdom, he came into all the courts, as otherwise it would give rise to this monstrous proposition—that he could bring his suit in one court, in which he sought to enforce the law of the land against a party, without giving that benefit to an appeal to a court of equity which every body else had. No doubt such a person was not within the jurisdiction of the courts; if he did not come and put himself under the jurisdiction; but he could not put himself under the jurisdiction of courts of law without putting himself within the jurisdiction of courts of equity also. If such a case as this had occurred during the early period of the law, when all the courts were under one roof, and called the Great Hall of the kingdom, a person coming into the Great Hall would be told that he must receive ju-

tice in all its bearings, and if he came for the benefit of the law, he must do all that a court of equity would compel every other person to do; otherwise it would come to this—that if a party brought a suit at law to recover against an opponent, and there was a motion incidentally made to the equitable jurisdiction of the court, the other might turn round and say, "You have no jurisdiction, because your application is to the equitable jurisdiction of the court, and I only submitted to the legal jurisdiction." He thought that there could be no doubt about the point. It had already been decided by the House of Lords, and seemed to him to go upon the simplest principles.

The case was ordered to stand over until the Minister of the Queen of Portugal could be consulted as to the propriety of referring it to three barristers, before whom the papers and other information necessary were to be produced: should he refuse his sanction to this proceeding, the case was to proceed.

COURT OF EXCHEQUER CHAMBER.

Nov. 12.

RUSHTON v. NISBETT.

Writ of Error—Writ of Right tried in the Court of Common Pleas at Lancaster—Judgment reversed by the Court of Queen's Bench—Construction of the 8th Sec. 11 Geo. 4., & 1 W. 4. c. 70—Jurisdiction of the Court as a Court of Appeal from the Queen's Bench.

Mr. *Wightman* had obtained a rule to show cause why the present writ of error should not be quashed, upon the ground that, according to the 11th Geo. IV. and 1st Wm. IV. c. 70., under which the present court of appeal was constituted, the appeal from the Queen's Bench in the circumstances ought to be directly and immediately to the House of Lords, without any intermediate appeal to the present tribunal.

Mr. *Starkie* now showed cause against the rule, and called the attention of the Court to the 8th section of the act, which directed that all writs of error upon any judgment given in any of the courts should only be returnable in the Exchequer Chamber before the judges of the other two. In *The King v. Wright*, the Lord Chief Justice of the Common Pleas had said, that as the words of the statute then in question was sufficiently general to include all cases, it was not to be inferred that the criminal courts were to be excluded merely because the King had not been expressly mentioned in the act. *Rivetts and Lewis*, (2 Cr. and Jer. p. 11, and 2 Tyrw. p. 15.) in which a doubt was expressed about the point upon the construction of the statute of the 27th of Elizabeth, Ch. 8. and in consequence of some words being used in that statute which seemed to limit the jurisdiction. But as the words in question had been omitted from the present act, and as the expressions therein

contained were evidently sufficiently general to include all judgments given in all the superior courts, he thought it unnecessary to trouble their Lordships at any further length upon the point.

Mr. *Wightman*, in support of the rule, said, that if Mr. Starkie's view were correct, the consequence of the late statute would be that three courts of appeal from the decisions of the Court of Common Pleas at Lancaster would now exist, whereas there had before that statute been only two. He contended that the act applied only to original judgments given in the courts of Westminster, and not to any judgments which should have been given in those courts on appeal from some other courts, and that it could not have been the intention of the act to increase the number of appellate jurisdictions by making, as in the present instance would be the case, three courts of appeal to exist where there were only two before.

Mr. Baron VAUGHAN.—But may it not have been the intention of the legislature to provide a court where the opinion of the majority of the judges upon the point could be produced by the parties before they incurred the expense of appealing to the House of Lords?

Mr. *Wightman*.—But after hearing the judgment in this court, the unsuccessful party can bring a writ of error to the House of Lords, as before.

Mr. Baron ALDERSON.—Yes. But is he likely to do so after the majority of the judges have decided against him? I should think it unlikely that any one would have recourse to such a proceeding.

Mr. Justice BOSANQUET.—I happen to know that the great object of the late statute was to procure the judicial opinions of the majority of the judges upon questions of importance before they were taken to the House of Lords, in order to discourage and render less frequent the appeals to that tribunal.

Mr. Baron ALDERSON.—And for that reason we are always anxious to have this court as full as possible.

The Lord CHIEF JUSTICE delivered the judgment of the Court. Referring to the words in the first part of the 8th section, his Lordship observed that they were quite large and general enough to comprehend judgments of every kind, either given upon an original hearing or upon appeal, and the effect of the last section was not to place any limitation upon the previous generality. But it had been said that the effect of discharging the rule would be to allow three writs of error where only two existed before. This was a consequence which might be incidental to the statute, but the effect of even allowing the third writ would be to diminish the expense, as it was improbable that any person whose case had been decided by the majority of the judges would carry it afterwards to the House of Lords. It had also been urged, that if the judges who tried a cause in the Court of Common Pleas at Lancaster should be members of the Court of Exchequer or Common Pleas

at Westminster, and if an appeal from their judgment were to be first brought into the King's Bench and there reversed, and a writ of error then brought into this Court from the King's Bench, the very judges who made the decision at Lancaster which was reversed in the King's Bench would themselves be a part of the Court of Exchequer Chamber which was to decide upon the propriety of the reversal. This was a state of things which very generally existed. In the case of a bill of exceptions tendered to a judge at *Nisi Prius*, where the action was pending in the Court to which he belonged, he himself afterwards sat in judgment along with the other judges of the Court upon the propriety of his decision in the Court below, and the same state of affairs occurred in several other instances. But the worst that could happen in the case put by Mr. Wightman would be, that whenever it occurred the two judges in question would be two out of six—a circumstance which the Court did not think of much importance.

The COURT was, upon the whole, of opinion that the case was within the letter, as it certainly was within the spirit and intention, of the act, and the rule for quashing the writ was therefore discharged.

Mr. Baron ALDERSON observed, that besides the reason which had been already mentioned for the passing of the act, another was to put all the Courts at Westminster upon the same footing on the score of authority. Before that act, the Common Pleas was overruled by the King's Bench, and the Exchequer by the two Chief Justices alone.

COMMON PLEAS.—Jan. 11.

GIBSON v. THE EAST INDIA COMPANY.

JUDGMENT.

Pensions granted by the East India Company, by Resolution only, and not under their Corporate Seal, inalienable.

Mr. Sergeant Wilde for the plaintiffs, and Mr. Sergeant Spankie for the defendants.

This case was argued last term, and the facts brought before the Court were these. Mr. Mallandine, who had formerly been a Lieutenant-Colonel in the service of the defendants, but who, having retired upon a pension of 365*l.* a-year, entered into business as a candle-manufacturer, failed, and became bankrupt, and the plaintiffs were his assignees, who claimed to recover from the defendants the sum of 182*l.* 10*s.*, the amount of half a-year's pension, the right to which the plaintiffs claimed to have passed to them as the bankrupt's assignees. The defendants resisted the demand on two grounds—1st, that pensions granted by them to their officers, similar to the one in question, were inalienable; and secondly, that being in the nature of annuities, they could only be granted by deed to enable even the party himself to enforce payment of them in a court of law, and conse-

quently, the pension in question not having been granted by deed, neither the bankrupt himself nor his assignees (even if it were not inalienable) could recover its amount in a court of law. The facts were turned into a special case.

Mr. Serjeant Wilde contended that there was no reason why the pension should be inalienable. It was given as a remuneration for past services when the officer was retiring from the army, and when it no longer affected the interests of the company whether he embarked in any other pursuit or not. Where it was intended to make pensions of this kind inalienable, acts of Parliament had been passed expressly for the purpose, as in the cases of Greenwich and Chelsea Hospitals pensions, the pensions granted to the Duke of Marlborough, and that granted to the Duke of Wellington. Now, if they were already inalienable in point of law, these legislative restrictions would have been unnecessary. Upon the other point he contended that the company had effectually bound themselves in point of law, by a parol contract, to pay this pension, for which they had received consideration in the past services of the officer, and that it differed materially from an annuity in the legal sense of the word, and consequently it was not necessary to make it binding in law, that it should have been granted by deed.

Mr. Serjeant Spankie contended that the nature and object of a pension of this nature, together with sound public policy, all combined to show that it was not intended and ought not to be allowed to be transferred from the individual to whom it was granted. He also argued that it was in every respect in the nature of an annuity, and its payment, therefore, could only be enforced when granted by deed.

The LORD CHIEF JUSTICE pronounced the judgment of the Court. The pension in question had been granted by a resolution of the defendants, and the question for decision was, whether or not they were bound by that resolution, without the corporate seal of the company being attached thereto. The general principle of law was, that a corporation was not bound by a contract not under their corporate seal; to which there were some exceptions in favour of the convenience of the company, such as the hiring of servants, or the purchase of goods of small amount. But the Court were of opinion that the present case did not come within the range of the exceptions. Looking at the general scope and object of the statute and charters by which the East India Company was formed and governed, it would be quite inconsistent with their spirit to hold that a retiring pension granted in this form to one of their military officers could be assigned away. It could not be contended for a moment that one of their officer's pay could be so assigned; and there was no difference in point of law between his military pay and his retiring pension. The effect of the resolution was, that it amounted to what jurists called an imperfect obligation;

it was binding *in foro conscientiae*, but not in a court of law. The company might have made a grant under their corporate seal, but they not having done so, and the case not coming within any of the exceptions before referred to, they could not be sued upon this contract by the bankrupt himself, and consequently not by his assignees. The Court, therefore, gave judgment of nonsuit.

So an officer cannot assign his half-pay, Flarty v. Oldham, 3 T. R. 68. except under the special provision of the Insolvent Act, (sec. 56. 1 & 2 Vic. c. 110.) Lord Kenyon held the ground for this decision to be, that the officer has no fixed durable interest in it; but that it depends on the bounty of the crown, that allows him certain benefits to enable him to attend whenever his service may be required, 7 Term Rep. 554.—ED.

WESTMINSTER SESSIONS. Jan. 11. Mr. Serjeant Adams, Chairman.

The legality of placing Prisoners before trial for examination, or for want of sureties, in separate cells.—Opinion of the Attorney-General.

The report of the visiting Justices of the Westminster Bridewell was read, from which we make the following extracts:

"Doubts having been expressed by some of the visiting Justices as to the legality of placing prisoners before trial for examination, or for want of sureties in separate cells, the visiting Justices directed that a case should be laid before Her Majesty's Attorney-General for his opinion on the subject; and the visiting Justices beg leave to lay the case, with the Attorney-General's opinion thereon, before the Court.

"The governor on the 15th inst. having reported, that in consequence of the increased number of committals of female convicts during the present month, the prisons appropriated for their reception were insufficient to maintain the system of separate confinement (the daily average of the number being 141, and the cells appropriated for their use being only 68), notwithstanding a temporary accommodation had been afforded, by transferring persons for trial, for bail, and for re-examination, from the common gaol to another building, and that the total number of available separate cells amounted to 102 only, leaving nearly 20 convicted female prisoners to be provided for, who were of necessity associated together, and the discipline of the prison thereby seriously interrupted; and the governor having submitted to the visiting Justices that the four large rooms in No. 1, female prison, at present comparatively useless, should be divided into separate sleeping berths, which

would afford accommodation for 40 prisoners, the visiting Justices have, in consequence, examined those rooms, and they recommend that they should be divided by wooden partitions accordingly, the estimated expense whereof will not exceed 20/- for each room."

The case submitted to the Attorney-General, and the opinion thereon, are as follows:—

"Prisoners, both male and female, committed to the Westminster Bridewell for trial, under examination, or for want of sureties, are placed in separate single cells, and not suffered to associate with each other except during one hour and a-half in the morning, while washing, &c., and exercising, half an hour at chapel, an hour at noon to receive food, clothing, and the visits of friends (if any), and one hour before lockings at night for exercise.

"It has been suggested to the visiting Justices that it is not lawful so to treat prisoners before trial or committed, as above stated.

"The Attorney-General is requested to peruse the acts of the 4th George IV. c. 64, and the 5th George IV. c. 85, and particularly the 13th section of the last-mentioned act, and advise the visiting Justices whether they are acting lawfully in placing the various prisoners before trial and committed as above-mentioned, in separate cells in the manner and under the restrictions above stated?"

Upon this statement of the case the Attorney-General gave the following opinion:—

"Supposing that the confinement of these prisoners in the manner described is deemed necessary for the safety and good discipline of the prison, I am of opinion that it is lawful. No objection can be made to their sleeping in separate cells. They cannot claim the right at all times when they are awake to converse and associate together, and a discretion is left with the magistrates as to the degree of restraint to which they are to be subjected. At the same time the magistrates would not be justified in imposing regulations upon them which can be considered as penal, or for any purpose except the safety and good discipline of the prison. The magistrates are far more competent than I am to judge what is necessary and expedient on such a subject; but I would respectfully recommend them to reconsider whether these regulations may not be too severe, as subjecting the prisoners to an excessive degree of seclusion and solitude.

"J. CAMPBELL.

"Temple, Oct. 28, 1838."

The CHAIRMAN said, the fact was, they were bound to keep the various prisoners in safe custody according to the best means which were at the command of the justices. It was, however, highly material that the uncontaminated prisoner should be kept apart from the contaminated offender. He was in great hopes that before the arrival of another year the powers of the metropolitan magistrates would be so altered and amended, as to enable them to put all these matters on a more rational footing than they had hitherto been. The uniform system, as applicable to the

metropolitan and the rural prisoner, was quite out of the question—that was, if an equal benefit or advantage was to be looked for. In the metropolis they had as many as twelve gaol deliveries in the course of the year, whilst in the rural districts the deliveries occurred only twice within the same period. In London, generally speaking, the accused parties were on the average not confined more than from ten to twelve days prior to trial, whereas in the country three or four, or even a greater number, of months frequently elapsed between the periods of committal and trial. It was desirable, of course, that there should be as little opportunity afforded of spreading evil contamination as was possible, and therefore, whatever step was adopted in the way of precaution, so as to keep those who were comparatively good from receiving the pernicious instructions of those who were notoriously bad, was an object for attainment. At the same time it was manifest that the same course of proceeding in that respect which was adopted in the country was not called for in the metropolis. As to having one permanent, and as it was denominated, "uniform," system throughout the metropolitan and the rural prisons, it was a complete farce. It was impossible to have one general system with advantage for all prisons, and until the Government could have their eyes opened to that fact, namely, that the same plan would not answer equally well in the metropolitan and rural gaols, all the exertions of the magistracy to effect an improvement would prove fruitless. It would be discovered, as in the case of licensing, that what was extremely good in practice in the country was on the other hand quite as bad in its operation when applied in the metropolis. He had devoted much time to the consideration of the subject, and he had arrived at this conclusion, that the metropolitan bench of justices would never be right—that was, that no system would work beneficially in London until they had a complete and distinct system for the government of the metropolitan prisons. In days of old the existing course of proceeding in that respect might have worked advantageously, but it was not so now. (*Heard, hear.*)

The Report was unanimously agreed to.

Business in the Courts.

COURT OF CHANCERY.

Curtis v. Cutts, appeal motions for judgment—*In re Wallis*, lunatic petition.

Appeals—*Lord Mostyn v. Burdekin*, part heard—*Milford v. Reynolds*—Attorney-General *v. Wilson*—*Tullett v. Armstrong*.

Causes—*De Haviland v. Saumarez*, by order—*Portman v. Mills*, exceptions and further directions—*Same v. Same*, cause by order—*Attorney-General v. Barker*—*Moore v. Langford*, further directions and costs—*Davison v. Cutler*, further directions—*Noel v. Middleton*, exceptions.

VICE-CHANCELLOR'S COURT.

Short Causes—*Sowerby v. Sowerby*—*Ward v. Sadler*—*Senior v. Mason*—*Cochrane v. Marsh*—*Swanston v. Down*—*Brown v. Pringle*—*Jefferson v. Wetherby*—*Bratt v. Smith*—*Wheeble v. Parmister*—*Wheeble v. Wheeble*, further directions and petition—*Powell v. Powell*—*Baird v. Baird*—*Paterson v. Toone*—*Baker v. Baker*, further directions and costs—*Smith v. Hutchinson*, ditto and petition—*Trotman v. Court*, further directions and two petitions.

Unopposed Petitions—*Lovell v. Lovell*—*Stratton v. Abercrombie*—*In re Eversfield*—*Ex parte Shank*—*Gilbert v. Royds*—*Crouch v. Pitman*—*Reid v. Reid*—*Davidson v. Greenhill*—*Cogswell v. Russell*—*Ex parte Nelson*—*Robinson v. Robinson*—*Ex parte Few*—*Lloyd v. Branton*—*Dixon v. Neatby*.

After the Unopposed Petitions—*In re Tottenham Charity*, petition by order—*Fermor v. Pomfret*, to be spoke to—Attorney-General *v. Ellison*, four causes, part heard.

ROLLS' COURT.

Middleton v. Ford to be spoke to—Attorney General *v. Clack*, part heard—Attorney-General *v. Fishmongers' Company* (2)—*De la Garde v. Lempriere*, further directions and costs—*Mence v. China*—*Skelding v. Clare*—*Green v. Campbell*—*Turner v. Hitchen*—*Lambert v. Hutchinson*—*Rowley v. Adams*, exceptions, further directions, and costs—*Neame v. Cobb*—*Goddard v. Sowerby*.

COURT OF QUEEN'S BENCH. *Sittings in Banco.*

BAIL COURT (QUEEN'S BENCH.) *Mack v. Twigg*—*Dear v. Howell*.

COURT OF COMMON PLEAS. *Sittings in Banco.*

COURT OF COMMON PLEAS.

London Common Juries.

Hay v. West—*Swift v. Boast*—*Sewell v. Gould*—*Wood v. Garratt*—*French v. Green*—*Stent v. Goodman*—*Gurney v. Sills*—*Rawlins v. Sewell* and another—*Rickerton v. Franks*—*Brandon v. Smith*—*Wade v. Richardson*—*Attwood v. Hillyer*—*Same v. Jolly*—*Cooper v. Cuthill*—*Poole v. Williams*—*Hoye v. Bush*—*Bradbury v. Hawkins*.

COURT OF EXCHEQUER. *Sittings in banco.*

EQUITY EXCHEQUER.

Petitions.—*Re Birmingham and Gloucester Railway*, petition of *Lawson*—*Re Midland Counties Railway*, petition of *Condon*—*Re Great Western Railway*, petition of *Deane*—*Re Bristol and Exeter Railway*, petition of

Mogg—Re Birmingham and Derby Railway, petition of Rice—Re Midland Counties Railway, petition of Trinity Hospital—Re Paddington Charity Estate, petition of Campbell—Re Hull and Selby Railway, petition of Viscount Galway—Re Manchester and Leeds Railway, petition of Calvert—Re Manchester Improvement Act, petition of the Same—Re London and Birmingham Railway, petition of Trinity Hospital—Re Great Western Railway, petition of Hancock—Re North Midland Railway, petition of Crew—Re Bristol and Exeter Railway, petition of the Company—Re Richard Bethell—Re Hubert de Burgh—Crawfurd *v.* Helder—Lingard *v.* Burton—Jones *v.* Williams.

After the Petitions, Motions.

TO CORRESPONDENTS.

"F. C." must excuse us this week.

"Civis."—His case is personal, and we must refer him to our notice, Dec. 1.—indeed we have much more important matter than we have room for.

"Inquirer." We thank him for his communication. See our notice to Subscribers.

"Gent. one, &c. Manchester." We would cheerfully comply with his wish, and insert his letter, but there are two reasons that prevent us—the one founded upon consistency, the other upon fact. We have more than once said that we do not interfere with our Contemporaries. Our plan is altogether different from any of them. *The writer* alluded to is a Contemporary, and we beg to refer our Correspondent to our answer to "Veritas," ante, p. 96. Thus far for consistency. Secondly, we have never seen the book to which our Correspondent alludes, and we submit that it is too much of a joke to expect we shall put our hands into our pockets, and buy a book, which must be to us waste paper, to satisfy ourselves that our Correspondent's criticism is correct, and thus indulge his wishes.

"Henricus," shall have attention next week.

A Subscriber, Wolverhampton, shall also have attention next week.

To our Correspondents ANSWERING PROBLEMS.—We beg to request some attention to *penmanship*. Some of the answers are to us quite *unintelligible*, and we regret to add that this remark applies even to our best Correspondents.

TO OUR SUBSCRIBERS.

We wish to call attention to an error of the Press, from which not only our meaning, but the law is perverted, and made any thing but what it is. See ante, p. 25, in the first line of the first column, the word "except," is omitted, and should have followed the word "covenant."

The assignee of a lessee is liable in covenant to all covenants that run with the land during the time he shall continue assignee. We will enter upon this subject again in a future Number, so as fully to explain the law upon it. A similar perversion was noticed on Tuesday last by the Lord Chancellor, through an error of the press, in 2 Wyld and Craig, 708., where the word "not," had been introduced for the word "now." They will occur sometimes.

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The Legal Guide.

No. 13.]

SATURDAY, JANUARY 26, 1839.

LAW OF REAL PROPERTY.

ESSAY I.

(Continued from p. 179.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

Receipt of the profits of the land for the purposes of the Act.

SECTION 35. enacts that the receipt of the rent payable by any tenant from year to year, or other lessee, shall as against such lessee, or any person claiming under him, (but subject to the lease) be deemed to be the receipt of the profits of the land for the purposes of this act.

Real and Mixed Actions.

Section 36. enacts that no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisia, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formendum in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darein presentment, juris utrum, or mort d'ancestor, in the per and cui, or in the post, writ of

entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra etatem, dum fuit in prona, ad communen legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divorium, or sur cui ante divorium, writ of entry sur abatement, writ of entry quare ejicit infra terminum, or ad terminum qui praeteriit, or causa matrimonii prelocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disseit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartae, writ of curia claudenda, or writ per que servitia, and no other action real or mixed, (except a writ of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment, and no plaint in the nature of any such writ or action, (except a plaint for free bench or dower) shall be brought after the 31st day of December, 1834.

Section 37 enacts, that when on the said 31st day of December, 1834, any person who shall not have a right of entry to any land, shall be entitled to maintain any such writ or action as aforesaid, in respect of such land, such writ or action may be brought at any time before the 1st day of June, 1835, in case the same might have been brought if the act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

Section 38 enacts, that when on the said 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discon-

tinuance, or warranty, might maintain any such writ or action as aforesaid, in respect of such land, such writ or action may be brought after the said 1st day of June, 1835; but only within the period during which, by virtue of the provisions of this act, an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away.

It is necessary that we should draw attention to the state of the law as it stood before the passing of this statute, in relation to *real and mixed actions*, in order that the present law may be the better understood.

The statutes of limitations have all been made for the purpose of quieting possession of men's estates, and avoiding suits. To use the words of Lord Eldon, (a) "they are not made simply for the purpose of terminating questions of title as between individuals, but are founded on a broader principle, which requires, for the sake of mankind at large, that the person who is in possession, and who has the credit attributed to that possession, should not be lightly disturbed."

The principal object of the Statute 21 Jac. 1. c. 16., was to ascertain the precise period when the possession became adverse, because from that time only the 20 years began to run.

Real actions or *feudal actions* (b) were *droitural* or *possessory*. The former, in which the demandant sued in respect of his mere right, having lost his right of possession, were commenced by *writ of right* properly so called, or by *writ in the nature of a writ of right*.

This *writ*, properly called a *writ of right*, which was the highest *writ* in the law, as it is said, (c) lay for the recovery of lands and tenements, by the tenant in fee simple, (d) and was *patent* or *close* (e); *patent* when the land was held of a subject; *close* when held of the king. A *writ of right close, parvum breve secundum*

consuetudinem manerii, also lay for the king's tenants in *ancient demesne*, and others of a similar nature. (f)

Sir E. Coke, (g) thus defines a title: *titulus est justa causa possidendi id quod nostrum est*, or it is the means whereby the owner of lands hath the just possession of his property, and the several stages or degrees requisite to form a complete title to lands and tenements are well considered by Blackstone, in the 2d volume of his *Commentaries*. (h) For the purpose of these observations we will make use of the heads of these stages or degrees.

1st, *Naked possession*, or actual occupation of an estate; without any apparent right, or any shadow or pretence of right to hold and continue such possession.

This is the lowest and the most imperfect degree of title.

2d, *Right of possession* residing in one man, while the actual possession is not in himself but in another.

This is the next step to a good and perfect title.

3d, *Right of property*, the *jus proprietatis*, without either possession, or even the right of possession, frequently spoken of as the *mere right, jus merum*, and the estate of the owner is in such cases said to be *totally devested* and put to a *right*.

4th, *A complete title* according to the ancient maxim of law, that no title is completely good unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatam, or droit droit*; (i) and when to this double right, the actual possession is also united, when there is, according to the expression of Fleta, (k) *juris et seisinæ conjunctio*, then and then only was the title completely legal.

To such a complete title there were four several denominations of ordinary injury. Where the tenant with a naked possession, while actually seized, shall be ousted or turned out of possession by another person. This was called *diseizin*;

(a) 4 Bligh, P. R. 117

(b) Mirror, c. 2. s. 6.

(c) F. N. B. 1.; Co. Litt. 1386.

(d) F. N. B. 1.; Booth, *Real Actions* 87, 88.

(e) 2 Tidd 1.

(f) Com. Dig. tit. Droit, D.

(g) 1 Inst. 345.

(h) Br. 4. c. 1.

(i) Co. Litt. 266.; Brac. I. 5. tr. 7. c. 5.

(k) l. 3. c. 15. sec 5.

the remedy for which, before the statute, was a writ, called a writ of entry, *sur disseisin*, or an assize, now abolished. Before this statute, acquiescence in the possession by the disseisor for 30 years, without bringing such writ, he gained the *actual right of possession*, and the disseisor retained nothing but the mere *right of property*, which right would fail unless pursued within 60 years.

2dly, Where a person died seized of an inheritance, and before the heir or devisee entered, a stranger who had no right made entry and got possession of the freehold; this was called *abatement*, the remedy for which was also a writ of entry,(l) though it was said that the proper remedy for the recovery of land after an abatement seemed to have been by assize of *mort d'ancestor*, or writ of *aiel, besaiel*, or *cosinage*.(m) An *aiel*, or *besaiel*, lay for the heir upon an *abatement* after the death of the grandfather, or grandmother, or great-grandfather, or great-grandmother, and a writ of *cosinage* upon the death of the grandfather's grandfather or grandmother, or any collateral relation other than those for whom a *mort d'ancestor* lay.(n)

3dly, Where in the interval between the death of the ancestor and the actual entry of the heir, a stranger entered, or intruded, or detained lands after a term had expired—(this was called *intrusion*)—the remedy for which was also a writ of entry, called *ad terminum qui preterit*; or where a woman gave land to a man in fee or for life to marry her in convenient time, and he did not, this was also *intrusion*, the remedy for which was a writ of entry, *causa matrimonii prælocuti*.

4thly, Where possession lawfully taken might have been wrongfully detained; as when a tenant *pour autre vie* held after the death of the *cestui que vie*, or one coparcener, held adversely to his companion, this was called *deforcement*, the remedy for which was also a writ of entry.

For these injuries the writs we have before

(l) See *Smith v. Coffin*, 2 H. Black. 444. *Rowles v. Lestey*, 1 Moore & P. 102; 4 Bing. 428.

(m) 2 Tidd. 9.

(n) F. N. B. 221.; *Booth*. 200.; *Com. Dig. tit. Assize, P.*

named are *now abolished*. In each of them there was a *disseisin*, or interruption of the lawful seizin of a more or less forcible nature.

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XI.

What are the provisions introduced by the Statute 1 & 2 Wil. 4. c. 58, called the Interpleader Act, as well to the relief of Private Individuals as to Sheriffs, when liable to be sued in cases in which they are not personally interested? and what is the present state of the law in relation to those provisions?

The Answer to this Problem may, for the sake of perspicuity, be more conveniently divided into two parts.

1. The provisions of this Statute, in respect of *private individuals*, and the present state of the law in relation to those provisions.

2. The like in respect of Sheriffs.

1. As respects private individuals, by sec. 1. of the 1 & 2 Will. 4. c. 58, it is enacted, "that upon application made by, or on behalf of any defendant sued in any of his Majesty's Courts at Westminster, Lancaster, or Durham, in any action of *Assumpsit*, *Debt*, *Detinus*, or *Trover*, (a) such application being made after declaration, and before plea, by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party, who has sued, or expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of the subject matter of the action in such manner as the Court or any Judge thereof may order or direct; it shall be lawful for the Court or any Judge thereof to make rules and orders

(o) N. B.—The operation of this Stat. is strictly confined to the above-named actions, and the court would not interfere where there was a count in the declaration in *Case*. *Lawrence v. Matthews*, 5 Pow. Rep. 149. (II.)

calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim; and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the mean time to stay the proceedings in such action; and finally, to order such third party to make himself defendant in the same or some other action, or to proceed to trial in one or more feigned issue or issues; and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel, or attorneys, to dispose of the merits of their claims and determine the same in a summary manner; and to make such other rules and orders therein, as to costs and all other matters as may appear to be just and reasonable;" and by s. 2. it is also enacted "that the judgment in any such action or issue as may be directed by the court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

By s. 3. if the third do not appear or comply with any rule or order to be made after appearance, the Court may declare such third party barred from prosecuting his claim against defendant, saving the right of such third party to his action against the plaintiff; and Court may make such order between defendant and plaintiff, as to costs and other matters as may appear just and reasonable.

By ss. 4 & 5, proviso, that every order of a single Judge, not made in Court, may be rescinded or altered by the Court; and that if the Judge thinks the matter more fit for the determination of the Court, he may refer the matter to the Court to be there disposed of. (I)

The following decisions will shew the present state of the law with relation to this Statute in respect of private individuals. It has been decided that the Court will not interfere until an action has been brought, and plaintiff has declared, Parker *v.* Linnitt, 2 Dow. Rep. 562: nor will the Court interfere unless it appears that the defendant had just expectation that he should be sued by

the third party, Harrison *v.* Pyne, 2 Hodges, 107; and it appears that, to give the Court jurisdiction under this act, there must be cross claims on one and the same subject matter, and that the party applying must shew that he cannot be liable to both the claims. Farr *v.* Ward, 5 Dow. Rep. It has been also decided that the rule will not be granted after a suit has been stayed by injunction. Arayne *v.* Lloyd, 1 Bing. N. R. 720; nor will the Court relieve a party who by his own act has placed himself in a situation to be sued. Belcher *v.* Smith, 9 Bing, 82; (III) neither will the Court relieve the holder of title-deeds against opposing claims. Smith *v.* Wheeler, 1 Gale, 163; nor the advertiser of a reward for the apprehension of a felon, against two different claimants for it. Grant *v.* Fry, 4 Dow. Rep. 135; nor in any case where defendant is indemnified by a third party, for not delivering up property in his possession, by the claimant. Tucker *v.* Morris, 1 Dow. Rep. P. C. 639, S. C. (IV) Where defendant has been sued by two claimants for the same property—one in the K. B., the other in the C. P.—it seems necessary in order to relieve himself from both actions, to obtain rules in both Courts. Allen *v.* Gilby, 3 Dow. Rep. 143; and where part of the sum claimed by the parties has been paid to one of them before adverse claims made, the adverse claimant has a right to have the whole sum he claims paid into Court, on the holders applying for relief under this act. Idem.

In the case of a wharfinger who claimed a lien on the goods for wharfage, &c. it was decided that the Court would not interfere where the lien attaches only on one of the parties by whom the goods were claimed. Braddick *v.* Smith, 9 Bing, 84. S. C. (V.) but the Court will interfere where the lien attaches upon the goods in dispute, whichever party succeeds. Cetter *v.* Bank of England, 2 Dow. Rep. 728. S. C. It seems that the Court will not in general preclude the successful party from bringing actions for special damage through the detention of the goods. Lucas *v.* London Dock Company, 4 Barn. & Ad. 378.

The costs of the applicant, if he has acted *bona fide*, will be directed to be paid out of

the fund or proceeds of the goods in dispute. *Ducar v. M'Kintosh*, 3 Moore & S. 174. (VI.) and by a later case, where the third party did not appear, the costs of the applicant were allowed under the 3rd sec. of this Act, out of the fund, although by such allowance, plaintiff's property in the fund would be diminished, the plaintiff's remedy being against the third person, the wrong doer. *Pitchers v. Edney*, C. P. T. T. 1838.

Where money has been paid into Court under this Act, the successful party cannot move to have the money paid out until final judgment has been signed. *Cooper v. Lead Smelting Company*, 9 Bing. 634. (VII.) it seems that a rule nisi, under the 1st sec. of this Act, is no stay of proceedings, unless notice of motion for that purpose has been given to the parties against whom it has been obtained. *Smith v. Wheeler*, 3 Dow. Rep. 431. F. J. C.

(To be continued.)

(I.) Sec. 7. all rules, orders, matters, and decisions (except only the affidavits to be filed) are to be entered of record, and to have the force and effect of a judgment, except only as to becoming a charge on lands, and in case any costs shall not be paid within fifteen days after notice of taxation, a *scire facias*, or *capias ad satisfacendum* may issue.—ED.

(II.) The word "trespass," is omitted, in which the Court can give no relief.—ED.

(III.) 2 Moore & Scott, S. C.—ED.

(IV.) 1 Cr. & M. 73.—ED.

(V.) Id. 131.—ED.

(VI.) See *Cotter v. Bank of England*, 3 Id. 180.—ED.

(VII.) 2 Moore & Scott. 810. 1 Dowl. P. C. 728. S. C.

PROBLEM XIII.

ACTIONS AT LAW.

What is the mode of commencing an Action?

—shewing what the writs are to contain, and manner and time of service — The decisions that have been made upon defective writs or irregular service.

TO THE EDITOR OF THE LEGAL GUIDE.

Middle Temple, Jan. 17th, 1839.

SIR,—A dispute having occurred at Chambers concerning the question, whether "a bond to restrain a tenant in tail from committing waste is void?"—we have come to the determination of submitting the following questions for your decision.

1st, A tenant in tail, in consideration of marriage and the wife's portion, enters into a bond not to alien his estate by feoffment, fine or recovery, or by any other means, nor to commit waste, but to keep the estate in good condition, in order that it may descend to the issue of the marriage. Qu. Whether the bond is void at law or in equity?

2nd, Whether a tenant in tail can be restrained at law or in equity, in any case by an instrument, from committing waste; or from barring his estate, although he should be a party to such instrument?

The cases on this point are very contradictory. In the case of *Freeman v. Freeman*, 2 Vern. 233. a father settles land on his son in tail, and takes a bond from him, that he will not dock the entail. The bond was decreed to be good, as if the son had not given the bond, the father would have made him only tenant for life. In the case of *Jervis v. Bruton*, 2 Vern. 251. the father settles land upon his daughter in the same manner, and takes a bond from her that she will not commit waste. Bond held to be void.

In my opinion, for the same reason that the bond was good in the one case, the bond was also good in the other.

Hoping that you will be so kind as to solve our difficulty on these points,

I remain, Sir,

Your obliged and obedient servant,

HENRICUS.

OPINION OF THE EDITOR.

These questions certainly deserve consideration, not only from the *apparent inconsistency* of the decisions alluded to by our correspondent, but from the recent changes made in the laws governing real property. Previous to the statute 3 & 4 W. 4. c. 74. it was the established law that no

condition in restraint of alienation by fine with proclamations, or common recovery, imposed upon a tenant in tail having the power of acquiring the fee, should be permitted to take effect, and that all such conditions annexed to a grant in tail were absolutely void; and as one of the incidents to a tenancy in tail is, that of committing waste, any restriction against it imposed on the tenant in tail was also void. See 10 Rep. 38, 39. But tenant in tail might have been restrained from alienation by feoffment or other tortious act that should have amounted to a *discontinuance*. See Piers v. Wynn, Pollexf. 435; 4 Bacon's Ab. 161. 6 ed. 740. King v. Burchell, Amb. 372. Fearn's Cont. Rem. 257. Com. Dig. tit. Condition, D. 5. 6. 1 Rep. 85; 6 id. 43; 10 id. 39. Jermyn v. Ancot, Ins. 364; 1 And. 186; 2 id. 7; 4 Swn. 83.

Since the statute, we consider that the same rule applies to restrictions upon tenant in tail conveying the fee simple by deed according to the provisions of that statute.

It is considered that Jervis v. Bruton overruled Freeman v. Freeman; see Eq. Ca. Ab. 87. pl. 8.; and Poole's case, cited in Tatton and Molleneux, Moore's Rep. 809. upon the principle that the former tended to a *perpetuity*, which establishes the same doctrine in equity as hath been ruled at law; see also Glenorchy v. Bosville, Forest. 16. as well as the case in Vernon.

Such conditions are, in themselves, repugnant. It was held by C. J. Lee, that there are three sorts of *conditions* to be rejected,—*first*, such as are repugnant; *secondly*, such as are impossible in their execution; *thirdly*, such as are *mala in se*. 1 Atk. 378.

Discontinuances are virtually abolished by the statutes, 3 & 4 W. 4. c. 74. ss. 2. 14; & id. c. 27. s. 39.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR,

A difficulty has occurred to me relative to what stamps are requisite in cases of transfers of mortgages, with a further sum advanced by the same deed.

Suppose A mortgages his estate at W to B, for a term of 1000 years, for securing

500*l.* and interest. B calls in his money, and A wishes to procure a further advance of 100*l.* on the said estate, and C takes a transfer of the mortgage of the said estate, and also advances the further sum of 100*l.*, and the term of 1000 years is assigned to a trustee for C by the same deed, which contained forty-five folios.

What are the stamps required for this deed? As this is an important case, and as much difference of opinion exists in this neighbourhood relative to the necessary stamps, and as to whether it does not require a 1*l.* 15*s.* stamp, in respect of the assignment of the term, I trust you will give publicity to this in your next valuable number, with your general opinion thereon.

I remain, Sir,

Your most obedient servant,

A SUBSCRIBER, &c.

Wolverhampton, 15th Jan. 1839.

OPINION OF THE EDITOR.

There has been a great difference of opinion among conveyancers upon this question, caused principally by the opinion of Lord Wynford in Martin's case, C. P. 5 Bing. 160, which in fact amounted to nothing, and in which Mr. J. Gaselee particularly expressed himself in deciding upon the case, that it should not be understood he gave any opinion on the question about the stamp.

The question since came before the Court of King's Bench, in Doe v. Gray, 3 Adolp. & E. 89; 4 Neville & Man. 720, Easter Term, 1835. In that case, which was after the statute 3 Geo. 4. c. 117, had come into operation, Carter demised land, of which he was seized in fee to Rowland, for 1000 years, to secure 150*l.* and interest; afterwards Carter wanted a further loan of 200*l.*, which he procured from one Worsley. Worsley paid off. Rowland, who assigned the term to a trustee for Worsley and Carter, in consideration of the surplus money, also demised the land to the trustee for the residue of the term, to secure 350*l.* and interest, and in the mean time in trust for Carter, and to attend. By the same deed he conveyed the fee to Worsley, in trust to sell and to

raise 350*l.* On producing this deed it was objected to as containing four skins of 1080 words. On the first was a stamp of 1*l.* 15*s.* on the second a stamp of 2*l.*, on the third a stamp of 2*l.*, and on the fourth a stamp of 1*l.*, in all 6*l.* 15*s.*, which it was contended were insufficient.

The case was heard upon a rule before Lord Denman, C. J., and Littledale, Patterson, and Coleridge, Justices, and the Court held, that as regarded the transfer, the stat. 55 G. 3. c. 184. Sched. part 1., title Mortgage, treats a transfer where a further sum of money is added, as an original mortgage, and imposes a duty of 1*l.* 15*s.* only in cases, "provided no further sum of money be added to the principal money already secured," and here a further sum was added. The stamps, therefore, would have been, under that act, a 4*l.* ad valorem stamp, and three progressive stamps of 1*l.* each, exceeding the stamps actually used by 5*s.*

But the stat. 3 G. 4. c. 117. s. 1. repeals stat. 55 G. 3. c. 184., so far as regards the duties on transfers of mortgages, and enacts, by sect. 2., that in case of a transfer, "provided no further sum of money be added to the principal money already secured," there shall be paid 1*l.* 15*s.*, and a progressive stamp duty of 1*l.* 5*s.*; "and if any further sum of money shall be added to the principal money already secured, the ad valorem duty on mortgages, payable under the said recited acts respectively, shall be charged only in respect of such further money." It is observable that by this act the transfer duty of 1*l.* 15*s.* is imposed with the same proviso as was contained in stat. 55 G. 3. c. 184., and the court thought that the effect was the same, viz. that the *transfer duty* is imposed in those cases only where no further sum of money is added. Here a *further sum* is added, and therefore the *transfer duty* is *out of the question*. The other part of the section requires an *ad valorem duty on the sum added*: and the court thought that the effect of that part of the clause is to make this transfer, as regards stamp duties, an original mortgage for securing 200*l.*; and that the *ad valorem* stamp duty of 2*l.* is charged upon it by the 55 G. 3. c. 184.,

and that it followed that the progressive duty was three sums of 1*l.* each, and those stamps are actually on the deeds in question.

But it was said that this was an original mortgage by reason of the conveyance of the fee, and the court held that the third section of 3 G. 4. c. 117. does not apply to these deeds; for it is confined to cases where the original instrument, on which the *ad valorem* duty was paid, was a bond: here it was an indenture. This part of the question, therefore, turns on the exemption clause in 55 G. 3. c. 184.

That clause exempts from the *ad valorem* duty, but not from any other, any deed made as *additional* or *further security* for any sum of money already secured by a deed which shall have paid the *ad valorem* duty, *in case such further security shall be made by the same person who made the original security*; but, *if any further sum be added*, the *ad valorem* duty shall be charged *in respect of such further sum*. Here the person conveying the fee was the same person who created the term, and a further sum was added; and the Court said, therefore, if the deed had been simply a conveyance of the fee, and *had not conveyed a transfer of the term*, the duty would have been 2*l.* *ad valorem*, on account of the additional 200*l.* and three progressive duties of 1*l.* each. Whether a common deed stamp also was necessary under either of the acts, the Court said it *was not material to inquire*, because the 1*l.* 15*s.* stamp erroneously put on these deeds was sufficient to cover that stamp, if necessary. But, as the deeds in question do contain a transfer of the original mortgage, it is plain that before the passing of 3 G. 4. c. 117. the exemption clause in 55 G. 3. c. 184. would not have applied, and on the whole this must have been treated as a new and original mortgage, liable to the *ad valorem* duty of 4*l.* The act of 3 G. 4. c. 117. has, however, repealed that part of the 55 G. 3. c. 184. and substituted the same *ad valorem* duty of 2*l.* on the transfer in respect of the additional sum, as the exemption clause had already charged on the new security in respect of the additional sum; and as the *ad valorem* duty depends

on the sum secured, and not on the value or number of the securities, and is only to be paid once, it follows that the case is the same in effect as if the *ad valorem* duty of 2*l.* had been charged on the transfer, and afterwards the fee had been conveyed as a further security for the whole sum of 350*l.* in which case a common deed-stamp only would have been required.

We are therefore of opinion, that in the case put by our correspondent the *ad valorem* duty is payable *only on the additional sum advanced beyond the amount of the first mortgage, viz. an ad valorem stamp of 1*l.* 10*s.* if such additional sum does not exceed 100*l.** and this duty will extend to 30 folios, and that the following 15 folios should have a stamp of 1*l.* The deed does not require any other duty.

Law Reports.

COURT OF CHANCERY.

Trusts for the separate use of unmarried Women.

TULLET v. ARMSTRONG. (a)
SCARBOROUGH v. BOWMAN.

APPEAL.

These cases have been this week argued upon appeals from the judgments given by the Master of the Rolls, and our repeated observations upon the subject make it unnecessary for us to enter upon a detail of the arguments made use of for and against the appeals.—ED.

Jan. 24th.

The LORD CHANCELLOR said it was impossible the law upon this important subject could continue in its present state, and he would look into the cases before he gave his decision. He would now however observe, that he thought the Master of the Rolls was right in holding that if the property of the wife was protected at all, it should be so throughout. A wife's separate property could only be secured by excluding anticipation, and if a clause for that purpose was held to be inconsistent with the estate previously given, a married woman would be in a worse situation than before. It seemed difficult to reconcile the cases on the subject, and especially those in which the Vice-Chancellor, upon the petition of the husband, had directed the property to be handed over to him. His

Lordship then referred to a case in 2 Vernon, 270, which he said deserved the consideration of counsel on both sides, and he would be glad of their observations upon it after it had been examined.

The case here alluded to is Tudor v. Samyne, in which the assignee of a mortgages of a term, by the second husband of a woman, for whose "separate use and benefit" it had been assigned to trustees by her first husband, filed a bill against the wife and her trustees, to compel them to assign over the legal estate to the plaintiff, and it was decreed accordingly; the reporter adds, for as the husband may dispose of a term for years, where the legal estate was in his wife, so he may of the trust of a term without either the wife or the husband joining, and Sir Edward Turner's case, (b) cited that a term assigned by the first husband for the separate use of the wife, may be sold or disposed of by the second husband.

It was objected that the husband in this case had made no settlement or provision for the wife; (c) and if he was plaintiff, the Court would not decree the trustees to assign to him without making some settlement on the wife, and the plaintiff, who derives under the husband, ought not to be in any better condition, *sed non allocatur*.—Upon the meaning of these words *sed non allocatur*, Lord Hardwicke said, in Jewson v. Moulson, 2 Atk. 421., there was some dispute at the bar, and as to how *non allocatur* was to be applied, whether to the whole case, or to the words immediately preceding. So early as 14 Car. 1., in Tanfield v. Davenport, reported by *Tothill*, it is noticed as a rule in equity, that this Court will not suffer the husband to take the wife's portion until he has made a reasonable provision for her, from which it should seem that *non allocatur* is applicable only to the last preceding words. It seemed then settled that the husband and all claiming under him, must make a suitable provision if he sues for his wife's fortune, though equity will not interrupt the legal title of the husband unless he calls for its assistance. We have not time to enter

(b) 1 Vern. 7, S. C. See 3 P. Wms. 201.

(c) See Bosvil v. Brander, 1 P. Wms. and Cases.

(a) Reported, ante, p. 21.

more fully into the old cases, but hope that we have said sufficient to guide our readers.
—ED.

QUEEN'S BENCH.—Jan. 12—14.

THE CANADIAN PRISONERS.

(Continued from page 186.)

There was another act on the subject, the 56th Geo. 3., which was brought into Parliament by Serjeant Onslow. The 31st Cha. 2. being confined to criminal cases, it was thought that an evil still remained in those cases which were not criminal. The power of issuing writs of *habeas corpus* in vacation did not exist for those purposes. The act was the 56th Geo. 3. c. 109, "for the more effectually securing the liberty of the subject," and it recited that the former act extended only to cases for criminal matters; and then it went on to say that the judges might issue in vacation a writ of *habeas corpus* returnable immediately for the cases other than for criminal matters, or for debt. It related to cases of persons confined as lunatics, and parents separated from their children.

Mr. Justice COLERIDGE said it extended to commitments for smuggling.

The *Attorney General* thought those cases were considered rather of a civil than of a criminal nature.

Mr. Justice LITTLEDALE stated he had frequently granted writs in vacation, and no objection was taken on that account. A week ago he had granted a writ to a person committed to the House of Correction under the statute for disobedience to masters. There was an informality in the committal, and he had granted a writ of *habeas corpus*, and the prisoner was discharged. In the case of Miss Coutts, which was heard before Lord Denman, the prisoner was also discharged.

The *Attorney General* said that was the case of Dunn, who was committed, as he understood, for not giving sureties of the peace. That was bailable, and he was entitled to his liberty at any time.

Lord DENMAN stated that it was for want of sureties.

The *Attorney General* would submit, that where the party was committed in the execution of the sentence at common law, there could not be a writ granted in vacation by a single judge; here there had been the fiat of a single judge. He would cite two cases to their Lordships—one, that of Crosbie, in 2 Sir W. Blackstone's Reports, 578, where the writ of *habeas corpus* was considered at common law, and it would appear that it was thought that a judge in vacation at chambers could not take cognizance of it, and the Lord Mayor and Aldermen were remanded. This case had to come before Lord Mansfield and Lord de Grey, and from their decision he inferred that those learned Lords had granted the writ: but when the matter came on before them in vacation, they thought they had no jurisdiction,

and without allowing the merits to be canvassed they remanded the prisoners. Then there was a motion made in term for a *habeas corpus*, and that was heard and disposed of. Again, in Sir John Hobhouse's case, it was stated, that it was a *habeas corpus* at common law, intimating that it was not a case in which a judge at chambers in vacation had jurisdiction to grant the writ. Sir John Hobhouse had been confined under a warrant of the Speaker of the House of Commons, and he apprehended he had a right to make the application to the Court to have the opinion of the Court as to the validity of that warrant, but that being a writ of *habeas corpus* at common law, it could only be moved for in term time. It appeared by the return in this case that the prisoners were in execution of their sentence on a criminal matter; therefore he apprehended that this writ, when the return was made—for he did not object to the granting of the writ by Mr. Justice Littledale, for in his humble opinion that learned judge was bound to grant it—the return showed the cause of the commitment, and he conceived their Lordships would say that the writ did not give their Lordships jurisdiction to canvass the merits of the case. If that was so, instead of throwing any obstacle in the way of the merits being discussed, he should be anxious to facilitate it.

Mr. Justice COLERIDGE asked if the Attorney-General had looked at Croley's case, as to the right of the judges to issue the writ in vacation. It was fully considered in that case, as reported in the 2d Swanston.

The *Attorney-General* would admit the right existed so far as the Court of Chancery was concerned.

Mr. Justice COLERIDGE said it extended the right to the judges of this court.

The *Attorney-General* said, if the judges of this court at common law had a right to grant the writ in vacation, it would be unnecessary to consider whether this case came within the 31st of Charles 2, or the 56th of George 3; but it seemed to have been established that that could not be done.

Mr. Justice COLERIDGE said, in this case Lord Eldon had overruled the decision in Jenks's case.

The *Attorney-General* said it was upon that case that the *Habeas Corpus* Act had passed. In Bacon's *Abridgment*, title "*Habeas Corpus*," it was said the court had the power, but at common law only in term time; but that the Chancellor might have done it as well in as out of term.

Mr. Justice LITTLEDALE.—One object of Serjeant Onslow's act was to enable the parties to file affidavits and discuss the merits of the case.

The *Attorney-General* said that was the object of one section; the first section gave a power to a single judge, where any person was confined other than in a criminal matter, unless imprisoned for debt, it should be lawful for one of the judges to grant a writ of *habeas corpus* returnable immediately before the per-

son so awarding it; so that it seemed to have been established perfectly at that time that it was at common law. He did not know what the practice was before the passing of the 56th of George 3.

Mr. Justice LITTLEDALE would put this case—Many persons were confined as lunatics, and many children were withheld from their parents. There were many instances of this kind before the passing of 56th Geo. 3. Surely a judge in vacation could grant a writ; a great many things were granted in vacation.

The *Attorney General* could not say what the practice was before 56th Geo. 3.

Mr. Justice LITTLEDALE—The object of the act might be destroyed if parties had to wait during the long vacation.

The *Attorney General* would submit that until that statute no such writ had been granted.

Mr. HILL said that Chief Justice Wilmet, in his book, had given many instances in which writs of *habeas corpus* had been granted during vacation, and that book was written before the statute of 56th Geo. 3. The Attorney-General had complained that they had not given the points they intended to make; it would have been advisable that his friend should have given him some information that a preliminary objection of this kind was to have been discussed, in order that he might have had time to look at a point of such great importance touching the bulwark of the liberty of the subject in this country, and which, so far as his friend was attempting, went to destroy that bulwark.

The *Attorney-General* thought his friend had made a very unnecessary interruption. He concluded by stating that he should have thought that a writ of *habeas corpus*, like a writ of *mandamus*, was to be moved before the Court in term time, and therefore that without statutable law the judge had no jurisdiction in vacation.

The *Solicitor-General*, on the same side, said, of course their Lordships understood that this objection was not made with a view of getting rid of the question, because whether it was decided then or at some future time, of course it could not be the intention of the law officers of the Crown to attempt to throw any obstacle in the way of having the question disposed of; but it appeared to those law officers to be their duty to call the attention of the Court to the real question before them. The conclusion to which they had arrived was this—that whatever might have been the popular notion of the subject, a judge in vacation had no right to issue a writ of *habeas corpus*, except for persons improperly committed and improperly detained. Their Lordships' attention had been called to the 31st Charles 2., and he would take the liberty of showing them a little more of that statute. (The learned counsel then read the preamble of that act.) Up to that time it stated that there were great delays as respected sheriffs and gaolers in bringing parties to trial, and therefore that statute enacted that every sheriff upon service

of a writ of *habeas corpus* should bring up the body of the party within a given time. The statute having pointed out the offences that required the remedies, enacted that every sheriff, upon having the writ of *habeas corpus* served upon him, should immediately bring up the body of that person; but it expressly excluded persons in custody on conviction, or in execution. Persons detained in other cases might apply to a judge in vacation to issue a *habeas corpus*.

Mr. Justice COLERIDGE asked if Mr. Hill contended for this under the *Habeas Corpus Act*?

Mr. HILL said, he contended that this was a writ at common law, and that their Lordships and every one of them had a right to issue it.

The *Solicitor-General* said, one of their Lordships had directed his attention to Croley's case. He had not read it with reference to the present argument, but his impression was, that Lord Eldon's notion was, that a *habeas corpus* was a writ issuable at common law at all times in Chancery, and in term time by the judges of the Court of Queen's Bench.

Lord DENMAN said, the question then was, whether Lord Northington had done right in refusing to issue the writ in vacation, and Lord Eldon thought he had done wrong. Did the common law judges stand in a different position?

The *Attorney-General* thought they did, because the Court of Chancery was always open.

Mr. Justice LITTLEDALE—Would not the same objection arise upon all writs issued in vacation—all were tested in term?

The *Solicitor-General* had very imperfectly cast his eye on that report, but there were several quotations in it from other cases, and it might be quoted as high authority. As far as he could trust his own memory, the case turned upon this, that the Court of Chancery was distinguished from the other courts—that court might issue a *habeas corpus* at any time.

Mr. Justice COLERIDGE thought Lord Eldon had said that it was matter of doubt whether the judge of that court could issue the writ in vacation, and more doubt as to the judges of the other courts.

The *Solicitor-General* said, their lordships would recollect Lord Eldon's way. He had great desire to shift from the Court of Chancery the burden of issuing these writs, and he was delighted to do so, and thus Lord Eldon might throw out suggestions of this sort, quite consistent with the mode in which he always administered justice. It was unfortunately a mode that frequently left the law more at sea than having any tendency to settle it. The learned counsel then referred to 2 Inst. page 53. If the writ was to be granted at any time by a single judge, that judge might decide upon the return, and the public would not have the decision of the whole Court on a case of such great importance. Their lordships had referred to a case of Custom-house officer;

that was the case of a person committed for the non-payment of a penalty. That was not considered a criminal case. That was a case before Chief Baron Eyre on the trial of a party for a breach of the revenue laws, and evidence was tendered as to the character of the party, but his Lordship refused to receive the evidence, as it was a civil suit. There would not have been any remedy in many cases but under Serjeant Onslow's Act, and there the *habeas corpus* must have been returnable in term time. The object of the act was to bring on the trial of the parties, and it seemed to him that the writ was not issuable under the 31st of Charles 2. All this, however, fell to the ground upon his being told that it was a writ issuing at common-law, and he apprehended it was for his learned friend to show what authority the Court had to issue the writ. The whole tenour of the argument in Croley's case was, that the writ in vacation could only issue under this statute.

Sir F. Pollock, on the same side, said, that it was laid down in Bacon's *Abridgment*, title "*habeas corpus*," that both by common law and statute the Courts had jurisdiction, but it seemed that by the common law the Court of King's Bench could only have awarded it in term time, but that the Court of Chancery might have done it in vacation as well as in term time, because that court was always open. Certainly the opinion would be that out of term time this Court had no jurisdiction, and he apprehended it would hardly be found in such a work as Bacon's *Abridgment*, if there had existed a single instance before the statute of Charles of a judge having issued a writ out of term time. There was no analogy between this case and writs issued in vacation, which were always supposed to have been issued in term, which were issued by a sort of fiction that applied to every case of every sort that was supposed to issue in term.

Lord DENMAN said that his learned brother (Mr. Justice COLERIDGE) had read from the text of Blackstone what he considered to be the practice, in which he stated that the writ might be issued by a single judge in vacation, and he referred to three cases in Burrow, pages 460, 542, and 608.

Sir F. Pollock said, every one of those cases was since the statute of Charles; and Lord Eldon said, that Blackstone in his *Commentaries* had not given this point with his usual accuracy, and that the writ was issuable not only in term but in vacation. That might be a case within the act of Parliament. Lord Eldon expressly points out that passage in Blackstone is incorrect. All the cases just mentioned occurred since the statute of Charles II.

Mr. Justice LITTLEDALE said, that though they had occurred since that statute, they might not all have been within it.

Sir F. Pollock continued.—Blackstone observed, "If the writ issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon, unless the term should intervene, and

then it may be returned in court." Upon this Lord Eldon remarked, "If this applied to the practice of the King's Bench, subsequent to 31 Car. II., it is accurate—that is, supposing the opinion of the judges delivered in 1758 to be correct, that the justices of that court could issue the writ in vacation." But inaccuracy was imputed to the text of Blackstone in so far as it implied that a writ of *habeas corpus* might be issued and made returnable in vacation by the common law courts in course of the common law. In a recent edition of Bacon's *Abridgement* there was a collection of all the opinions of all the judges on no less than ten different questions put to them by the House of Lords in 1758. At that time a bill similar to Serjeant Onslow's act was introduced into Parliament, and passed through the House of Commons. When it came before the Lords they proposed ten questions to the judges, one of which was, "What would be the effect of the bill then under consideration?" which the judges declined answering, stating that it was their duty to expound the law as it stood, but not give an opinion on the effect of a measure under discussion. They, however, answered the other questions, one of which related to the issuing of a writ of *habeas corpus* in vacation. As he had only received his instructions with respect to this matter late on Saturday last, his recollection only enabled him to allude to this circumstance, having had no opportunity of making researches; but their lordships would find in Bacon's *Abridgment* the collection of the opinions of all the judges. The House of Lords subsequently directed the judges to prepare a bill on the subject; but the matter slept from 1758 until 1816, when Mr. Serjeant Onslow's bill passed. As far as he recollects, he believed the judges were unanimously of opinion that since the statute of Cha. 2. there was no doubt of their ability to issue a writ of *habeas corpus* during vacation; but whether they could issue such writ in vacation in reference to matters to which that statute did not apply, was the question now before the Court. If he could show that prior to the statute of Cha. 2. this Court never issued a writ of *habeas corpus* in vacation and returnable in vacation, then the question would be, whether that statute was not confined to the cases to which it immediately applied. And here he would call the notice of the Court to an observation by Lord Eldon on the 16th of Cha. I. That noble lord observed, that that statute "gives no jurisdiction to the judges of the Common Pleas to issue a writ of *habeas corpus*, except in cases therein mentioned; but then, by a construction in favour of the liberty of the subject, they have granted the writ in other cases, and have inferred, from a statute giving them power in certain specified instances, that they possess a general power to issue the writ." After what had fallen from the Attorney-General he thought it unnecessary for him to trespass upon the time of the Court any longer.

Mr. Wightman followed upon the same side. He said that the writ now under consideration

was issued in vacation, and it was admitted upon the other side that it was not issued under the 31st of Charles II., but in course of common law. Now he had taken pains to investigate the matter, and he had been wholly unable to find a single instance of a writ of *habeas corpus* issued by the courts of common law before the 31st of Charles II. which was tested and made returnable in vacation. Blackstone certainly intimated that a writ might issue and be returnable in vacation, and cited three cases from Burrow in support of his opinion. But all those cases had arisen after the passing of the 31st Charles II., and it did not appear whether they arose under that statute or not. He was at a loss to understand how, previous to the 31st Charles II., a writ of *habeas corpus* could issue from and be returnable to a court of common law in vacation. With respect to the Court of Chancery, which in the eye of the law was always sitting, it was laid down that a writ of *habeas corpus* might issue from that court at any time, and be returnable at any time, but not so with regard to a court of common law. The following passage was to be found in Bacon's *Abridgment*—“It is clear that both by the common law, as also by the statute, the Courts of Chancery and King's Bench have jurisdiction of awarding this writ of *habeas corpus*, and that without any privilege in the person for whom it is awarded. But it seems that by the common law the Court of King's Bench could have done it only in term time, but that the Chancery might have done it as well out of as in term, because that court is always open.”

Lord DENMAN—Do you not find any precedents of writs of *habeas corpus* previous to the 31st of Charles II. returnable immediately?

Mr. Wightman—No, my Lord.

Lord DENMAN—To be of any use, the writs should be returnable immediately; but, of course, this consideration alone did not empower the judges to enforce an immediate return.

Mr. Wightman said, that the passage already quoted from Bacon's *Abridgment* showed that there was a difference in the power of the Court of Chancery and the courts of common law with reference to the issuing of writs of *habeas corpus*, and inconveniences had, no doubt, arisen from this distinction, and led to the enactment of Charles II. But this last law was not found sufficient, as it did not include a number of cases requiring redress; and, therefore, the 55th George III. extended to such cases. He would put it, however, to his learned friends on the other side to show an instance before the statutes of Charles II. and George III. in which a writ of *habeas corpus* had issued and been made returnable in the vacation. He would conclude by directing the attention of their Lordships to the following observations by Lord Eldon with reference to Jenks's case, which he thought were applicable in the present instance. That noble lord said—“The statute of 16th Charles I.

having been passed before this commitment, and having given to the judges of the King's Bench and Common Pleas a right to issue the writ of *habeas corpus* in cases therein mentioned, in the then state of the law, a subject committed for what is here represented, it being clear that under that act of Charles I. the Courts of King's Bench and Common Pleas could not issue the writ in vacation, was altogether without remedy, unless the Chancellor being applied to could issue the writ in vacation, and make it returnable not immediate, supposing him to have issued it for the purpose not of giving immediate relief, but of securing to himself, if he knows the distinction of term, or to some other court in term, the means of deciding whether the commitment was proper.”

He read a statement in Bacon's *Abridgment*, bearing on the question. As follows:—“Notwithstanding the writ of *habeas corpus* be a writ of right, and what the subject is entitled to, yet the provision of the law herein was in a great measure eluded by the judges being only enabled to award it in term time.”

Lord DENMAN, after a short consultation with his learned brothers, said they had considered the objections which had been made yesterday as to the return of the writs, and they were of opinion that it was not necessary to hear the arguments on the other side; for they had decided to be bound by a practice which had existed and been sanctioned by the courts for a great number of years. In 1758 the question came before the judges, and indeed had been decided before that time in various cases. In that year, however, a bill was introduced into the House of Lords to remedy some defects relative to writs of *habeas corpus*, and on the point in question seven out of the ten judges who were present gave their opinion as he (Lord Denman) now stated it. Chief Justice Wilmot at that time observed, that at least for eighty years the practice had been similar, and he referred to cases of even earlier date. He (Lord Denman) and his learned brothers were aware that they had a right to consider these questions, but to them it would seem like tampering with the great remedy which the writ of *habeas corpus* gave to the subject, if they were not to abide by the decision of the judges in the case he had spoken of, and allow writs to be issued in the vacation. At the time to which he referred seven judges out of ten had so decided it, and although Mr. Justice Foster was prevented from attending, he was of the same opinion, and wished indeed to carry the writ of *habeas corpus* further. This manifested the practice at that time, and it had been well ascertained since, and the act alluded to being dropped, was another proof of such opinions being well founded.

(To be continued.)

COURT OF EXCHEQUER.

*Hilary Term.**Sittings in Banco.***BENNET v. BROUGHTON and AVERY.***Whether a Police Constable be entitled to notice of action, under the 10 G. 4. c. 43.?*

Mr. Butt moved to enter a verdict for the defendant Avery, in this case, which was one of trespass against Mr. Broughton, the police magistrate, and Avery, one of the police force, by which the plaintiff sought to recover compensation for the alleged misconduct by which one William May, a debtor of the plaintiff, was rescued from the hands of the sheriff's officer. At the trial, Mr. Broughton was acquitted, on the ground of an informality in the notice of action, as also on the merits of the case; but it being the opinion of Lord Abinger, who tried the cause, that Avery was not justified in doing what he did by the order given by Broughton, the case went to the jury upon contradictory evidence as to the identity of the person rescued by him, and the jury gave a verdict against him for 10*l.* Leave, however, being reserved to the learned counsel, the present motion was made with a view of raising the question, whether, under the terms of the 41st sec. of the Metropolitan Force Act, Avery was not also entitled to notice of action, in order to enable the plaintiff to maintain his action, there not having been any served on him?

Per curiam.—You may take your rule nisi.

OLIVER v. WOODROOFFE.*An infant cannot execute a cognovit.*

Mr. Wordsworth having obtained a rule to set aside a cognovit, given in this action by the defendant, a minor, and also all the subsequent proceedings;

Mr. Humfrey shewed cause, and contended that the cognovit was not void, from the fact of its being given by an infant. Such an instrument was very different from a warrant of attorney, which it was admitted an infant could not bind himself by giving.

Mr. Wordsworth in reply, argued that there would exist no reason why an infant should not give a valid warrant of attorney, if he should be allowed to bind himself by such an instrument as a cognovit. The rule was drawn up on reading the cognovit, and the appearance of the defendant entered for him by the plaintiff's attorney in pursuance of it, and it was therefore abundantly clear that the cognovit authorised the plaintiff's attorney to do an act for the defendant which the law expressly said, an infant could not delegate to an attorney. The Court having taken time to consider its judgment, afterwards on the following day,

Lord Abinger said, We are all of opinion,

that an infant cannot give a cognovit, which embraces all the characteristics of a warrant of attorney. The principle of the law is admitted to be, that an infant cannot do any act which is to his own prejudice, but here he deprives himself of the power of appealing to a Court of Error, which must be held to be an act highly to his prejudice, and therefore prohibited by the law. Neither can he state an account—but if he be brought into Court, the jury will do that act for him; while he is also prevented by the law from authorising any one to appear for him as his attorney. Each and all, however, of these three matters are embraced within this cognovit, and for those reasons we are very clearly of opinion that the cognovit and all subsequent proceedings must be set aside for irregularity.

Rule absolute accordingly.

STEWART v. ROGERS AND TAYLOR.*Where one defendant has suffered judgment by default, the other is entitled to move for Judgment as in case of nonsuit.*

Mr. Keating having obtained a rule nisi for judgment as in case of a nonsuit, on behalf of the defendant Rogers,

Mr. Palmer shewed cause, and contended that a defendant was not entitled to have judgment as in case of a nonsuit, where another co-defendant has suffered judgment by default. It was laid down in *Harris v. Butterly* and others, in Cowp. 483, that the plaintiff could not be nonsuited where one of several defendants had already suffered judgment by default; and though that was an action of tort, yet it was submitted to be analogous to the present one, which was in assumpsit. Besides this, however, there was the case of *Hannay, Bart. v. Smith* and another, where it was laid down that a plaintiff could not elect to be nonsuited at the trial, when one of the defendants had already suffered judgment by default, but that the other defendant was entitled to have a verdict. So here it was submitted that one defendant having suffered judgment by default, it was not competent to the other to claim judgment as in case of a nonsuit from the plaintiff.

Per Curiam, however, the case in Cowper being in tort, is no guide to this case, and that in Term Reports, is where the plaintiff was the applicant to the Court; and neither of them affect the case of *Jones v. Gibson*, in 5 B. & C. 768, and that of *Murphy v. Donallan*, in page 178 of same volume, both of which were cited by Mr. Keating in moving for the rule—which must be made absolute as far as this point is concerned. Ultimately, however, the case went off on the merits as shewn by the affidavits, and the Court ordered a *stat processus* to be entered.

Rule discharged accordingly upon these terms

INSOLVENT DEBTOR'S COURT.

JEREMIAH BOARD'S CASE. Jan. 22.
Abolition of Imprisonment for Debt Bill.
 Sec. 66.

Power of the Court to commit prisoners to Newgate for contempt.

The rule obtained in this case (a) under the 66th Sec. of this Act to shew cause why the insolvent should not be committed to Newgate for contempt of the Court, in not having filed a schedule in compliance with an order of the Court to that effect, and for which purpose he had been brought up by a creditor under the 36th sec. was argued on the 2d inst., (b) and the Commissioners before whom the argument was made, took time to consult their colleagues whether or not the 66th sec. gave them authority to remove a prisoner from one prison to another.

Mr. Commissioner BROWN considering that as the legislature had not given them *specific power* in such cases, the clause was nugatory as affecting insolvents already in custody.

The Chief Commissioner this day delivered

the opinion of the Court, which was, that the warden of the Fleet Prison would be entitled legally to resist the removal of the prisoner from his custody to Newgate, and that the rule must be discharged.

HENRY GOMPERTZ'S CASE.—Jan. 18.
Abolition of Imprisonment for Debt Bill.
 Sec. 36.

Time allowed for prisoner to file his schedule on being brought up by creditor to do so.

The Court had already granted the insolvent a month's time to file his schedule, and this day Mr. Cooke applied for further time. The insolvent had been living in the rules of the Queen's Bench Prison for some time. One of the creditors had petitioned the Court under the compulsory clause of the new act, and on that application the estate had been vested in the provisional assignee. The month was nearly expired, and further time was requisite for preparing the schedule.

The Court granted ten days.

A LIST OF ARTICLED CLERKS APPLYING TO BE ADMITTED AS ATTORNEYS
 IN THE COURT OF QUEEN'S BENCH, EASTER TERM, 1839.

<i>Clerk's Name and Residence.</i>	<i>To whom articled, assigned, &c., and Residence.</i>
Ainsworth, Sam., 13, Cursitor-st., Manchester Allee, Lawrence Turton, 2, Wilson-street, Gray's Inn Lane; and Rookley	John Sudlow, Manchester. James Ralfe, Winchester.
Allison, Henry, Pavia Pl., Park Rd., Dalston; and White Conduit Grove, Islington	Robert Nesham, Darlington.
Atter, James, Battle; and Stamford : . .	Thomas Hippisley Jackson, Stamford.
Adney, John, 77, Great Tower-street : . .	Septimus Smith, Blandford; assigned to Thos. Pearson, 22, Essex-street, Strand.
Allatt, William, Bretton, York : . .	John Sanderson Archer, Ossett.
Abbott, Vernon Montague, 70, Gower-street	Charles Murray, Chancery-lane; assigned to James Arch. Murray, Chancery-lane.
Benn, John Higginson, 9, Featherstone Build- ings; and Rugby	William Wise, Rugby.
Bird, Henry, 1, Sussex Place, Islington; and Arundel-street, Strand	John Cole, Odham and Basingstoke.
Bennett, William Woolley Leigh, 20, Judd Place West, New Road; and Buckingham	Thomas Hearn, Buckingham.
Barber, Samuel, 5, Warwick Court; and Heaton Norris, Macclesfield	Henry Coppock, Stockport.
Buchanan, William Ralph, 4, Montague Place, Old Kent Road	Hugh Lewis, 22, Artillery-pl. West, St. Luke's.
Brooks, Abraham James, Portsea : . .	David William Weddell, Gosport; assigned to William Minchin, Portsea.
Baker, Henry, 37, Gloucester-street, Queen's- square; and Maze Pond, Southwark	William Mitchell, Petersfield; assigned to W. Lawrence Bicknell, Lincoln's Inn Fields
Beesley, James, Banbury : . .	William Walford, Banbury.
Bunting, Jabez, the Younger, 30, Myddleton- square; and Manchester	Thomas Percival Bunting, Manchester.
Bird, John Proctor, 13, Penton Place, Ken- nington-road	William Smith, 22 John-street, Bedford-row.
Bishop, Frederic, 13, Bouverie-street; and Shelton-hall	William Bishop, Shelton Hall.
Bryan, James, 13, Wingrove-pl., Clerkenwell	Charles Edward Hunt, Barnard's Inn.
Barber, George, 10, New North-street, Isling- ton; and Reading	John Lambert, Alnwick.
Billings, William Frederick, Cheltenham : .	Thomas Billings, Cheltenham.

(a) See ante, p. 108.

(b) See the Argument Reported, ante, p. 153.

<i>Clerk's Name and Residence.</i>	<i>To whom articled, assigned, &c., and Residence.</i>
Brooks, John, the Younger, Ashton-under-Lyne	Alfred Higginbottom, Ashton-under-Lyne.
Bradley, Edward Gould, 7, Castle-street, Bloomsbury; Bath; and Reading	Robert Clarke, Bath.
Barton, Richard Carroll, 7, Cheltenham-place, Lambeth	Joshua Mayhew, 26, Carey-street.
Clayton, Sykes, Kippex; and Strand on the Green	Beauvoir Brock, Loughborough.
Crockett, Richard Singleton, 13, Warwick- court; Holborn; Wolverhampton; and Gray's Inn	Edward Mortimer Green, Ashby-de-la-Zouch; assigned to Henry Turner, Wolverhampton; assigned to Campbell W. Hobson, Gray's Inn.
Coles, James Bond, Taunton	Thos. Milliken Mills, Taunton; assigned to J. Manning Innes Hazelton, Taunton.
Challinor, Edward, 7, Bedford-street, Bedford- row; and Manchester	John Norris, Manchester.
Cory, Charles, Argyll Chambers; and Great Yarmouth	Robert Cory, the Younger, Great Yarmouth.
Cooper, Samuel Nicholas, 70, Margaret-street, Cavendish-square; and Crawford-street, Portman-square	William Read King, Serjeant's Inn, Fleet-st.
Clutton, John, the Younger, 3, Webbe-street, Southwark	John Clutton, the Elder, High-st., Southwark.
Cronhelm, John, Leeds	Edward Harker Soulby, Leeds; assigned to Edwin Eddison, Leeds.
Cory, Edward James, 39, Lamb's Conduit- street; and 104, Brook-street, Lambeth	Charles Kingdon, Holesworthy, Devon.
Cameron, Dugald Edward, 21, Somers-place East, New-road	John Campbell Cameron, Raymond Buildings
Clough, William Thomas, Pontefract	William Clough, Pontefract.
Dyson, Matthew Henry Moorhouse, Holmfirth	Martin Kidd, Holmfirth.
Dunn, Henry Thomas, 8, New Inn	John Dunn, Durham; assigned to William Vizard, 51, Lincoln's Inn Fields.
Davenport, Robert, 15, Montpellier-square, Brompton	John Marriott Davenport, Oxford; assigned to Joseph Blower, Lincoln's Inn Fields.
De Medina, Henry Augustus, 32, Fitzroy- square	Edward Rice, Verulam Buildings, Gray's Inn.
Evans, William Cornwallis, 7, Prince's-street, Upper Stamford-street, Lambeth; and Saltash	William Richard Berryman, Devonport.
Edwards, James Barber, Deal	John Mercer, Deal.
Fell, Robert, Durham	John Burrell, Durham.
Foreade, Henry William, 44, York-road, Lam- beth	John Hunter, Bank Chambers, and 2, Air-st.; assigned to Wm. Pyne, Inner Temple-lane.
Gilham, John, 112, Fetter-lane; and 15, Win- grove-place, St. John-street-road	John Shearman, 21, Bartlett's Buildings.

(To be Continued.)

Business in the Courts.**COURT OF CHANCERY.**

Eton College *v.* the Great Western Railway,
appeal motion, part heard.

Causes.—The Attorney-General *v.* Barker,
part heard—De Haviland *v.* Saumarez, by
order—Portman *v.* Mill, exceptions and fur-
ther directions—the Same *v.* the Same—David-
son *v.* Cutler, further directions—Noel *v.* Mid-
leton, exceptions.

VICE-CHANCELLOR'S COURT.

His Honour will take, first, short causes
(13 in the paper), after which, 12 unopposed
petitions.

After the unopposed petitions, Rees *v.* Rees,
petition by order.

His Honour will next proceed with the ad-
journed cause petitions, commencing with
Richards *v.* Macclesfield, part heard.

After the petitions, Spry *v.* Bloomfield, de-
murrer by order—Hill *v.* Collett, cause by
order.

COURT OF QUEEN'S BENCH.
*Sittings in Banco.***COURT OF COMMON PLEAS.**
Sittings in Banco.

The LORD CHIEF JUSTICE has intimated to
the bar, that in consequence of the state of
the business of the Court, it was their inten-
tion to devote the Tuesday after term and the
remainder of that week to sittings in bench;
on the Saturday and Monday next after the

term his Lordship would sit at *Nisi Prius*, and try common jury cases; on the Monday week after term he would try one of the two special jury cases appointed for an early day, but on the next day (Tuesday) he should be obliged to sit in the Court of Error.

London Common Juries.—*Haye v. Bush—Stent v. Goodman—Robertson v. Cornish—Griffin v. Murgatroyd—Harrison v. Cooke—Williams v. Allen—the Same v. Ravenscroft—Hall v. Wells—Swift v. Goodwin—Hood v. Warr—Weibel v. Ramsey—Sibley v. Kingett—Pocock v. Francis—the Same v. Child.*

COURT OF EXCHEQUER. *Sittings in Banco.*

EQUITY EXCHEQUER.

Perring v. King, further directions and exceptions—Pope v. Garland—the Same v. the Same, further directions and petition—Ricketts v. Loftus, exceptions—Cowgill v. Lord Oxmantown, ditto to report—Clayton v. Meadows, plea—Sharp v. Sharp, exceptions to report—Hewson v. Brooks, exceptions—Owen v. Owen, further directions.

TO SUBSCRIBERS.

We propose every six months to prepare a copious Index for this work, which can then be bound, and will form two volumes in each year.

TO CORRESPONDENTS.

“H. D. M.”—A correspondent writes to us in complaint that in your Answer to Problem X. you have drawn “a limitation that would never under any circumstances warrant your conclusion,” viz. that under a limitation to A and his heirs on the body of B. begotten, upon a divorce *a joint estate for life* would arise, and that you have fallen into the error by erroneously copying an article in Watkins’s Conveyancing. We do not blame you for selecting so excellent a work to support your views, but blame certainly attaches to you for want of proper care—the limitation should have been in order to create a *joint estate for life* to A and his wife and the heirs of their two bodies, as it is very properly put by our correspondent M. We leave H. D. M. to answer him.

M.—We are much gratified with his

communication—this criticising the productions of each other by the students is as it should be. With regret, however, we find ourselves compelled to blame him also for want of proper care. If in his just criticism upon the production of H. D. M. he had *indeed* looked at “Watkins’s Conveyancing” as the text book from which the erroneous quotation is stated to have been taken, we must say that he can see better than we can; for it is an extraordinary fact, that Mr. Watkins does not take any notice of such an estate as “tenant in tail after possibility of issue extinct.”

“An Annual Subscriber, Romsey,” is answered in our Notice to Subscribers.

“Henricus.”—His answer to Problem X. came too late, and we are sadly pressed for room.

“C. T. H.” is under consideration.

“A Subscriber.”—Next week.

“E. C. W.”—A very peremptory and imbecile letter has been addressed to our publishers, for which they had to *pay the postage*. It contains a quotation of twelve lines from Blackstone, professing to be an Answer to our Problem XII.; it was forwarded to us as being its probable intended destination; but we think it some hoax from a Vauxhall Day-school—if not, we recommend the gentleman to go to school for twelve months, and get polished before he attempts again commencing the *genius*. Our columns are open only to men of education, talents, and industry.

CHANCERY CLERK.

L AW—WANTED, the services of a person who fully understands the Practice of the Court of Chancery, for two or three hours in the evening of the day. Apply to Mr. HOUGHTON, 30, Poultry.

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Price 6d. Stamped Edition, 7d.

The Legal Guide.

No. 14.]

SATURDAY, FEBRUARY 2, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from p. 195.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The new Statute of Limitations, relating to Real Property, 3 & 4 W. 4. c. 27.

Sec. 36. Real and Mixed Actions—continued.

IN our last we shewed what was a complete title, according to the ancient maxim of law, and the four several denominations of ordinary injury to such a complete title, with their former remedies, now by this section abolished.

The only real actions saved by this section are those of Dower, which is more commonly the subject of a bill in equity; Dower *underrit habet*; *Quare impedit*, the (ordinary remedy of the patron of a church for obstruction in the exercise of his right of presentation;) and Ejectment.

Quare impedit, we have before noticed in our observations upon the title required to advowsons and ecclesiastical benefices; and we will now look at the other actions that are saved, and commence with that of *Ejectment*.

This action is in point of form a *personal action* of trespass. It has for its object to recover as well the possession wrongfully kept as also compensation for the injury sustained, and heretofore was in great use instead of many of the remedies now abolished, and being partly real and partly

personal, was called, as it is in effect, a *mixed action*, by which a lessee for years, when ousted of his possession, may recover his term and damages. Its *inconclusive* nature, with its comparative facility and easy expense, made it the ordinary remedy for the recovery of land; and though the judgment does not decide *directly* as to the title, but merely as to the immediate possession, yet it does so *indirectly*. As if A brought this action, claiming under a lease by B, who claimed as devisee under a will, the verdict went only to affirm or disaffirm the right of B to make the alleged lease, without *defining* the quantity or quality of B's estate; yet that right would depend on the solution of previous questions of construction,—as whether a prior devisee who had suffered a recovery took an estate tail or an estate for life, only, and whether B himself, supposing he were dead, had any and what more durable estate than for his own life: so that this action afforded the means of obtaining incidentally a judicial opinion upon points of title. It is governed by the 2d and 16th sections of this Statute; it is not affected by the Statute 2 W. 4. c. 39, called the Uniformity of Process Act, and therefore may be commenced as before that act, either by original writ in the Queen's Bench or Common Pleas, or by bill in the Queen's Bench or Exchequer of Pleas. (a) In proceedings by landlord against tenant, when the tenancy expires, or right of entry accrues in or after Hilary or Trinity Terms in any year, it is governed by the Statute 11 Geo. 4 and

(a) See Tidd's Pract. 60.

1 W. 4. c. 70. which enacts, (by sec. 36,) that in all actions of ejectment to be brought in any of his Majesty Courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant for the recovery of any lands or hereditaments, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord in or after Hilary or Trinity Terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire or right of entry accrue, as aforesaid, to serve a declaration in ejectment entitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto within ten days in the court in which such action may be brought, and proceeding shall be had on such declaration, and rules to plead entered and given, in such and the same manner as nearly as may be as if such declaration had been duly served before the preceding term. Provided that no judgment shall be signed against the casual ejector, until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes, at which such ejectment is intended to be tried; and also, provided that any defendant in such action may, at any time before the trial thereof, apply to a judge of either of his Majesty's superior Courts at Westminster, by summons in the usual manner, for time to plead or for staying or setting aside the proceedings, or for postponing the trial until the next assizes, and that the judge in his discretion shall make such order as to him shall seem expedient; and that in making up the record of the proceedings on any such declaration in ejectment, such declaration may be entitled specially of the day next after the day of the demise therein, whether such day shall be in term or vacation, and no judgment thereupon shall be avoided or reversed by reason only of such special title. And Sec. 38,

enacts that, in all cases of trials of ejectments at *nisi prius*, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry or ouster, it shall be lawful for the judge before whom the cause shall be tried to certify his opinion on the back of the record, that a writ of possession ought to issue immediately; and upon such certificate a writ of possession may be issued forthwith, and the costs may be taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued; provided that such writ, instead of reciting a recovery by judgment in the form now in use, shall recite shortly that the cause come on for trial at *nisi prius* at such a time and place, and before such a judge (naming the time, place, and judge,) and that thereupon the judge certified his opinion that a writ of possession ought to issue immediately.

That statute only applies to issuable terms, *Doe v. Roe*, 2 Cromp. & J. 123. 1 Dowl. Rep. 304. S. C. and under it, where a landlord's right of entry accrued after the essoign day of Trinity Term, it has been held that he was not entitled to serve a declaration in *ejectment* as of that term, *Doe v. Roe*, 1 Dowl. 79. So where the tenancy under an agreement expired before the first day of Trinity Term it was held to be not a case within the statute, *Doe v. Roe*, 4 Moore & S. 747. *Nor does it apply to cases in Middlesex*, but only where the cause is to be tried at the assizes, *Doe v. Roe*, 1 Dowl. Rep. 547. The present statute of limitations also extends the action of ejectment to cases where it did not heretofore apply; and it has now become (instead of being, as before, the *ordinary* remedy) the *only* remedy almost for recovering possession and trying the title to real estate at common law.

The provisions of the statute 11 Geo. 4. & 1 W. 4. c. 70. s. 38. relating to the issuing of a writ of *habere facias possessionem* as before stated, are not affected by the statute, 1 W. 4. c. 7; and it has been held that the judge has no discretion under it as to the time at which the lessor of the plaintiff shall have possession, but must either grant a certificate to enable him to

get immediate possession, or let the case take its regular course, Doe d. Williamson v. Dawson, 4 Car. & P. 589 ; Doe d. Parker v. Hilliard, 5 id. 132 ; and if the judge should think that some time ought to be allowed to the defendant, he will grant a certificate for immediate possession, upon the lessor of the plaintiff undertaking not to enforce it for a certain time. Id.

(To be continued.)

HABEAS CORPUS.

Case of the Canadian Prisoners.

OBSERVATIONS BY THE EDITOR UPON THE PRELIMINARY OBJECTION RAISED BY THE ATTORNEY-GENERAL, "WHETHER THIS WAS A CASE IN WHICH THERE COULD BE A WRIT OF *Habeas Corpus* issued in Vacation by a single Judge?"

We had not room last week to add these observations to our report of the preliminary argument in this case upon the *questioned power of a single Judge to sign a writ of Habeas Corpus in Vacation*, as taken by the Attorney-General, and to express our surprise that the valuable time of the Court should have been suffered to be taken up for two whole days upon the argument of a question in itself untenable, and so fatally connected with the *liberty of the subject*.

We indeed live in fearful times, when we see the Lord High Chancellor in his Court, setting himself in opposition to the declared doctrines ruled by his predecessors, for the last 50 years, and under which the public have been slumbering in fancied security; (*a*) and if we turn to the State itself, we find the Attorney-General for the Crown, and on the part of the Crown, attempting (no matter how feebly) to impose a fetter upon the *liberty of the subject*, by restraining the operation of the writ of *habeas corpus*, as declared by law.

We live in an age in which we find, all around us, cries for liberty, freedom, and a variety of other such like cant phrases, with which the public mind is inflamed by dema-

(*a*) We allude to his Lordship's opinion upon the operation or validity of trusts for the separate use of unmarried women. See ante, p. 200.

gogues, who avail themselves of the general disposition of the people only to promote their own private views, and who, when they see *true liberty* in real danger, find it not to their interest to defend it, or even lend a hand to promote its welfare. We could say much upon this subject, but that we eschew politics in this Journal, although what we would say might with truth be called jurisprudence.

With the facts connected with the Canadian Prisoners, and their transportation or crime, we have nothing to do; but it is with the attempt to lessen the security of this interesting branch of public liberty, called by Mr. Justice Blackstone, "*the famous Habeas Corpus Act*," which was obtained through the oppression of an obscure individual, that we have to do. We feel it a duty incumbent on us, as a very humble portion of the public press, to explain the declared law that governs this writ, and that has governed it since the Restoration; and in doing so, we cannot but express our surprise at the apathy shewn by the Press at large upon this all-powerful and stirring subject. The public owe a debt of gratitude to the Judges of the Court of Queen's Bench, for their decision upon a point in which the liberty of the subject was so greatly involved.

We refer our readers to the report of this case, (*b*) which makes it unnecessary for us here to repeat it. Let it suffice that they were brought up by *habeas corpus*, signed by a single Judge (*c*) in vacation, and returnable before a single Judge.

It may be desirable, for the sake of explanation, that we shew the principal articles of the Act as stated in Western's Commentaries, p. 220. See also the Index, tit. *Habeas Corpus Act*.

1st. To fix the different terms allowed for bringing a prisoner, those terms are proportioned to the distance, and none can in any case exceed twenty days.

2nd. That the officer and keeper neglecting to make due returns, or not delivering to the prisoner, or his agent, within six hours after demand, a copy of the warrant

(*b*) *Ante*, p. 185.

(*c*) Mr. Justice Littledale.

of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority, (specified in the act) shall for the first offence forfeit one hundred pounds, and for the second two hundred, to the party aggrieved, and be disabled to hold his office. Upon this article Mr. Western adds in a note, "If an equivocal return be made, an attachment may be had immediately."

3dly, No person once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of five hundred pounds.

4th, Every person committed for treason or felony, shall, if he require it, in the first week of the next term, or the day of the next session, be indicted in that term, or session, or else admitted to bail, unless it should be proved upon oath, that the king's witnesses cannot be produced at that time; and if not indicted and tried in the second term, or session, he shall be discharged of his imprisonment for such imputed offence.

5th, And of the twelve judges, or the Lord Chancellor, who shall deny a writ of *habeas corpus*, on sight of the warrant, or on oath that the same is refused, shall forfeit severally to the party aggrieved 500*l.*

6th, No inhabitant of England (except persons contracting or convicts praying to be transported) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any place beyond the seas, within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved, a sum not less than 500*l.*, to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of a premunire, and be incapable of the king's pardon.

The preliminary objection taken by the *Attorney General* on the part of the crown, went to the validity of the writ. He said, "he felt it his duty to draw the attention of the court to the question, as to whether this was a case in which there could be a writ of *habeas corpus* issued in vacation by a single judge," (d) and *Lord Denman*, in delivering the judgment of the court, which was (e) in accordance with the opinions of

(d) See ante, p. 185; id. p. 204.

(e) See ante, p. 204.

the judges in 1758, emphatically expressed that, "it would seem like tampering with the great remedy which the writ of *habeas corpus* gave to the subject, if they were not to abide by those opinions, and allow writs to be issued in the vacation."

It may be interesting to our readers, that we refer to the time, and see what was actually done towards settling such a question, and which every *lawyer* should be well acquainted with. On the 9th May, 1758, upon the second reading of a bill then introduced for giving a more speedy remedy to the subject upon the writ of *habeas corpus*, in order to arrive at the real state of the law upon such an important matter, the Lords ordered the Judges to attend the House to deliver their opinions *seriatim* upon a long list of questions, from which we will select two as pertinent to our subject.

The first question was, "Whether in cases not within the act 31 Car. 2. writs of *habeas corpus ad subjiciendum*, by the law as it then stood, ought to issue of course, or upon probable cause verified by affidavit.

The second question is in point. "Whether, in cases not within the said act, such writs of *habeas corpus*, by the law as it then stood, may issue in the vacation by fiat from a Judge of the Court of King's Bench, returnable before himself.

To these questions *Chief Justice Wilnot* gave the following answer—

To the first. "I am of opinion that in cases not within the act of the 31 Car. 2., writs of *habeas corpus ad subjiciendum*, by the law as it now stands, ought not to issue of course, but upon probable cause verified by affidavit. A writ which issues upon a probable cause verified by affidavit, is as much a writ of right as a writ which issues of course." After commenting upon other writs of right and of course, the learned Judge proceeds—"Writs of course are those writs which lie between party and party, for the commencement of civil suits: and if they are sued without a good foundation, the Common Law punishes the plaintiff for suing out the writ vexatiously, by amercing him *pro falso clamore*, and by the Statute Law he is to pay the costs of suit. But the writ of *habeas corpus* is not the

commencement of a civil suit, where the party proceeds at the peril of costs, if his complaint is a groundless one: it is a remedial mandatory writ by which the King's supreme Court of Justice, and the judges of that court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the cause of his imprisonment; and it is a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs at the common law to all dominions held of the Crown. It is accommodated to all persons and places, (2 Cro. 543. Palmer, 54.) And as these remedial writs were originally rather the suite of the king than of the subject, the King's Courts of Justice would not suffer them to issue upon a mere suggestion; but upon some proof of a wrong and injury done to a subject."

To the *second question* the learned Judge answered—"I am of opinion that in cases not within the act of 31 Car. 2. writs of *habeas corpus ad subjiciendum*, by the law as it now stands, *may issue in the vacation by fiat from a judge of the Court of King's Bench returnable before himself*. From the best inquiry I can make, writs of *habeas corpus* in *criminal cases* have been awarded by the chief justice of the King's Bench and the judges of that Court *long before* the 31 Car. 2. The files of the *fiats* for writs made out in the Crown Office before the reign of Car. 2. are not to be found there, except for four or five terms in Queen Elizabeth's time, one or two in Jac. 1. and for six or seven terms in Car. 2. No information is to be had from the records, but there are traces from cases in print and from *fiats* since the Restoration and before the 31 Car. 2., that there had been a kind of unsettled practice for the Chief Justice and Judges of the Court of King's Bench *granting them in vacation*; and as the Judges of that Court are justices of peace all over the kingdom, they have a power of bailing as incident to that authority, and I don't see how that power of bailing could well be exercised without removing the person to be bailed before them by *habeas corpus*. Catesby's case in vacation, is in Hil. 43 Eliz. in

the 7th vol. of the State Trials, 175. I have a list of *fiats* for *habeas corpus* since the Restoration and before the 31 Car. 2. Thirty of them appear to have been granted and made returnable *before the judges in vacation*; since the 31 Car. 2. these writs have issued in *criminal cases* under that act when granted at the instance of a subject."

The learned Judge subsequently says—“It has been lately said that the practice of issuing these writs by the judges in vacation was taken up under an apprehension of their being *within* the 31 Car. 2.; and that they have been marked in the Crown Office by that statute. How such an apprehension or practice could have prevailed, is to me inexplicable. No man could ever have such an apprehension who had ever read the act; it is confined in words, and by the nature of almost every provision in it, to *criminal* or *supposed criminal matter*. I will never offer such an indignity to the very great and eminent men who have presided in that Court, and to the succession of Judges who have sat in it for near eighty years, as to say that they founded this practice upon a mistake which would not have infected the meanest capacity,” and after attacking the doctrines of *Lord Chief Justice Hale* (d) and *Lord Coke*, (e) upon the fact that no writ of *habeas corpus* could be found to have issued out of the Court of Chancery, except some returnable in the House of Lords; and that the 16 Car. 1. takes no notice of the Court of Chancery, which it is most probable it would have done, if it had been thought that the writ had issued out of that Court in vacation; and the 31 Car. 2. seems to proceed upon a supposition that it could not issue out of the Court of Chancery, because the 10th sec.

(d) *Lord Chief Justice Hale* says—“This writ is not regularly to issue but in the term time, when the Court may judge of the return, or bail, or discharge the prisoner;” 2 *Pleas Cr.* 145. and in p. 147. His Lordship adds, “It seems regularly this writ should issue out of the Court of Chancery in vacation time, and out of the King's Bench in term time.

(e) *Lord Coke* says—“It ought to issue out of the Court of King's Bench in term time, and out of Chancery in term time or vacation;” 2 *Inst.* 53; 4 *id.* 81. 162; All writs were formerly supposed to issue in term time, which reconciles the expression to the law.

expressly empowers the Court of Chancery to grant it, which would have been unnecessary if it could have granted the writ before. But upon Lord Coke's own principles, (saith the learned judge) suppose no such practice when he wrote, yet a subsequent practice founded upon legal principles, and an experience of its utility has made the law—"per varios actus legem experientia fecit." Lord Coke's averment has not the weight it would have had if made after 31 Car. 2.; according to his own principles, the practice would have made it law, and as it appears by the flats between the Restoration and the 31 Car. 2., that three chief justices, Foster, Hyde, Keyling, and four judges of the Court, Morton, Twisden, Mallet, and Wyld, granted these writs *in vacation*, and the practice is warranted by legal principles, and it is admitted they were always grantable "*pro rege*," (which establishes the vacation right) the opinion both of Lord Hale may be true; and upon Lord Coke's own principle, if he had written twenty years after the Restoration, instead of thirty years *before* it, he must have been of the same opinion I now give. Lord Denman has said, "that as to the right of Mr. J. Littledale to grant the writ, the court desired to state their deliberate opinion, that he had done no more than the law fully justified him in doing. That the court desired neither the praise or the censure which belong to innovation in the case, but it only adhered to the established practice." That it was true Lord Coke, Sir Matthew Hale, and Chief Baron Comyn appeared to have confined to the Court of Chancery the *officina justitiae*, the court which was at all times open, this power of issuing writs of *habeas corpus* in vacation; but in Hale's Pleas of the Crown there are four precedents in the exact form of that now before the court, and they are all earlier than the statute 31 Car. 2.; one of them (e) going back to the 43 Eliz.

We think (or rather hope) that these observations may prove of service to such of our readers as shall not possess the "Memoirs and opinion of Chief Justice Wilmot," and will lead to the better understand-

(e) Catesby's case before mentioned.

ing the question, than had we remained silent; and we cannot refrain repeating our surprise, that the public time should have been wasted by the introduction of such a weak quibble, more particularly by a liberal Attorney-General; indeed we are surprised that the talents and time of an Attorney-General, should, on the part of the Crown, have been wasted at this day by urging in a Court of Justice, that "*at the common law, a writ of habeas corpus could only be granted by the Court of Queen's Bench in term time upon motion.*" We regret to see the bad taste of an Attorney-General, who is, or ought to be, a person well skilled in the laws, striving to maintain a doctrine, that with the well informed of the profession, is called a quibble without a shadow of pretence to support it, and which, had he sustained it, would have imposed an iron fetter upon the liberty of the subject.

We can only account for this question being raised, by some unaccountable misconstruction of the real state of the law. The argument of the Attorney-General was, that the prisoner had been committed by legal authority upon a criminal matter *in the execution of his sentence*, and cited the dictum of *Lord Tenterden*, that it was by no means *a matter of course*, granting such a writ, and that the reasons must be stated to the Court. This is true in some cases: Lord Chief Justice Wilmot, in his opinion to the House of Lords, before noticed, says "*writs of habeas corpus* upon imprisonment for criminal matters, were never writs of course: they always issued upon a motion grafted upon a copy of the commitment, and cases may be put in which they ought not to be granted. 1 Lev. 1. Comber. 74. *Habeas corpus* was denied to one committed to Bridewell for lewdness, 3 Bul. 27. 2 Mod. 206. If *malefactors under sentence of death* in all the gaols in the kingdom could have these writs of course, the sentence of the law might be suspended, and perhaps totally eluded by them." And his lordship's opinion upon the practice of the Courts in criminal cases was, that the 31 Car. 2., made no alteration in such practice in granting these writs; they were

moved for in term time upon the same foundation as they were before, and *when a single judge in vacation* grants them under the 31 Car. 2., in criminal cases, a copy of the commitment, or an affidavit of the refusal of it must be laid before him. He must judge even in that case whether *Treason* or *Felony*, is specially expressed in the warrant of commitment; and there have been a great number of cases where a doubt has arisen on the frame and wording of the warrant, so that even upon the act, the probable cause of bailing is really disclosed to the judge, unless the copy of the commitment is refused, and then the law will presume every thing against it.

These opinions of the judges in 1758, are the declared law of the land for writs of *habeas corpus* at the present hour, and we will never see an attempt made to trample upon it without raising a hand in its defence.

We may add here in conclusion in reference to the disposal of the preliminary objections, that the return to the habeas was amended by stating fully the Provincial Act of Legislature, 1 Vict. c. 10., and as to any defect in the return to a writ of *habeas corpus*, it seems that before the return is filed, any defect in form, or the want of an averment of a matter of fact may be amended, but this must be *at the peril of the officer*, in the same manner as if the return were originally what it is after the amendment; Anon. Mod. 102.; but *after* the return is filed it becomes a record of the Court and cannot be amended.

TO THE EDITOR OF THE LEGAL GUIDE.

Colchester, Jan. 24th, 1839.

Sir,—I have taken the liberty of sending you an answer to Problem XII. I hope it is not too long for your columns—if so, you will of course, in perusing it, strike out all irrelevant matter.

I may not have fully answered the questions proposed, but I did not like to branch out further lest I should trench upon a future Problem on the same subject. However, whether it is worthy of an insertion in your excellent “Guide,” you will be the best judge. That it is defective in the arrangement, I doubt not, it being the first thing of the kind that I ever attempted. I

am sure every one must duly appreciate the opportunity thus afforded them of investigating the law upon important subjects.

I am, Sir,

Your most obedient Servant,

B. H. T.

ANSWER TO PROBLEM XII.

What is an Estate in Dower?—and what are the Requisites to Dower?

Dower is an estate for life, which the law (irrespective of the recent stat. 3 & 4 W. 4. c. 105, for the amendment of the law of dower) gives the widow in the third part of the lands and tenements of which the husband was solely seised at any time during the coverture of an estate in fee, or in tail in possession, and to which the issue of such widow might by possibility have inherited. This definition points out three principal circumstances as requisite to an estate in dower;—marriage, seisin, and death of husband. 1st, As to the marriage, it must be solemnised in a legal manner, and between persons capable of contracting matrimony, for it is a maxim of law “ubi nullum matrimonium ibi nulla dos.” (Perk. 304.) But although a marriage be voidable, yet if it is not avoided in the husband’s lifetime, his widow will be entitled to dower. 2nd, *Seisin*, independent of the above mentioned stat. and as regards women married before, or upon the 1st Jan. 1834, the husband must be seised during the coverture, of the estate whereof the wife is to be endowed. A *seisin* in deed is not however requisite, as in *courtesy*, a *seisin* in law being sufficient.

A *seisin* in law, in its usual acceptation, is where the inheritance in lands and hereditaments of which a man died seised, or possessed, descends upon his heir who dies before entry or possession. (Litt. s. 448.) In such a case if the heir leave a widow, she will be entitled to dower. (Id. s. 681.) Also on conveyances under the stat. of uses, the bargainer, or *cestui que use*, is seised in law immediately on the delivery of the deed, and therefore his wife is dowable, although no entry had been made by him, nor other act done to acquire an actual *seisin*. As if lands are bargained and sold, and a stranger enters, and then the deed is enrolled and the bargainer dies, his wife will be endowed

(2 And. 161; Gilb. Uses by Sugden, 213) but if the husband dies before enrolment she will not be endowed. (Gilb. Uses. 213.) But whenever an actual entry is necessary to give effect to a conveyance at common-law, the wife is not entitled to dower, unless the husband had entered. (Perk. s. 368. Park on Dower, 34.)

The husband must also be possessed of the *legal seisin*, for the Courts of Equity have not permitted a wife to claim dower out of equitable estates, (that is, estates not recognized at law, but only in equity) upon the principle that dower is to be considered as a mere legal right, and that equity ought not to create that right where it does not subsist at law. This decision of the courts of equity has been, however, generally disapproved on account of the inconsistency of the doctrine which allowed courtesy of a trust estate, and not dower; and the law is now altered, as I shall presently notice. Also, by reason of the necessity of a seisin in the husband *during the coverture*, a widow shall not be endowed of a remainder, or reversion expectant on an estate of freehold granted before marriage. (Co. Litt. 32. a.) As if a mortgage in fee be made *before* marriage, the wife will not be entitled to dower out of the equity of redemption. But if the remainder or reversion be expectant on a term for years, she shall be endowed of a third part of the reversion, and a third part of the rent. As in the case of a mortgage for a term made *before* marriage, the mortgagor's wife will be entitled to dower, but not as against the mortgagee, and she therefore takes a third of the rent and reversion. The reason for this distinction between a mortgage in fee and a mortgage by demise, is that in the former the husband had parted with the legal freehold and inheritance before the marriage, and of course was not *seized* during the coverture; but in the latter case he had granted a term of years only, whereby the *seisin* of the inheritance remained in him. If, however, the mortgage were made after marriage, the widow would of course take precedence of the mortgage, whether it were in fee or for years, unless she concurred in the mortgage, by fine or recovery, and then

she would be barred of her dower to the extent only of the mortgage, (if no further purpose be declared), a fine or recovery on the occasion of a mortgage being a partial, not an absolute bar of dower, (see Roper's Husb. & Wife, ed. 1826, vol. i. 520. 537; 2 Powell's Mortg. by Cov. p. 679. n.)

The husband must also be solely seized, and therefore the widow of a joint tenant in fee, or in tail, is not entitled to dower, because upon the death of one of the joint tenants the estate goes to the survivor, who is then in form the first grantee, and may plead the deed creating the estate as originally made to him without naming his companion, (Litt. s. 45; Co. Litt. 30. a. 37. b. 183. a.) If, therefore, one or both the joint tenants alien during the jointure, their respective wives will not be entitled to dower. But it seems that if a joint tenant aliens so as to sever the jointure, or if he becomes the survivor, or sole owner by release, dower will then attach. (Co. Litt. 30. a. 183. a.) The estate of inheritance of which the husband dies seized must also be "*in possession*," that is, the actual occupation, and not intervened by any prior estate of freehold. And this estate of freehold should be a vested estate, for neither a prior term, nor it seems a contingent estate of freehold, which never arises and the possibility of which is determined by the death of the husband, will prevent the attachment of dower. (Cudal's case, Cro. Eliz. 316; Hooker v. Hooker, temp. Hardw. 13.) It has, however, been fully decided, that if an outstanding term is assigned to a trustee for a purchaser by the direction of the husband, the dower will be barred, although the purchaser has express notice of the marriage. But an actual assignment is necessary for the purpose. (Maundrell v. Maundrell, 7 Ves. p. 567. & 10. ib. 246.) Thus stood the law as to the *seisin* of the husband previously to the act 3 & 4 W. 4. c. 105, and it must be recollect that it is still in force as to the dower of women married before or upon the 1st Jan. 1834, (I) the time at which the act came into operation. But as to dower of women married after that day the law is materially different. For by sect. 2. it is enacted, "That where

a husband shall die *beneficially entitled* to any land for an interest, which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land." And by sec. 3. it is further enacted, "That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession thereof she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof: provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced." So that by this act widows married after the 1st day of January, 1834, will be entitled to dower out of equitable as well as legal estates and interests, and that without the necessity of a seisin in the husband, either in deed or law. There are several other important alterations made by this statute, which I must only mention, viz. that the widow (married after the above day) will not be entitled to dower out of estates disposed of by the husband in his life-time, or by his will (s. 4.) or exempted from dower by his declaration in any deed (s. 6.), or will (s. 9.), or in case of a devise to her of land of which she would otherwise be dowable (s. 10.); and the statute also enacts, that the debts and liabilities of the husband, and the partial dispositions by will or otherwise shall take precedence (ss. 5. 7. 8.) The 3rd and last circumstance required to the existence of an estate in dower, is the death of the husband; and it is said that nothing but the natural death of the husband will give a title to dower, (1 Inst. 53. ib.) Though there are some authorities to prove that banishment by abjuration or by parliament, which is a civil death, will have the same effect, (Jenk. Cent. 1. Case 4. 1 Inst. 133 a.) With respect to freebench of copyholds, a widow is not entitled to it, unless the custom of the manor warrants it. By the

custom of some manors the widow is entitled to a moiety of the husband's copyhold; by others to a third or a fourth part, and by some few to the whole copyhold. In most manors she is only entitled to freebench out of those copyhold or customary lands, of which her husband died seized. But by the special custom of some manors (as that of Cheltenham, in Gloucester,) the widow is entitled to freebench of the land of which the husband was seized at any time during the coverture, as in the case of dower at common law, (Riddell v. Jenner, 10 Bing. 29.) Freebench, however, in the absence of any custom to the contrary, does not attach even in right until the husband's death, and therefore any alienation by him *alone*, even by contract to take effect in his lifetime, will defeat the widow's claim. By the custom of gavelkind, the wife after the death of her husband, shall have for her dower a *moiety* of all lands of her husband so long as she continues chaste, (Rob. on Gavelkind by Wilson, pp. 205—236.) Copyholds and freebench are not within 3 & 4 W. 4. c. 105. The widow's third must be *assigned*, for she cannot by the common law enter into her dower before assignment, and therefore if the heir refuse she is driven to her writ of dower, and the sheriff must assign her dower by metes and bounds, unless the husband be seized as tenant in common, when she shall have a third part of the undivided part, (Co. Litt. 32 b.) If the inheritance be entire, and such of which an assignment of dower cannot be made, she shall have the third part of the profits, as of a fair, an office, &c. and the third presentation to an advowson, (Litt. s. 44.) After an assignment made, the widow may enter, and she shall be *in* of the estate of her husband and paramount all incumbrances, mortgages, or leases made by him during the coverture. (Co. Litt. 32 a.)

B. H. T.

(I) That is, as to every woman married on or before that day, and being or becoming a widow. Sir Edw. Sugden observes, that it is to be borne in mind, that as to widows within the exception, their rights are saved in estates acquired by their husbands, even

after the 1st January, 1834; the right of dower of women married after the 1st Jan., 1834, is placed on altogether a different footing, 2 Vend. & Pur. 364.—ED.

PROBLEM XIV.

DOWER.

What are the changes made in the Law by the Statute 3 & 4 Wil. 4. c. 105, commonly called the Dower Act?

TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—Having observed in the last number of your valuable Journal, that a correspondent “M.”(a) has written you upon the subject of my answer to your Problem X. I lose no time in replying to the same. That the point referred to is an error, there can be no doubt, and an omission on my part, which (however inexcusable) I can only account for by my not having perused with sufficient care what I had previously written, owing to my being rather hurried to forward the answer in time for your 12th Number; and as such I beg to thank your correspondent for having pointed it out, as I perfectly coincide with you that “this criticising the productions of each other by the students, is as it should be,” as it will have the effect of keeping all upon the *qui vive*. “M.” certainly begins, in error *himself*, by stating—I have fallen into *error* by *erroneously copying* an article in *Watkins's Conveyancing*. Now, independently of the fact of Mr. Watkins *not* having treated at all upon the subject in question, I do not well see how (unless by supernatural agency) your correspondent could be enabled to state, that I had *copied* the sentence referred to from the work of Mr. Watkins, or any one else, for I think it will be allowed that if I *had* done as he says I should *not have taken the trouble* to leave out so particular a part. Thanking you, as I am sure each and every other of your subscribers must do, for the unceasing attention you pay to the interests of all,

I remain, sir,

Your most obedient and obliged servant,
H. D. M. (a)

(a) Here this must end. We think that we have done justice to both parties.—ED.

January 29th, 1839.

“M.” will observe, that although the example I have chosen is not in itself correct, yet it is quite sufficient to prove what I advanced, viz. that the estate of a tenant in tail, after possibility of issue extinct, must be created by the act of God, and not by limitation of the party.

H. D. M.

Law Reports.

ROLLS COURT.—Jan. 28.

DE HOURMELIN v. SHELTON.

Judgment—Alien husband—Vendor and purchaser—Wife's estate—Purchase-money arising out of land devised to trustees for sale—Whether the husband of one of the cestuis que trust an English woman, being an alien, is a sufficient objection to the title in such case.

This case was brought on upon exceptions to the Master's Report,—the ground that the plaintiff, the husband and children were aliens, and could not take any interest in land.

The facts were these:—Elizabeth, the wife of Charles Henry Shelton, had a power of appointment by will over a landed estate. She had six daughters, and on the 9th of October, 1824, she made a testamentary appointment to the use of three trustees and their heirs, upon trust to make sale of the estate, and to convey it to the purchaser in fee, and they were authorized to give effectual receipts for the purchase-money to the purchasers, who were not to see to its application. The trustees were to stand possessed of the purchase-money, to invest in the funds, or upon Government securities, in trust for such of her (Mrs. Shelton's) children as, being sons, should attain twenty-one, or being daughters, should attain that age or marry, in equal shares if more than one, and for the children of such children; and it was provided that the husbands of the daughters should take life interests. One of the six daughters was Frances Matilda, the wife of the plaintiff, De Hourmelin, by whom the suit was instituted. He was an alien, their children were aliens, and the three other daughters were also married to aliens. By the decree of the Court, the trusts of the appointment were directed to be performed, and the estate was ordered to be sold. The Earl of Radnor became purchaser for £13,400. The Master reported, on the 16th of August last, that there was a good title upon the abstract. These exceptions were taken.

LORD LANGDALE said, if the trust were performed as the testatrix intended, the land would remain in the trustees, or the purchasers from them, and never could be vested in aliens, for their interest was only to be in the

stock to be purchased, and not in the land, because all the vested interests in the land were appointed to English subjects, who had a right to have the trusts performed. Neither the aliens nor the Attorney-General could direct that there should be no conveyance. There was a decree for a sale, and when completed the purchase-money would be the only property. It was argued that, as the land was the source from which the money was to be realized, the aliens had an interest in the land, and as they could only hold it for the Crown, it followed that the Crown took their interest in the stock; and it was also urged that aliens could not formerly have compelled feoffees to execute a use, nor could they now in a court of equity compel trustees to execute a trust for their benefit. This argument was only applicable when aliens took an equitable interest in land, but did not extend to cases where no interest in land was ever intended to vest in them, or to cases where the interest of the alien only was to have the land converted into money. It had been held that the disability of an alien to hold lands was not in the nature of a penalty or forfeiture, but arose from the policy of the law, which however gave him a right of holding money or stock. A man desirous of benefiting an alien, might, therefore, sell land and give the money to him, and it would be strange if he could not do the same by means of a trustee. Because an alien had an interest to have the land converted into money, it did not follow from the peculiar doctrine of the court that he was to forfeit his interest in that money. He thought the Crown was not entitled by prerogative to the portion of the land, and that there was no ground to insist that the trusts should not be executed as was intended, by the appointment in favour of the plaintiffs and their children. The exceptions taken to the Master's Report must therefore be overruled.

QUEEN'S BENCH.—Jan. 30.

Sittings in Bench.

REGINA v. LAWSON.

Libel—Judgment.

As we have already reported this case (*a*), it becomes unnecessary for us to repeat the facts connected with it. Mr. Thessiger this day moved for the judgment of the Court, and the defendant was brought up accordingly.

Lord DENMAN read his notes of the trial, and Mr. Justice LITTLEDALE delivered the following judgment of the Court:—John Joseph Lawson, you are to receive the judgment of this court for a libel, which appeared some time ago in *The Times* newspaper, reflecting on the character of Sir John Conroy. It appears from the statement which has been pronounced, a libel, that Sir John Conroy was a person confidentially employed by the Duchess of Kent, and it charges him in the

first place with great mismanagement and neglect of duty, which had occasioned her to accumulate a debt of 30,000*l.*; but the most serious part of the libel is that where it is attempted to be insinuated that Sir John Conroy had improperly appropriated a part of the money to his own use towards the purchase of an estate in Wales. The first part, insinuating that he had suffered the Duchess of Kent to contract so great a debt, is highly improper; at the same time it might proceed from general ignorance or inattention, and is not of so much consequence as the other part. A criminal information was applied for against you for having published this libel, and it was in your power to have made an affidavit tending to show the truth of it; and it would have depended upon the Court whether they would have suffered that criminal information to go or not. It appears you have made no affidavit at all; the case therefore went for the decision of a jury, and they have found, the matter being submitted to them, that you were guilty of having published this libel maliciously. No one whatever can entertain a doubt that that this is a most serious reflection on Sir John Conroy. You now then, having been convicted, are brought up to receive the judgment of this Court, and it is suggested in your favour that you had nothing to do with the actual publishing of the paragraph, and that it is a very hard thing upon those concerned in *The Times* newspaper, which they say is a newspaper which has conferred great benefit on the public for 40 years, that you should be brought to receive punishment. If that newspaper has maintained its character for upwards of 40 years, it is most unfortunate that on this occasion it has so far deviated from it that you are the first person brought up to receive the judgment of a Court of justice. But, whatever the character of *The Times* may have been, it makes no defence now. You have published this libel, a most gross and scandalous libel, imputing to Sir John Conroy conduct tending to bring him into public detestation, and for which he must be looked upon by his fellows in a very different way than he was before. It is then suggested that you had nothing to do with the actual writing of this paragraph; you were only the editor. It is very possible you may not have been concerned in the actual composition of it, but if we were to confine our punishment to those who actually composed the articles, how difficult it would be to pass any punishment at all; but you being the printer, are bound to take notice of what may be introduced into the newspaper. You have an opportunity of looking over the papers, and, if you think there is any thing improper, it is your duty to go to the editor or proprietors and point out to them what you conceive to be improper, and if they still persevere in it, it is your duty to resign: if you do not do that, you cannot complain of any punishment you may be subject to. The Court, taking all the circum-

(*a*) See ante, p. 120.

stances into consideration, do order and adjudge that for this offence you be imprisoned in the custody of the Marshal of the Marshalsea for the space of one calendar month, and that you do pay a fine to the Queen of 200*l.*, and that you be further imprisoned in the custody of the Marshal of the Marshalsea till that fine be paid.

The defendant was removed in custody.

THE QUESTIONS AND "THE LETTER BOX"
OF THE
Editor of a Contemporary Journal.

REVIEW OF NEW BOOKS.

PRINCIPLES of the LAWS of ENGLAND, in the various Departments, and also the Practice of the Superior Courts, in the form of Question and Answer, for the Assistance of ARTICLED CLERKS in Preparing for Examination, and incidentally for the Use of Practitioners. By A SOLICITOR. London: William Crofts, 19, Chancery Lane, 1839.

HERE we have a book full of *real* questions, and, what must be to all novices of far greater importance—we have the answers to them. Of a truth, the simple namby-pamby examinations, at the Law Society are becoming quite a business, we should rather say a trade, because they commenced in the way of business and the trade followed. In our opinion, for us to have attorneys of respectable abilities, it is only needful that they be properly educated,—that instead of smoking cigars, the student worked the healthy Problem,—that he made himself acquainted with first principles, by close reading; and by practice, see those principles in action,—and that a proper tribunal, composed of men learned in the law, do examine him as to his competency to practise as an attorney.

The examinations, as now established, are a farce—a mockery, and, by foreigners, must be looked at with contempt. We have had the last Saturday's number of a contemporary sent us, in which we find a notice from the "EDITOR'S LETTER BOX"—certainly a much more *gentle* Box than the lion's head of Venice of old, though something of the same sort of *inquisitorial* cast, save that this Box has the good manners to give notice to all delinquents before they

are sacrificed. We rather think, that some wag must have dropped this silly notice (which will come out presently) into the EDITOR'S LETTER Box alluded to. We cannot think it was placed there by the respected Editor himself, or by any Proprietor of the Journal in question: however in THE BOX we find it, and therefore as the printer of a Journal is answerable for its delinquencies, so must Mr. Editor father the notice. He says, that *he* was enabled to state the questions put, at the examination, to the candidates last term, and that they were copied by *two other periodical publications*, following precisely HIS ALTERATIONS. Now, we do not know whether this is intended for us, as one of the culprits, *nil conscire sibi, nullā pallescere culpā*, and as we are fearless and independent, we will suppose the shaft to be aimed at us, and in reply we say to our respectable contemporary, that we had a bundle of the questions handed to us by several gentlemen who had been examined, (as we now have of the questions put on the 22nd inst.), although so much care is taken by the *officials at the Law Society* to prevent copies being taken, (with what justice to the candidates we will not now enquire.) These *questions are either public property, or they belong to the Society exclusively*; if they be public property, then it is quite immaterial to our contemporary in what manner we possess them, or in what manner we think fit to publish them; if they belong exclusively to the society, then the officer who has their custody must ——— (we will be as *gentle* as the Box) they cannot by any possible means of special pleading be *his* property; perhaps after all the *legal right* is in the Candidates *n'importe*. We are in no need to creep into holes and corners—we know our business—professional and editorial, and will never be found wanting in taking up the gauntlet, whether thrown aside, as the players say, or *pelle melle*, boldly at us. Now, let us look, as lawyers, at the notice to ourselves.—"WE ARE NOT TO REPEAT THIS OUR CRIME."—The merits of the case are these:—Questions, in writing, are prepared by the examiners and *delivered to the proper officer of the society*, to be pre-

sented for the use of the Candidates on the day of examination. These printed questions are numbered, and the candidates are required to answer them by number, and the greatest care is taken by the officials, that no copy is taken of these questions ; this is the greatest part of the business, and the most serious in a trading point of view. Thus, all is left to memory except the document in the hands of the officer of the society. Why the candidate is desired not to copy the written questions given to him is a mystery that we will not at present seek to unravel *tempus omnia revelat*. If this officer performs his duty as a trust-worthy servant of the society, assuming these questions to belong exclusively to that body, he very properly deposits the valuable treasure in the strong box of the society, (certainly not by mistake into the Editor's letter box,) there to remain as special pleaders used to say, until, &c. So that our contemporary must do as we have done, resort to the candidates for the questions which he confesses he alters, and moulds into a palatable shape, enters them upon his journal, and calls them forsooth his private property, nay, denounces his brethren in the field, because they have been obliged, for the reason before mentioned, to adopt the same course in order to satisfy their subscribers. We would scout these questions as unworthy this paper, but that our subscribers seem to have a taste for them; we regret their bad taste, but cannot help it. We are, however, quite sure that the Editor of the Journal in question will admit that when he has published what he calls "the questions," they are (with a saving clause to what we have before said as to the legality of proprietorship in them) public property, and may be copied by all the public, or made use of as the public shall think fit. Having said thus much upon the question of right, we need only add, that it is quite an impossibility (except in concert with each other) that two journals published simultaneously the one with the other, can copy from one another. We have a great respect for our worthy contemporary, and are willing to think that such a notice was inserted without his knowledge ; at all events we hope to see no more such

tom-foolery, or we shall take up a defensive position in earnest.

This brings us again to the book before us, which is the result of considerable reading and some labour. The author says, that the ground-work was prepared for his own use, without the remotest intention of publication ; taking this as a fact, we say, he has been most indefatigable in his studies. He says, that being anxious to acquire a proper knowledge of his profession, he devoted himself to reading the works of the best authors on the different branches of the law, and, in pursuing this course, he extracted the principles and the practice as he read, forming the same into question and answer ; and that, after some years, the matter which he had thus collected having accumulated to a considerable bulk, he had the whole bound up together and arranged under appropriate heads ; before us is the result. The book is divided into Five Parts, viz.: *Common Law, Conveyancing, Chancery, Bankruptcy, and Criminal Law* ; and the author submits that it will be found not very serviceable to practitioners ; it is not well got up, and yet there is useful information in it. We are, however, of decided opinion, that with students of all classes, *Keys* promote only idleness, and superficial knowledge. If a student, with the aid of a good library, and a determination to acquire knowledge, will take up this book, it will lead him to much useful information ; but if, on the contrary, he will take it up only to read, he will gain nothing by his labour, but a smattering of something he cannot comprehend. There are two great objections to the book,—1st, It has neither index or table of contents. To arrive at any question required, the book must be read through till it is found. 2dly, The whole is unsupported by authorities, so that the student is left to himself to find, in his library, that which the book should have referred him to. For a student of two years' standing it may be useful to write up from, by promoting the spirit of research and inquiry, as he can find nothing in it beyond the question and answer. This he will be compelled to do, so that it will act as a sort of stimulant to exertion, but nothing further.

QUESTIONS PUT BY THE EXAMINERS TO APPLICANTS FOR ADMISSION AS ATTORNEYS AT THE EXAMINATION.

Hilary Term, 1839.

The three Preliminary Questions were as usual.

I. CONVEYANCING.

Who may make a will?

The requisite attestation?

How revoked?

Describe chattels real, and personal?—also assets? and how are they marshalled for payment of debts?—also the essentials to be attended to on the execution of deeds, as well under power as otherwise?—also the usual covenants in the assignment of a lease?

Whether a lessee, under the usual covenants to repair and pay rent, is liable to the payment of rent of buildings whilst they are uninhabitable by reason of fire?

If a person contract for the sale of his estate, and afterwards become a lunatic, who can convey the estate to the purchaser? and what course should be pursued?

How is an estate tail to be barred by the tenant in tail in possession or not in possession, distinguishing the different modes of so doing as to freehold and copyhold estates, and money to be laid out in the purchase of land to uses in strict settlement?

A complete title to a freehold estate, the essentials to a copyhold estate, and who are incapable of alienating lands required?

II. EQUITY, AND PRACTICE OF THE COURTS.

The first three questions require the authority a solicitor should take from his client—How a suit is to be instituted, and how a defendant is to be compelled to appear.

The next three require in what case may a subpoena be issued and served before the bill is filed?

In what cases do Courts of Equity give ordinary relief? and in what cases do they give special relief by injunction?

When will the Court of Chancery grant a writ of *ne exeat regno?*

The meaning of being in contempt? and the first thing to be done by a party in contempt, and who wishes to apply to the court on any other subject, are the next requisitions—the following close this branch.

How must the parties to a suit in Equity proceed for the purpose of proving such facts of the case as are not admitted?

How is the attendance of a witness to be compelled?

In prosecuting a decree in the master's office, what parties must have notice to attend? and how are decrees or orders to be enforced?

How a plaintiff's case must be brought to issue, and how an order to enlarge publication is obtained.

III. COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS.

The difference between an action in assumpsit and debt required?

In what cases is the form of action only in debt?

In debt and assumpsit, where the defendant does not plead, steps to be taken to enforce the demand required?

The difference in the proceedings where the declaration is on a bill of exchange or promissory note, and the defendant does not plead? and, if any, the mode of proceeding required?

The difference between an interlocutor and a final judgment required, and where there must in all cases be both sorts of judgment.

How advantage is to be taken of a cause of defence arising after action brought.

The nature of and first process in the following actions was required:—

Trover.

Replevin.

Ejectment.

The different writs of execution required.

IV. BANKRUPTCY, AND PRACTICE OF THE COURTS.

The two first questions are to the facts to be proved on opening a fiat, and the usual proceedings at the first and second public meetings under a fiat?

How may a bankrupt obtain protection from arrest? and what are the instances in which a bankrupt is not protected from arrest?

When the bankrupt is in custody, how is he to be examined before the commissioners? and what is the consequence of his not surrendering in due time? and whether the time for surrender can be enlarged? and upon what grounds and how?

What is the punishment to which a bankrupt is liable for concealing property? and whether he may be committed to prison if his examination be not satisfactory, though he answer the questions directly and positively? and who has power to do so? whether a single commissioner?

(*To be continued.*)

New Writs in pursuance of statute 1 & 2

Vic. cap. 110., being the Act for abolishing arrest for Debt on Meane Process.—Sec. 20.

These writs have been framed by the Judges, and are ordered to be used from and after the 1st day of March next, with such alterations as the nature of the action, the description of the Court, in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

We shall give our Subscribers the forms of these writs in due time.

Business in the Courts.**ROLLS COURT.**

Short Causes.—*Eyre v. Monkland*, further directions and costs—*Lee v. Rutley*—*Seed v. Lee*—*Nicholl v. Lord Dynevor*—*Eyre v. Everett*—*Crewe v. Crewe*, further directions and costs—*Collins v. Smith*—*Richards v. Foster*—*Scott v. Booth*—*Younge v. Bruce*, further directions and costs—*Shidd v. Pasquier*—*Hitchcock v. Clendinen*—*Banister v. Rogers*, further directions.

After the Short Causes.—*Clough v. Clough*, petition, by order—*Allen v. Coster*, to be spoke to—*White v. Bowen*, ditto—*Vivian v. Humphreys*—*Skimmers' Company v. Irish Society*, ditto.

COURT OF QUEEN'S BENCH.
Sittings in Banco.—Special Paper.**COURT OF COMMON PLEAS.**

This Court will sit on Tuesday, the 5th day of February next, and will proceed with disposing of the business now pending in the paper of new trials on the 5th of February and two following days, and will proceed in disposing of the business now pending in the special paper on Friday, the 8th of the same month, and the following days.

By THE COURT.

Sittings at Nisi Prius.

The Court will sit at *Nisi Prius*, in Middlesex, on Friday, Feb. 1, and following days, including the days appointed as above for sittings in *Banco*.

Middlesex Common Juries.—*Norcutt v. Mottram*—*Jay v. Clift*, and another—*Dyer v. Haslewood*—*Thorpe v. Kaye*—*Malins v. Freeman*—*Norton v. Allison*—*Whitlow v. Miller* and another—*Oridge v. Burghart*—*Lock v. Gregory*—*Doe v. Scott*—*Read v. Fell*—*Tozer v. Clark*.

The last cause is No. 18 on the list.

COURT OF EXCHEQUER.

This Court will sit on Thursday the 5th day of February next, hold sittings, and will proceed in disposing of the business now pending in the *Paper of New Trials* on the 5th day of the said month, and the four following days.

By THE COURT.

Middlesex Common Juries.—*Belcher v. McIntosh*—*Costello v. Morgan*—*Williamson v. Webb*—*Richardson v. Claridge*—*Griffiths v. Bollington*—*Neary v. Mellick*—*Wright v. Pinner*—*Darby v. Smith*—*Winckstead v. Carrington*—the Same v. *Jones*—*Whitmarsh v. Gibson*—*Beauchamp v. Palfreyman*—*Von Dohren v. Hickman*—*Alderman v. Clark*, undefended.

The last defended cause is No. 17 on the list.

EQUITY EXCHEQUER,
Serjeants'-inn-Hall.

Mason v. Brooks, on minutes—the Same v. the Same, petitions, by order—*Cowgill v. Lord Oxmantown*, exceptions—*Clayton v. Meadows*—*Meadows, Pleas*—*Sharpe v. Sharpe*, exceptions—*Owen v. Owen*, further directions—*Stark v. Cunliffe*, exceptions—*Flin v. Finlay*, demurrer.

SITTINGS OF THE COMMON LAW COURTS AFTER TERM.**COURT OF QUEEN'S BENCH.***In Banco.*

Friday, Feb. 1, Special Paper—Saturday, 2, Crown Paper—Monday, 4, Special Paper—Tuesday, 5, ditto—Wednesday, 6, ditto.

At Nisi Prius.

Friday, Feb. 1, Middlesex, to adjourn only—Saturday, 2, London, to adjourn only—Monday, 4, No sitting—Tuesday, 5, ditto—Wednesday, 8, ditto—Thursday, 7, Middlesex adjournment-day.

The London adjournment-day is not yet fixed.

COURT OF COMMON PLEAS.*In Banco.*

Friday, Feb. 5, New Trial Paper—Wed. 6, ditto—Thursday, 7, ditto—Friday, 8, Special Paper—Saturday, 9, ditto.

At Nisi Prius.

Friday, Feb. 1, Middlesex, Common Juries only—Saturday, 2, ditto, London, to adjourn—Monday, 4, ditto—Tuesday, 5, Middlesex, Common or Special Juries—Wednesday, 6, ditto—Thursday, 7, ditto—Friday, 8, ditto—Saturday, 9, ditto—Monday, 11, *Shears v. Crease*, Middlesex, Special Jury cause.—Friday, 16, London adjournment-day.

COURT OF EXCHEQUER.*In Banco.*

Tuesday, Feb. 5, New Trial Paper—Wednesday, 6, ditto—Thursday, 7, ditto—Friday, 8, ditto—Saturday, 9, ditto.

At Nisi Prius.

Friday, Feb. 1, Middlesex, Common Juries—Saturday, 2, ditto, London, to adjourn only—Monday, 4, Middlesex Revenue and Common Juries—Tuesday, 5, Middlesex, Common Juries—Wednesday, 6, ditto—Thursday, 7, Middlesex, Special and Common Juries—Friday, 8, ditto—Saturday, 9, ditto—Monday, 11, Middlesex, Common Juries—Tuesday, 12, ditto—Wednesday, 13, London, adjournment-day.

TO CORRESPONDENTS.

“B. H. T.”—We have inserted his answer to Problem XII. to shew our Subscribers that we encourage the industry of the whole Profession, and that our Editorial labours are not confined to London.

We must request attention on the part of our Correspondents who wish their productions to appear in this Journal. We

can look at nothing that has even the shade of *wilful* carelessness, or that does not evince education, talents and industry.

A country Subscriber (we cannot make out the postmark)—His question is not of public interest. The legislature has already interfered in cases of forfeiture. On the forfeiture of a bond at law, the whole penalty was *once* recoverable, but the Court of Equity interfered and restrained the penalty being enforced upon payment of principal, interest, and costs, and this at length became law by the Stat. 4 & 5 Anne, c. 16. We refer him to the following reports of cases at law and in equity on the subject. 2 Term. Rep. 388. 6 Id. 399. 3 Bro. 489. 2 Anst. 525. 2 Ves. J. 718. 6 Id. 92—411. 3 Car. & P. 12. 1 East, 436. 17 Ves. J. 106. We are alluding to bonds for payment of money. Bonds for performance of Covenants, and other bonds, see the 8 & 9 Wil. 3. c. 11. s. 8. The judgment in these cases will only stand as security for the damages sustained. See Goodwin v. Crowle, Cowp. 357. If only in solitary cases, as our Correspondent puts it, more than the penalty cannot be recovered, then his question as to "the utility of inserting in a bond double the sum intended to be secured as a penalty," is at once answered. The stamp (if correct) will reach the sum due, be it what it may, that the bond will reach.

"F. C."—"H. D. M." are under consideration.

We would cheerfully oblige *all* our correspondents; but we cannot work impossibilities. The multitude of answers that we receive to the Problems really take up no little portion of our time; even the selection is an arduous task, and when selected, we must see that such selection is fit for publication, or make it so. Our limits also confine us more particularly, since we have so far exceeded our pledges as to original matter in this Journal; indeed *this week we have not even room for our usual Reports*; we could even issue a double number to clear our table, but that we stand pledged to price. We shall travel out of our way next week, and give another answer to Problem XII. by reason that we have several that are well written. Our correspondents of talent (and we are pleased to have several such) must not therefore think themselves neglected if their essays do not always appear—each shall have his turn where there are equals in ability, and each shall have our aid when reasonably required. Those whose productions never appear should

study the more, and continue to write until they *do* see themselves in print—when they may consider themselves fairly on the race-course. We can say no more.

"M." is referred to the letter of "H.D.M." and our appended note.

"HENRICUS" is under consideration—we don't like answers to Problems that are *broken*; and as a man of good sense he must know that it interferes very much with a weekly periodical. Suppose the answer *not* to be continued, where is the responsibility? We have already had an instance of this in one of our first correspondents, but which we attribute to his want of sufficient knowledge to accomplish the task he had undertaken, in a manner that would be satisfactory to *us*.

TO SUBSCRIBERS.

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THE LEGAL GUIDE.

PART 3 containing Nos. 10 to 13, both inclusive, with Table of Contents to the whole. This part contains Original Essays upon all the New Laws relating to Advosons and Ecclesiastical Benefices, as also to Ecclesiastical Writs, and upon the present uncertain state of the Law in relation to Trusts for the separate use of unmarried Women. Part 4 will be published on the 1st of March.

John Richards & Co., 194, Fleet Street.

On the 1st of February was Published,

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THE LONDON MONTHLY MISCELLANY, a Magazine of General Literature and Art; Illustrated by a fac simile of SIR JOSHUA REYNOLD'S Original sketch of the INFANT HERCULES; and Autographs of Eminent Individuals. Amongst many other interesting contributions will be found—Tales of a Physician—Third Series, No. 1. The Silent Lovers—Inedited Remains of Eminent Persons, Chap. IV.—What is the British Constitution? &c. &c.—And under the Title of "Russia and the Russians," is an interesting account of Russian Legislation, and a history of their attempts at Codification.

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Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 2nd February, 1839.

Price 6*d.* Stamped Edition, 7*d.*

The Legal Guide.

No. 15.]

SATURDAY, FEBRUARY 9, 1839.

TO THE HONOURABLE
LORD COTTENHAM,
LORD HIGH CHANCELLOR OF GREAT BRITAIN.*

MY LORD.—The question raised, and now remaining open for the solemn decision of your lordship in the Appeal Cases of Tullett *v.* Armstrong, and Scarborough *v.* Bowman, and the known opinion of your lordship upon the operation of trusts limited to the separate use of unmarried women (not being in contemplation of marriage) as expressed in Massey *v.* Parker, has caused a general sensation of alarm throughout the kingdom, leading, as it does, if pronounced to be law, to the serious disturbance of the doctrine held in your Lordship's Court for very many years, and under which a great portion of the property of this country is settled. To this opinion the two other Judges of your Lordship's Court are in decided opposition.

For a long period previous to the cases of Newton *v.* Reid, and Massey *v.* Parker, it was never supposed that *coveture or coverture at the time of the making or taking effect of the gift* was or was not a material circumstance to be taken into consideration; and upon this conveyancers have as long acted, regarding only the *time of disposition* by the *feme*. No doctrine was considered to be more perfectly settled than that of the operation of trusts for separate estate and restraint from anticipation, or that a gift of real or personal property in

favour of a woman for life for her separate use, free from the control of any husband, was effectual to secure it to her sole control; and if to that gift was annexed a restraint upon anticipation, then *upon marriage*, when the gift came into operation, to create *separate estate*, that restraint became also effectual. This doctrine was invented by the Court of Equity for protecting women in the sole enjoyment of property when covert, and your Lordship has now to pronounce a judgment that shall either entail ruin and misery upon a large portion of the women of England, or continue to them that protection the Court of Equity has hitherto afforded them. How many deeds and wills are in existence by which trusts have been created, of property intended to secure a separate and inalienable provision for *women unmarried*, and not in contemplation of marriage—parents for their infant children, for instance, without *any* doubt having been in the minds of the conveyancers that such trusts would be effectual when they came into operation.

In Massey *v.* Parker your Lordship's opinion in opposition to this settled doctrine first appeared;—that opinion being, that a gift, to the separate use of an *unmarried woman*, when she married, by that act it became the property of her husband, and that upon *principle* your Lordship has no doubt of the right of the husband in such a case: your Lordship seems to have considered the point as settled by the decision in Newton *v.* Reid. Will your Lordship permit me to remark upon that decision, that it did not interfere with the question; the married woman and her husband had combined to assign her separate property, and no one doubted that

* This letter was intended for publication as a distinct pamphlet, and not for this Journal. With the view, however, of extending its usefulness, the Editor has foregone any private advantages he might have derived from its publication in the former shape, and gives it to the Subscribers.

they might do so, unless they were prevented by the clause against alienation, and the decision only went to this, that the restriction on alienation was rendered ineffectual *by the context of the will*; but no opinion was expressed as to the effect or operation of the previous words. V. C. Benson *v.* Benson.

As a conveyancing counsel of some considerable practice and experience, I feel in common with all conveyancers and equity men, a great interest in this question, which will I trust prevent the observations I am about making being considered obtrusive at this *momentous period*.

Your Lordship is entitled to every credit for the best of intentions; but in this attempt to make the law *what it should be*, is not your Lordship creating an evil for which a remedy may not be easily found, and an evil of so great an extent, that it is awful to think upon? Is it not, as Lord Eldon remarked, *too late* to disturb a doctrine so long acted upon, and on the faith of which so many women have relied for protection?

With the highest respect for your Lordship's superior talents as a Judge, and convinced as I am, that your Lordship's views are of the most conscientious kind, — that they lean to strict justice, and that in order to administer strict justice conscientiously, your Lordship feels that the doctrine so long held *being an anomaly*, consequently an evil, it can *never be too late* to remove it; with these feelings I most respectfully venture these observations upon what fell from your Lordship, when the appeal cases, Tulloft *v.* Armstrong and Scarborough *v.* Bowman were argued before your Lordship on the 24th of last month.

Your Lordship gave no opinion, but referred to the case of Tudor *v.* Samyne, in 2 Vernon. 270., which your Lordship considered as deserving the consideration of counsel on both sides, and I must, therefore, assume that to be the case upon which your Lordship intends forming a judgment; and here I wish respectfully to request that your Lordship will bear in recollection, that the decision in *that* case was founded upon a *new doctrine then recently introduced by the House of Lords, against the decided*

opinions of the Judges, and that doctrine continued until the present one arose. I find that most of the modern cases are far from going to the broad question, as I have before taken the liberty of remarking upon Newton *v.* Reid. Beable *v.* Dodd, 1 Term Rep. 193. is very near to it; and there Willes J. and Ashurst J. went so far as to rule that the restriction was not confined to the then husband, but extended to *any future husband*, and this was a case of *inheritance*; they all depend upon some peculiar feature, and many of them upon construction only; even Tudor *v.* Samyne was a question upon future coverture.

So early as the reign of Charles I., it was a rule in equity, that your Lordship's court would not suffer the husband to take the wife's portion, until he had made a reasonable provision for her, Tanfield *v.* Davenport, Tothill, Tr. Ch. 14 Car. 1. and in many instances has granted injunctions to stay proceedings in the Ecclesiastical Court, 1 Atk. 491. This, (*says LORD HARDWICKE*), is an equity grounded upon natural justice, and is that kind of parental care which your Lordship's Court exercises for the benefit of orphans, and as the father would not have married his daughter without insisting upon some provision, so your Lordship's Court, which stands in *locus parentis*, will *not do it*. His Lordship also observed in Jewson *v.* Moulson, 2 Atk. 419. that *if one looks into the cases upon this head it is difficult to reconcile them*, though indeed one thing was clear through them all, that if the husband makes a voluntary assignment of the wife's portion, the volunteer must stand *in the place* of the husband, and there was the same equity as to assignees of bankrupts, and executors, and administrators, because it was *the law* that cast it upon them. What shall we therefore say to what has taken place under the modern doctrine, where women with property settled to their separate use relying upon the protection afforded them by the Court of Equity, have required no settlement before marriage, being satisfied that their separate property was safely secured to them, free from the control, debts, or engagements of their husbands, and yet

are now (and in what a multitude of instances will it occur!) to be stripped of that protection, and with it *all* their property, and thrown upon the world without a shilling, by the misconduct of their husbands, or by their insolvency or bankruptcy, which latter events would pass their property to assignees, and that without being entitled to any settlement or allowance of any kind? this was ruled by *Tudor v. Samyne*. The reflection brings to my mind an expression of Mr. WATKINS, in his *introduction* to the "Principles of Conveyancing."—"It is but little consolation to say on the trial of a cause, '*that case is not law, after it has misled half the kingdom.*' What are we to say to the cases where trustees of property settled to the separate use of unmarried women, have, after coverture, been paying them, (as they considered they were bound to do,) their separate incomes, and may now be called upon to pay that income over again by the husbands, or by their assignees, and confined in extent only by the Statute of Limitations, unless your Lordship shall get a Bill of Indemnity passed to meet the occasion?

These are serious evils to be considered by your Lordship in disturbing the MODERN DOCTRINE, and I will now respectfully attempt a review of the OLD DOCTRINE.

The case of *Tudor v. Samyne*, referred to by your Lordship, occurred in 1692, and the doctrine there ruled was in accordance with the *then new doctrine* of the House of Lords, as introduced in Turner's case, which I shall speak of presently; but I find the present doctrine existing at a much earlier period, when it was the constant practice to set aside, and frustrate all incumbrances and acts done by the husband. In the time of Elizabeth, it was decreed by the advice of *all the Justices in England*, that a husband is not entitled to a term, nor the use of it, when granted to a trustee for the use of his wife. *Wytham v. Waterhouse*, Hilary Term, 38 Eliz. B. R. Cro. Eliz. 466. In the time of Car. I., a *feme sole*, entitled to a copyhold in fee, married, and the husband made a lease for years, which by the custom of the manor worked a forfeiture; the husband died, and it was adjudged that the lease did not bind the *feme*, nor was the forfeiture avail-

able against her, and she had the land again. *Saverne v. Smith*, in error, Ex. Ch. Easter Term, 1 Car. 1. 4 Cro. Car. 7.

In the case of *Doyly v. Perfull*, Cases in Ch. 225. Mich. T. 25 Car. 2. it was admitted by the Court, that since Queen Elizabeth's time, it had been the constant course of your Lordship's Court to set aside and frustrate all incumbrances and acts of the husband upon the trust of a term created for the separate use of the wife before marriage, and that he should neither charge or grant it away; and that it was the common way of proceeding for the jointures of women, to convey a term in trust for them upon marriage, that it might be out of the power and reach of the husband, neither should he forfeit it by outlawry or felony, if for jointure or in pursuance of articles of marriage, or during the wife's time, it is assigned in trust as in this case (now citing) or if on other good consideration it is assigned. But if it be an assignment after marriage by the husband in trust for the wife, it is voluntary and fraudulent against purchasers. This, my Lord, was the expressed opinion of the then LORD KEEPER FINCH. It may be said that these cases refer only to trusts created in *contemplation of marriage*; but I humbly submit it was the general practice of the Court (as I hope to be able to shew to your Lordship) in *all cases* of property settled to the separate use of a *feme sole*, that it should be so enjoyed under the protection of your Lordship's Court. To arrive at something like this practice, the case of *Fleming v. Waldegrave*, Ch. Ca. 58. Mich. T. 16 Car. 2. where 900*l.* was secured by a lease for years to a *feme sole*, in case she did not marry contrary to the liking of Sir Edward Waldegrave and his lady, and if she did, then to the nomine of the latter two persons, and for want of such nomination, then to the same two persons and the survivor of them: they were also lessees in trust: the *feme sole* married *without* their consent. Lady Waldegrave, who survived her husband (she having made no appointment) made a general deed of gift of all her goods and chattels to one Sandal. The question was between Sandal and the administrator to the *feme*

sole that was, who was also administrator to Lady Waldegrave as to who should have the benefit of the lease; and it was held by the Lord Chancellor, that it was not in the power of Sir Edward and his lady to have disposed of this lease otherwise than for the benefit of the *feme sole*, if she had lived, and that *her* administrator was well entitled to the benefit of the lease. The reports at this time are very brief, and it must be taken for granted that this trust was for the *separate use* of the *feme sole*, and *not* created in contemplation of marriage. Subsequently, in the same reign, I again approach the question with Gibbons *v.* Moulton & ux. Easter Term, 30 Car. 2. Ch. Rep. 346. (though in a shape that is perhaps equivocal), where a devise was made of a power to a *single woman* to grant an annuity from a fund given to her, and she afterwards married, and it was held that the marriage did not divest her of the power to lodge it in her husband.

Two years afterwards comes the case of Sir EDWARD TURNER, and this the most important of all;* for through it the law was changed, and it may not be unimportant to consider that Sir Edward Turner was *Lord Chief Baron*, and of course possessed great influence, particularly in those corrupt days. His wife had settled upon her by a former husband the trust of a term—after her second marriage the Chief Baron (her second husband) sold this trust, and the Lord Keeper Finch decreed the sale to be void as against the wife. The Chief Baron appealed to the House of Lords, and this decree was reversed, and THEN THE DOCTRINE REFERRED TO BY YOUR LORDSHIP FIRST COMMENCED. The Lords having held that a *feme* possessed of the trust of a term when she marries, the husband may dispose of it; and consequently it becomes liable to his debts. The ground of this decision is stated in 2 Atkyn's Rep. 421. to be, that as the husband at law could dispose of a term of years, so might he dispose of the trust of a term, because the same rule of property must prevail in equity as at law. But a trust being the creature of equity, its duty

is to carry out the trust according as it may be directed; therefore that ground is not sustained.

The late LORD TENTERDEN, at law, in Dean *v.* Brown, 2 Car. & P. 62, entirely destroyed the ground of this decision. His Lordship said that by the law of this country a married woman can have no property distinct from her husband, and by her marriage all property that she had before belongs to him, and is liable to his debts; but in another mode, the property of even moveable articles may be secured to a wife, by conveying such property previously to marriage to trustees, for her sole and separate use; and that in this way, though the wife herself could by law have no separate property, yet the trustees might hold it for her, so that it should not be subject to the control of her husband, nor be liable to his debts, and that with regard to real estates this was done very many years ago, and in mere personal property had often been so secured.

This NEW DOCTRINE was in direct opposition to the opinions of the Judges at the time, for we find in Pitt *v.* Hunt, 1 Vern. 17., where the same question was raised, that the LORD CHANCELLOR (NOTTINGHAM) wondered at the resolution of the House of Lords in Turner's case, which he said "would not amount to an act of Parliament to change the law; and although at first there possibly was no great reason for those resolutions, that the husband could not dispose of a trust for the *feme*, made without his privity before marriage; yet the law being so settled, people made provisions for their children according to what the law was then taken to be; and now those provisions are defeated by this new resolution; so that now it is almost impossible for a man so to provide for his child, but it shall be subject to the disposal of an extravagant husband, and his Lordship commended the saying of *Chief Baron Walter*—"It is no matter what the law is, so it be known what it is;" but his Lordship was of course compelled to decree in this case, as it had been held by the Lords in Turner's case, observing, "that there must not be one sort of equity above-stairs in the House of Lords, and another below-stairs in Chancery; and his Lordship thought

* It is a parallel case with Tudor *v.* Samyne.

that from thenceforth it would not serve to have the husband's consent or privity to an assignment of a term in trust for the *feme* before marriage, unless he was likewise made a party to the assignment." See also Sir George Sand's case, Hard. 448.

I have thus shewn the commencement of the doctrine, which your Lordship wishes again to introduce, and that it is in fact an innovation upon the old law, which protected the property of women in the same manner as the modern law hath done; and besides it expresses all that I could say, or can be said against another change being made, but that it should remain in accordance with the ancient and accustomed law of the land.

After Tudor v. Samyne followed upon the new doctrine, came Walter v. Saunders, in Trinity Term, 1703, Eq. Ca. Ab. 58., in which the Master of the Rolls also followed, by compulsion, observing that it was much against his conscience, but he did so that there might be a uniformity of judgments.

I cannot refrain also from looking at the time when this change in the law took place, so contrary to the opinions of the Equity Judges—the person through whose influence that change was made—and the high character of the Lord Chancellor Nottingham, who set his face so decidedly against the change; his lordship was considered a man of sound judgment, and always reasoned with eloquence and exactness—of whom, it is said, in the preface to the Reports in Chancery during his time, that the then late Bishop of Salisbury gave him this noble character—"That he was a man of probity, and well versed in the laws, an incorrupt Judge, and in his own court could resist the strongest application, even from the king himself." Such was the Judge, and if we look to the time, we find juries in the habit of "filling up a six-pence, if cross for the plaintiff, if pile for the defendant."

It is also said, in a note to Sir Edward Turner's case, 1 Vern. 7., that although the doctrine on this subject as laid down since then, appeared to be then established, yet it seemed formerly neither to have been considered as law, nor to have met with

favour since its establishment; and that the Court even then would go so far as upon circumstances to restrain the husband from parting with the property of the wife. Ellis v. Ellis, before Lord Loughborough, Ch. 1793. MSS. Roberts v. Roberts, before the Master of the Rolls, 12 Feb. 1796. MSS. cit. Vin. Ab. Supp. 476. S. C. 2 Cox. 422.

Lord Thurlow then, in order to afford some shield to women against the misconduct of their husbands, and to secure to them some support, introduced the anticipation clause, not, as his Lordship said, to take away any of the incidents of property at law, but that the interest which he thus suffered a married woman to take, became a creature of equity which might modify the power of alienation. This was merely a supplemental expedient for protection devised in the spirit of the original doctrine. Since that time property has been governed and settled accordingly. The established and well-settled doctrine being, to adopt the words of the Vice-Chancellor, in Davis v. Thornycroft, that it is lawful to give property to the separate use of a woman, married or unmarried, and the practice of the profession has been according to that opinion, without any variation. The Master of the Rolls also, in one of the cases now before your Lordship, also defined this doctrine to be, that property given to a woman for her separate use, without power of anticipation, might under the authority of your Lordship's court, be enjoyed by her as her separate estate, and that in respect of such estate she might be considered as a *feme sole*, and that the words "independent of her husband," meant that the court would not permit the marital power of the husband to be used in contravention of the donor's intention, and this doctrine was previously well established and settled by Lords Eldon and Lyndhurst, and Sir John Leach.

I have confined myself in this letter to the old law. All the modern law has left untouched the substance of the doctrine I have before stated; and upon the question at issue I cannot do better than use the words of Sir Edward Sugden, as strong

and forcible reasons that the doctrine should not be disturbed:—"Where such a gift is in favour of an *unmarried woman* it is no bridle upon herself; but if she do not alien and marry, the husband cannot complain; he should have enquired; and a settlement for the wife's separate use should not be deemed a nullity; if the trust had been considered inoperative, the wife might have created a similar binding one before marriage. Why should not the subsisting one be allowed to remain operative, and be considered as adopted by the husband by the marriage? If he desired to have the ownership, of the property he should have required his wife, before the marriage, to renounce the trust for her separate use. She, by allowing it to remain undisturbed, manifested her intent not to relinquish the protection which it afforded to her." 1 Treat. Pow. 208.

I have the honor to be,

MY LORD,

Your Lordship's very humble servant,

THE EDITOR.

Legal Guide Office, 194, Fleet St.

9 Feb. 1839.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XI.

(Continued from page 195.)

What are the provisions introduced by the Statute 1 & 2 Wil. 4. c. 58, called the Interpleader Act, as well to the relief of Private Individuals as to Sheriffs, when liable to be sued in cases in which they are not personally interested? and what is the present state of the law in relation to those provisions?

As respects sheriffs and other officers in execution of process against goods and chattels, by s. 6. of the before-mentioned act of the 1 & 2 Wil. 4. c. 58. (I) it is enacted that "when any claim shall be made to any goods or chattels taken or intended to be taken in execution under any process, [issued under the authority of the aforesaid Courts, vide sec. 1.] or to the proceeds or the value thereof, it shall and may be lawful to and for the Court from which such

process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of Court, as well the party issuing such process, as the party making such claim; and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court."

The following cases have been decided on this section:—

If the claimant claims a lien only on the property, and in case of conflicting claims, the Court will relieve. Ford *v.* Baynton, 1 Dow, P. C. 357. So if the goods were seized in the claimant's possession, and not in that of the defendant. Allen *v.* Gibbon, 2 Dow, P. C. 292. And even if execution-creditor abandons his process against claimant, Court will relieve. Baynton *v.* Harbey, 3 Dow, P. C. 344. And it has been decided that it is not necessary for sheriff first to apply for an indemnity from either party, nor is he bound to accept one, if offered to him. Crosby *v.* Ebers, 1 Har. & W. 216; Levy *v.* Champney, 2 Dow, P. C. 337. It seems that the sheriff must inquire into the nature of the claim before he applies to the Court. Bishop *v.* Hinxman, (II) 2 Dow, P. C. 166. And sheriff must shew that claimant intends to enforce his claim, and that claim has been actually made; but it is not necessary that an action should be brought before Court will relieve. Green *v.* Brown, 3 Dow, P. C. 337; Bentley *v.* Hook, 2 id. 339; Isaac *v.* Spilsbury, 10 Bing. 3.

The Court will not relieve sheriff against contending claims of landlord and execution-creditor where landlord has distrained. Haythorn *v.* Bush, 2 Dow, P. C. 641. Nor where a claim has been set up by a person as partner of defendants. Holmes *v.* Mentze, 4 Dow, P. C. 300. Nor where sheriff has paid over proceeds to judgment creditor, after notice of a claim by a third party. Anderson

v. Calloway, 1 Crompt. & M. 182; 1 Dow, P. C. 636. (III) although he paid over money before claim made, Scott v. Lewis, 1 Gale 204; or although he may be willing to bring a similar amount into Court, Ireland v. Bushell, 5 Dow, P. C. 147.

The Court will not relieve where the undersheriff is plaintiff in the action, or in any way interested therein. Ostler v. Bower, 4 Dow, P. C. 605; Dudden v. Long, 1 Bing. N.R. 299. Nor where sheriff has been guilty of any neglect. Blackenbury v. Laurie, 3 Dow, P. C. 180.

The sheriff must come to the Court in a reasonable time, or relief will not be granted. Alemore v. Adeane, 3 Dow, P. C. 498. As to what is considered reasonable time, *vide* Skipper v. Lane, 2 Dow, P. C. 784; and Dixon v. Ensell, id. 621; Lashmar v. Claringbold, 2 Har. & W. 87. (IV)

One Court cannot relieve sheriff with respect to process issued out of another Court, and therefore where the sheriff has process from different Courts he must apply to each. Bragg v. Hopkins; Wills v. Hopkins, 2 Dow, P. C. 151. Where execution-creditors did not appear, but the claimant did, the Court ordered sheriff to withdraw, and that sheriff should be discharged from all proceedings by execution-creditor in respect of the seizure. Doble v. Cummins, 2 B. T. T. 1837.

Where application is made by the sheriff, the Court cannot try the merits of the respective claims on affidavits, but must direct an issue. Bramidge v. Adshead, 2 Dow, P. C. 59. and no one can be heard against the rule, unless called upon to appear, although a claimant; and if called upon in one character, he cannot appear in another, Clark v. Lord, 2 Dow, P. C. 55; but defendant's assignees may be made parties to the rule, if defendant afterwards become bankrupt, Kirk v. Clark, 4 Dow, P. C. 363. (V)

The sheriff is not entitled to costs, and his claim to poundage depends on the legality of the seizure, Barker v. Dynes, 1 Dow, P. C. 169. id. 417, 636. and Beswick v. Thomas, 5 Dow, P. C. 458.; but if he can shew that the conduct of the parties had been vexatious, then the Court will in

general give him his costs. Cox v. Fenn, Exch. M. T. 1838; and Morland v. Chitty, 1 Dow, P. C. 520. But where no blame appears to attach to either party, each will have to pay his own costs, Bishop v. Hinckman, 2 Dow, P. C. 166.

F. I. C.

(I) The act does not apply to claims in equity, Sturgess v. Claud, 1 Dow, P. C. 505.—Ed.

(II) If he brings parties before the Court in consequence of a claim, which is clearly bad in point of law, the Court will compel him to pay the costs. Id. But he must come as soon as possible, Cook v. Allen, 2 Dow, P. C. 2.—Ed.

(III) Chalon v. Anderson, 3 Tyr. 237; Devereux v. John, 1 Dow, P. C. 548.—Ed.

(IV) Sheriff need not wait for proceedings against him before he applies for relief, Green v. Brown, 3 Dow, P. C. 337.—Ed.

(V) Cause cannot be shown against his rule at Chambers, where sheriff applies to the Court for a rule, Shaw v. Roberts, 2 Dow, P. C. 25.—Ed.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XII.

What is an Estate in Dower?—and what are the Requisites to Dower?

Where a man is entitled to an estate of inheritance, and dies leaving a wife, such wife shall have for her life the third part of all the lands and hereditaments of which the husband was entitled to, at any time during the coverture, which is denominated her estate in Dower.

Dower is divided by the old law-writers into Dos, and Dotarium or Doarium. The first signifying that property which the wife brings her husband in marriage, otherwise called Maritagium—marriage goods. The other, according to Glanville, lib. 7, cap. 1, and Britton, lib. 2, cap. 101, that portion of lands and tenements which she hath for the term of her life from her husband, if she outlive him. The former has been called by way of distinction a “dowry,” and the latter a “dower.” “But,” says an

old law-writer on this subject, "they are often confounded; of the former, our law books speak little—this only may be noted, that whereas by the civil law, instruments are made before marriage, which contain the quantity of the wife's dowry or substance brought to her husband; that he, having the use of it during marriage, may after certain deductions, restore it again to the wife's heirs or friends after the marriage is dissolved. The common law of England, whatsoever chattels, movable or immovable, or ready money, she brings, makes them forthwith her husband's own, to be disposed of as he will, leaving her at his courtesy, to bestow anything or nothing upon her at his death; only if she be an inheritrix, the husband holds her lands but during her life, except he have issue by her, and then he holds them by the courtesy of England during his own life."

I shall in my endeavour to describe this estate, consider, in the 1st place, Who may be endowed? 2nd. What may be endowed? 3rd. The different species of Dower. 4th. The incidents to Dower. 5th. The assignment of Dower. 6th. The remedy of Dower. And, lastly, the method of barring or destroying Dower.

And 1st. Who may be endowed? Any woman who is a natural born subject of this kingdom, having attained the age of nine years, may be endowed, Co. Litt. 33 a. In the time of Bracton, the age was of no consequence, as dower was then only due *si uxor posset dotem promereret et virum sustinere*. She must be the actual wife of the party at the time of his decease; for the maxim of the law is, "*ubi nullum matrimonium, ibi nulla dos;*" if she is divorced, *o vinculo matrimonii*, she will not be entitled to dower, provided the marriage is dissolved in the lifetime of the husband, Co. Litt. 33 a.; Rop. Husb. and Wife, 559. 561; but if divorced *propter metum aut servitium, or a mensa et thoro*, she will be entitled to dower, Co. Litt. 32 a. Stowell's case, Godb. 146. A divorce *propter adulterium* alone is no bar of dower by the common law, Co. Litt. 32 a. 9; Vin. Abr. 241. pl. 9. 242. pl. 11. 12; but by the Statute Westm. 2. (13 Edw. 1. c. 34.) if a woman elopes from

her husband, and lives with an adulterer, and there is no reconciliation between her and her husband, she shall lose her dower: and see Paynell's case, 2 Inst. 435; also, if she be stolen, and afterwards consent to live with her ravisher, she is barred of dower by Statute 6 Rd. 2. st. 1. c. 6. But if she be afterwards reconciled to her husband, she will be entitled to dower, as if she had never eloped, Green v. Harvey, 1 Roll. Abr. 680; Haworth v. Herbert, Dyer, 107; 13 Rep. 23; Bateman v. Bateman, 1 Dow, 245. It has been held that the wife of an idiot may be endowed, though the husband of an idiot could not be tenant by the courtesy; but this opinion is now exploded, upon this principle, that as an idiot cannot consent to any contract, an idiot cannot marry. An alien woman cannot be endowed unless she be Queen Consort, for no alien is capable of holding lands. But if aliens and Jewish women are naturalized by Act of Parliament, or created denizens, they are entitled to dower. See Cru. Dig. tit. 6. c. 1. s. 30. 32.; and Hargreave in his note 187, to Co. Litt. 32, mentions that, by an Act of Parliament not printed, Rot. Parl. 8 Hen. 5. n. 15, all women, aliens, married to Englishmen by the license of the King, are enabled to demand their dower, in the same manner as Englishwomen. By the ancient law, the wife of a person attainted of treason or felony, could not be endowed, for this reason, says Staunford, P. C. b. 3. c. 3, that if the love of a man's own life cannot restrain him from such atrocious deeds, the love of his wife and children may; though Britton, c. 110. gives it another turn, viz. that it is presumed the wife was privy to her husband's crime. The Statute of 1 Edw. 6. c. 12. mollified the rigour of this law, and allowed the wife her dower; but this Statute was repealed by the 5 & 6 Edw. 6. c. 11, and now all widows of traitors are barred of their dower, (except in cases of certain modern treasons relating to the coin) but not the widows of felons, see 2 Bl. Com. 131.

I come now to the second part of my enquiry, viz. of what a wife may be endowed?—I shall consider, under this head, in the first place, the law as it stood (in

respect of this part of my subject) previous to the 1st of January, 1834; and, in the second place, the law as it now stands in regard thereto, as altered by the late Dower Act, 3 & 4 Wil. 4. c. 105. which, however, does affect widows married before the 1st January 1834, at which time it came into operation.

Therefore every widow married before that time, is entitled to be endowed out of all the lands and tenements of which her husband was solely seized at any time during the coverture of an estate in fee simple or fee tail, and to which estate *the issue of such widow might by possibility have inherited*, Co. Litt. 32 b. 39 b.; consequently, where a man holds an estate to him and his wife, and the heirs of their two bodies, if such wife dies, and he marries a second wife and dies, the second wife cannot possibly be endowed, because the issue by her cannot inherit *per formam doni*. Bro. 19. 36. Cro. Jac. 615. Litt. sect. 53. Co. Litt. 31. A seizin in law is as effectual as a seizin in deed, in order to render the wife dowable; but if the husband is only seized for a transitory instant, as when the same act which gives him the estate conveys it also out of him again, the wife will not be entitled to dower, for the land was merely *in transitu*, and never in the husband, the grant and render being one continual act; but if the land abides in him but for a single moment, the wife shall be endowed thereof, 2 Bl. Com. 132. She is also entitled to Dower out of all the profits arising from such estates, as mines wrought and opened during the coverture, and also of all mills, dove-houses, parks, fisheries, profits of courts, fines, heriots, advowsons appendant, Wood's Inst. 124; Dyer, 356; or in gross. Cro. Jac. 622. Tithes impropriate, Co. Litt. 159 a. Offices of inheritance, Co. Litt. 29 a. 33 a. Of a reversion or remainder of an estate for years, Co. Litt. 32 a. Also out of the equity of redemption of lands mortgaged in fee before the marriage, upon the widow paying a third of the mortgage money, or keeping down a third of the interest, 2 P. Wms. 216; Banks v. Sutton, 2 P. Wms. 700. Likewise out of a tenancy in common; and in such case, the dower is

assigned in common too, for she cannot have it otherwise than her husband himself had, Co. Litt. 34 b; and also out of estates held in coparcenary, 1 Cru. Dig. 154. 172. She is entitled to dower out of copyholds, which is termed her freebench; but it depends upon the custom of the manor, and may be of any part or of the whole, Boraston v. Hay, Cro. Eliz. 415; and during life or widowhood, Linsey v. Dixon, Dyer 192. By the custom of some places, the wife may have half, and of others, the whole of the estate, Wood's Inst. 124. It has been held, that the widow is entitled to dower out of a share in the river Avon, Buckeridge v. Ingram, 2 Ves. Jun. 652. A woman cannot be endowed out of a castle for the defence of the realm; nor of the capital mansion of a barony by tenure; nor out of a common in gross without number; nor out of an annuity that is a personal charge, Co. Litt. 31 b. 32 a; nor out of an estate held in joint tenancy, ibid. 37 b. 4 Bro. 84. Cro. Car. 121; nor of a trust estate of inheritance, Forder v. Wade, 4 Bro. C. C. 521; Crabtree v. Bramble, 3 Atk. 687.

(To be continued.)

PROBLEM XV.

ERROR.

WHAT IS A WRIT OF ERROR? WHEN IS IT GRANTED? FOR WHAT CAUSE? AND WHAT ARE THE CHANGES MADE BY THE STATUTES 11 GEO. 4, AND 1 WIL. 4. c. 70. IN RELATION TO IT?

TO THE EDITOR OF THE LEGAL GUIDE.
CORONERSHIP FOR MIDDLESEX.

SIR,—Medical or Non-medical Coroner is the question the Freeholders of Middlesex have now to decide. I have no personal knowledge of Mr. Adey, but it is with much satisfaction that I find he is again in the field; and from what I can glean, I believe him to be fully competent to fulfil the duties of the important office. Surely it is incumbent on the Legal Profession, of which he is a member, to support him in the approaching struggle;—allow me therefore, through the medium of your respectable Journal, to appeal to, and respectfully urge the members of the pro-

fession to render Mr. Adey the requisite pecuniary aid and assistance to secure his election. I will most cheerfully contribute my mite, and the same will be paid on application to Yours, very obediently,

C. G. S.

Gray's Inn Square, Feb. 7th, 1839.

We know the writer of the above letter, and shall be happy to forward his views on behalf of Mr. Adey, in any way he or the Profession may suggest. Our Publisher will receive subscriptions. We are decidedly opposed to a *medical* coroner. The statute of Westminster, 3 Edw. 1. c. 10. declares the qualifications of a coroner, that he shall be a loyal and wise knight, which knows well, and may best attend upon such offices, and which lawfully shall attach and present pleas of the crown.

It is no objection, at this day, that the person chosen is not a knight. The very name of the office is an evidence that a *medical* person is incompetent. *Coroner, coronatur*, because he hath *principally to do with pleas of the crown*, or such wherein the King is more immediately concerned; and hence it has been considered necessary that the *LORD CHIEF JUSTICE of the King's Bench* should be (as he is) the principal coroner in the kingdom. We have an instance of a person being removed from the office after having been elected, because he was a *merchant*, (2 Inst. 32.).

By the 6 & 7 W. 4. c. 105. s. 6, coroners, *in cases of illness*, are authorized to appoint deputies, who must be either Barristers or Solicitors.—ED.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR.—Your opinion is solicited on the following point.—By 1 & 2 Vic. c. 110. s. 9., it is enacted “that from and after the 1st Oct. 1838, no warrant of attorney to confess a judgment in any personal action, or a *cognovit actionem* given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts, on behalf of such person, expressly named by him and attending, at his request, to inform him of the nature and effect of such warrant or *cognovit* before the same is

executed, and that such attorney shall subscribe his name as witness,” &c. A question has arisen, whether this enactment extends only to the superior Courts of Record, or whether it also includes County Courts in general, they not being Courts of Record? I would particularly request the favour of your attention to the language of the recital to that particular section. I have not set it out, fearing to trespass at too great a length on your columns.—I have the honour to be, sir, your very obedient faithful servant,

TYRO.

1st February, 1839.

We have already given one opinion upon sec. 9. of the statute for abolishing arrest upon *mesne process*; (a) the present question is however of a different nature, and it must be construed in accordance with the preamble, “it is expedient that provision should be made for giving *every person* executing a warrant of attorney to confess judgment, or a *cognovit actionem*, due information of the nature and effect thereof,” and the statute then proceeds to make such provision in the words stated in the case put by “Tyro.”

We are of opinion that the statute extends to *every warrant* of attorney and *cognovit actionem*, no matter how or where given—whether in Courts of Record or County Courts; but every such warrant of attorney and *cognovit actionem* must be witnessed by an attorney of *one of the superior courts*, as directed by the act, to make it of effect.

EDITOR.

Law Reports.

VICE CHANCELLOR'S COURT.—Jan. 31.

PHILLIPS v. JONES.

LESSOR and LESSEE—Lease of COAL MINES—*Liability of lessee to pay a certain yearly rent, whether any coals should be dug or received out of the premises or not, in the event of the mine proving a failure.*

An injunction had been obtained by the plaintiff to restrain the defendant (the lessor) from proceeding in an action at law upon the

(a) *Ante, 161.*

covenant of the plaintiff (the lessee) for rent, and cause was now shown against it.

The facts of the case appeared by the bill to be, that the defendant had granted the plaintiff a lease of coal mines in Monmouthshire for twenty-one years, at a yearly rent of 300*l.*, whether any coal should be dug or received out of the premises or not, and a further rent or royalty of 10*s.* a weigh for all the coals dug up "exceeding 600 weighs, that being the quantity considered as paid for by the rent of 300*l.* a-year," that should be raised in any one year, and which the plaintiff entered into the usual covenant with the defendant to pay. It was also provided, that if certain seams of coal should be wholly worked out before the expiration of the term, the lessee should have power to put an end to the lease upon due notice to the lessor. From the allegations in the bill, it appeared the plaintiff had expended immense sums of money in working the mines, and had paid royalty dues to the amount of nearly 3,000*l.*, but that in consequence of the faults and dikes which interrupted the veins, the immense falls of the roof, the effects of the ancient workings, and other causes, all which were unknown to the plaintiff at the time he executed the lease, he had been unable yet to obtain any coal, and that he was not only assured, that after continuing the works for several years, he could not reach the coal except at an expense of five times the value of the land and coal, but that if ever he had reached it, the quantity would have been found so small, that it must have been long since exhausted, and that the sum already paid would exceed the whole royalty at 10*s.* a-weigh. The plaintiff also alleged, that he had represented all this to the defendant, and the inevitably ruinous consequences to himself which must attend the fulfilment of the contract, and had offered a surrender of the lease, but that the defendant had refused to accept it, insisting on being paid the full amount of 300*l.* per annum for the whole 14 years, in consideration of the coal which actually existed, and without reference to the difficulties of getting at it, and had commenced proceedings at law for payment of the 300*l.* annual rent. The bill prayed a declaration that the defendant was only entitled to 10*s.* per weigh upon the coal actually in the mines at the date of the lease, and a consequent account between them.

The case of *Smith v. Morris*, 2 Bro. C. C. 311., was relied upon in support of the injunction; but the *Vice-Chancellor* (without calling on the counsel on the other side) said he was of opinion the case cited was materially different from the present. There the terms of the lease were that the tenant should be bound to work the mine and pay a specified royalty to the landlord upon the coal which should be won, and the tenant alleging he should be ruined if he were compelled to continue working, was relieved on giving the landlord all that could have been obtained by him even if the tenant were ruined. But in this case the tenant was bound to pay a gross

sum in the first instance, whether the coal was worked or not, and afterwards a certain royalty in the event of more than 600 weigh of coal being raised. Had the action been brought upon the covenant to work the mines, he admitted "*Smith v. Morris*" would have been applicable to the case; but as the annual rent of 300*l.* was to be paid, whether the coal was worked or not, in his Honour's opinion there was no pretence for relieving the tenant against the payment of that sum. Injunction dissolved.

QUEEN'S BENCH.—Feb. 6.

STORR v. LEA & UX.

HUSBAND and WIFE—Liability of the husband to the debts of the wife, (a) who before marriage as a *feme sole*, had taken the benefit of the Insolvent Act.

This was an important case, and raised a question that the Insolvent Act had not contemplated. Here the female defendant, before her marriage, and during the time she was a *feme sole*, had taken the benefit of the Insolvent Act, and had given the usual warrant of attorney to the Court as directed by the Act.

She afterwards married the male defendant, and the plaintiff, who was one of her scheduled creditors for a debt contracted before her marriage, brought this action, and the question was, whether the defendants were liable under the circumstances.

The Court held that this case was never contemplated by the Legislature, and was therefore entirely omitted in the statute. In order to bring the parties within the operation of the act, some other provisions than those existing were necessary.

Judgment for the defendants.

COURT OF EXCHEQUER.

Hilary Term.

Sittings in Banco.

WATSON v. CARROLL AND ANOTHER.

Where one who is privileged from arrest is in custody on several writs, and obtains a Judge's order for his release in one,—the Sheriff is not bound to discharge him on the other writs, until he has obtained an order in each and demands his release: otherwise he may be liable to Actions for Escape.

Trespass on the case for arresting a barrister on his return from his attendance in the Court of Chancery, setting forth an order by Mr. Justice Coleridge to the defendants to release, of which they had notice, and alleging their duty to discharge the plaintiff.

Plea 1st, not guilty—2d, that when the plaintiff was so arrested on *mesne process*, as in the declaration mentioned, the defendants as sheriffs had a suit of *capias ad satisfaciens*.

(a) See *Edwards v. Perry and Others*, ante, p. 173.

dum placed in their hands at the suit of one T. Bailey, by which they were directed to take the body of the said plaintiff, who was in their bailiwick, and him keep, &c. and that thereupon the plaintiff, when arrested on *mesne process*, became and was detained and kept in custody under and by virtue of the *capias ad satisfacendum*, as well as under the other writ, until the defendants had notice as alleged in the declaration, of the order for his release on the *mesne process* writ; that the defendants thenceforth kept and detained him in custody under and by virtue of the said suit of *ca. sa.*

3d and 4th pleas to the same effect, justifying under other writs of *ca. sa.* to which the plaintiff specially demurred, and for grounds of demurrer, averred that the pleas were no answer to the matters in the declaration, which went for damages for the retention of the plaintiff after notice of his discharge given by him to the defendants, and that the privilege from arrest of a barrister extends to a writ of *ca. sa.* as well as a *capias ad respondendum*; and further, that the conduct of the defendants was wrongful and malicious.

Joinder in demurrer.

Stammers in support of the demurrer. These pleas are no answer to the declaration—No case exactly in point; though there are some indirectly bearing on it. Lord Mansfield, in *Tarlton v. Tucker*, Doug. 671, says, that trespass will not lie, but if the defendants be proved to have done any thing oppressive and vexatious, then they as sheriffs are liable in case, if moreover they had notice of the privilege claimed. So in this case, if the defendants had notice of Mr. Justice Coleridge's order for the plaintiff's discharge, and its reasons, which they had, they are liable in this form of action for a disregard of that notice and those reasons; *Stokes v. White*, 1 C. M. & R. 223, the defendant's knowledge is necessary.

Per Curiam—What notice is there to the sheriffs that the plaintiff was entitled to his discharge on the *ca. sa.*? If he had been discharged without express notice on each writ, the sheriffs would have been liable for an escape.

Stammers.—The plaintiff was entitled to his discharge on all, if on one, and as soon as it is notified to the sheriffs that he is entitled in respect of one, it is submitted that he ought to have been set at liberty on all the causes of detention. It is not clear, moreover, that the plaintiff knew of the existence of more than one writ, that, namely, on which he applied to a judge, and in respect of which the order was granted for his discharge. But the sheriff must have known that his privilege extended over all writs equally, and having notice of his exemption, he must have held him in the face of a knowledge that he was entitled to his discharge. If formal notice be necessary in all cases, then the plaintiff would be bound to go before judge in each case to claim his privilege, which would be vexatious and most expensive.

Mr. BARON ALDERSON.—The case resolves itself into this—Is the sheriff bound to discharge a man on all cases if he claims a privilege in one?

Stammers.—Exactly so. There is a case of *Spence v. Stuart*, in 3rd E. 89., where the privilege extends to cases of detainer as well as to original writs. In order to maintain this case, an averment of malice is necessary, which may be found in the declaration, and the sheriff being clearly liable under these circumstances, the demurrer is maintained and judgment must be given for the plaintiff.

Kennedy, for the defendants, was stopped.

Per Curiam.—There is nothing in this case to shew oppression on the part of the sheriffs; the plaintiff only applies for his discharge in one case, that of *mesne process*, and if the sheriffs had taken upon themselves to discharge him on all the others, we think they would have subjected themselves to so many actions for escape. If it had appeared on the record that the defendants had concealed the existence of these other writs from the plaintiff, there might then have been something like a case of oppression—but it is not so: neither do we see that any demand was made for his discharge. On the merits, however, we think the judgment ought to be for the defendants, for as the plaintiff only obtained an order for his discharge in one case, *non constat*, but that the other plaintiffs might have been able to resist the granting an order in their own, for perchance there might have been collusion in that one case. The sheriffs, therefore, we think, were bound to detain him in all cases except in that on which he obtained his order and demanded his release, and for these reasons we are of opinion that the judgment must be for the defendants.

COURT OF REVIEW.

Jan. 26.

In re Mr. WEBB, a Solicitor.
As to the Practice of Solicitors in this Court without being admitted in it.

Mr. W. Keene applied on behalf of Mr. Webb of Newport, Monmouthshire, to be admitted on the rolls of the court and registered as enrolled in 1835. This gentleman was at that date admitted to practise in Chancery, but was *not enrolled in this court*, in consequence of an omission by an agent. At a more recent period the agent in London executed certain business in this court, upon which bills of costs came before the Master, and a doubt arose in consequence of the omission, whether Mr. Webb was entitled to receive the same. The Master overruled the objection, but Mr. Webb was anxious to set himself right, and now asked to be admitted *nunc pro tunc*.

Sir J. Cross said there was something in the nature of *lis pendens*, and he could not interfere, as the parties might possibly be entitled to avail themselves of the objection.

Application refused.

BAIL COURT.—Jan. 28.

Doe dem. DUNCAN v. EDWARDS.

Practice—Notice for New Trial, how to be given.

A rule nisi had been obtained for setting aside the judgment that had been signed in this cause, for want of a sufficient notice of trial.

The question is one of considerable importance to practitioners: in consequence of the great pressure of business in the Court of Queen's Bench, it is frequently impossible to bring forward a motion for a new trial within the first four days of the term, which constitute in form the time limited for that purpose. Leave is, however, frequently given to set down particular cases, which could not have been so brought forward, in a separate paper, and the books of practice have laid it down as a rule, that such paper in the hands of the officer of the court is notice to all parties that a new trial is to be moved for in any case contained in the paper. In the present case, no motion for a new trial had been made during the first four days of the term, and the other party signed judgment upon the morning of the fifth. The rule was had upon the ground that the case had been placed in the paper, and that the party signing judgment was bound to take notice of that fact without having received any other intimation upon the subject.

Mr. Justice PATTESON, thinking the subject of extensive practical importance, took time to consider his judgment, and this morning stated that he had consulted the other judges of that court, as well as the Barons of the Exchequer, upon the point, and that they were unanimously of opinion that the party entering the case in the new trial motion paper, was bound to give the opposite party notice of that fact, and that if such notice were not given, a judgment signed on the morning of the fifth day of term would be perfectly regular. As the point was, however, new, and the decision upon a question which had been in some doubt, the rule would be discharged, without costs.

SITTINGS IN EQUITY,
after Hilary Term, 1839.

LORD CHANCELLOR.

Friday, Feb. 8, and Saturday 9.—Appeals and causes.

Monday, Feb. 11.—The first seal.—Appeal motions and appeals.

Tuesday, Feb. 12, and daily, to Wednesday, 20, both inclusive.—Appeals and causes.

Thursday, Feb. 21.—The second seal.—Appeal motions, appeals, and causes.

Friday, Feb. 22, and daily, to Tuesday, March 5, both inclusive.—Appeals and causes.

Wednesday, March 6.—The third seal.—Appeal motions, appeals, and causes.

Thursday, March 7, and daily, to Tuesday, 19, both inclusive.—Appeals and causes.

Wednesday, March 20.—The fourth seal.—Appeal motions, appeals, and causes.

Thursday, March 21.—Petitions.

Those days on which his Lordship will be occupied in the House of Lords excepted.

VICE-CHANCELLOR.

Daily, till the first seal.—Motions.

Monday, Feb. 11.—The first seal.—Motions. Tuesday, Feb. 12, and daily, to Wednesday, 20, both inclusive.—Pleas, demurrers, exceptions, causes, and further directions.

Thursday, Feb. 21.—The second seal.—Motions.

Friday, Feb. 22, and daily, to Tuesday, March 5.—Pleas, demurrers, exceptions, causes, and further directions.

Wednesday, March 6.—The third seal.—Motions.

Thursday, March 7, and daily, to Tuesday, 19, both inclusive.—Pleas, demurrers, exceptions, causes, and further directions.

Wednesday, March 20.—The fourth seal.—Motions.

Thursday, March 21.—Petitions.

Friday, March 22.—Short causes and unopposed petitions.

Short causes and unopposed petitions every Friday previous to the general paper.

EXCHEQUER OF PLEAS.

SITTINGS in Middlesex and London before the Honourable JAMES LORD ABINGER, Chief Baron of Her Majesty's Court of Exchequer, after HILARY TERM, 1839.

MIDDLESEX.

Friday, February 1st,	Common Juries.
Saturday, 2nd	
Monday, 4th,	Revenue and Common Juries.
Tuesday, 5th,	Common Juries.
Wednesday, 6th,	
Thursday, 7th,	Special & Com. Juries.
Friday, 8th,	
Saturday, 9th,	Common Juries.
Monday, 11th,	
Tuesday, 12th,	

LONDON.

Saturday, February 2nd, (to adjourn only.)	Common Juries.
Wednesday, 13th, Adjourn. Day. Com. Juries.	
Thursday, 14th,	Common Juries.
Friday, 15th,	
Saturday, 16th,	Special & Com. Juries.
Monday, 18th,	
Tuesday, 19th,	Common Juries.
Wednesday, 20th,	
Thursday, 21st,	Common Juries.
Friday, 22nd,	
Saturday, 23rd,	

Sit at half-past nine o'clock.

CIRCUITS OF THE JUDGES.

MONTGOMERY ASSIZES.

Order in Council, dated February 4, orders these Assizes to be holden at WELSHPOOL in the Spring, and at NEWTOWN in the Summer, of every year.

REVIEW OF NEW BOOKS.

The ARTICLED CLERK'S ASSISTANT, or GUIDE TO THE EXAMINATION, containing a series of Questions and Answers relative to Real Property, and the Theory and Practice of Conveyancing, intended to assist the Articled Clerk in preparing himself for the Examination required of him previous to his being admitted to Practise as an Attorney or Solicitor, with the Regulations to be observed by the Candidates for Examination. By A CONVEYANCING BARRISTER. London: Henry Butterworth, Law Bookseller and Publisher, 7, Fleet Street, 1839.

HERE we have another Book of Questions and Answers, intended as a guide to the Examinations of Articled Clerks by the Law Examiners. We are almost nauseated with these questions and answers, and we said quite enough in our last (*a*) as to the opinion we entertain of all these books. This however is confined to conveyancing, and if there is any value to be placed upon one more than another of them, *this is the best we have seen*. The author gives authorities for what he writes, and thus drives the student to read up the question and the answer, if he be so inclined. The book will be found a useful companion or guide for the student to *read from*, and such appears to have been the author's simple intention.

QUESTIONS PUT BY THE EXAMINERS TO APPLICANTS FOR ADMISSION AS ATTORNEYS AT THE EXAMINATION.

Hilary Term, 1839.

(Continued from p. 222.)

May a bankrupt be committed for refusing to answer questions touching his property, though such answer may criminate himself? and what property may he retain for his own use?

On what grounds must the allowance of a bankrupt's certificate be opposed? and before what court must the opposition be made, and what are the cases in which, when allowed, it may be recalled?

V. CRIMINAL LAW AND PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

Do any of the privileges which exempt cer-

tain persons from being arrested in civil cases, extend to criminal?

Some of the usual cases prosecuted at quarter sessions required.

Whether a person is liable to be indicted for concealing and applying to his own use, property casually found by him? and can any person be apprehended for felony without the warrant of a justice?

What is the difference between a summons and a warrant?—and state some of the ordinary cases in which you apply for the former, and which for the latter.

When the confession of a prisoner is rejected as evidence against him?—see Reg. v. Arnold, reported ante, p. 3.

Whether a constable, with or without a warrant for felony, can break open the outer door of a house, where the party accused is known or suspected to be concealed?

How many days' notice of appeal is necessary against an order of removal by magistrates under the poor laws?

What is embezzlement?

Can one or more magistrates admit to bail persons accused of felony?

What constitutes the offence of larceny?

Are there any other and what means of such accused persons being admitted to bail, and what steps are to be taken?

What are the effects of a pardon granted to a person convicted of felony, as regards the giving testimony by that person afterwards?

At what age are infants amenable to the criminal law; and is there any and what difference in respect of capital crimes, common misdemeanours, or other offences?

In what cases are married women protected from punishment for criminal offences, and when are they not so protected?

There are privileges in which persons are exempt from arrest in civil cases, do they extend to criminal cases?

Have you copied these questions?

The candidates are examined upon these questions, by number, in the practice of the Courts of Equity and Common Law, and in one other branch, but much must of course depend upon their general knowledge, and a candidate must have had a very meagre education that cannot answer the whole list without hesitation.

97 candidates were examined at this Sitting: 94 passed, and three were postponed.

Business in the Courts.

COURT OF CHANCERY.

Codrington v. Johnstone, appeal, part heard—Johnstone v. Codrington, ditto—Rickman v. Dike, exceptions and further directions—Trash v. Woodcause—Carter v. Howgrave, ditto—Fairlie v. Hatwell, ditto.

VICE-CHANCELLOR'S COURT.

Russell v. Buchanan, to be spoken to—Meredith v. Evans, cause by order—Webb v.

Clayton, further directions and costs—Evans v. Roberts, ditto.

After which 21 unopposed petitions.

After the unopposed petitions, Braham v. Strathmore, petition by order. And Motions.

ROLLS' COURT.

De la Garde v. Lompriere, part heard—Hedges v. Great Western Railway, demurrer—Wynniatt v. Lindow, further directions and costs—Mence v. Chinn, exceptions, further directions, and costs—Skelding v. Clare—Green v. Campbell—Lambert v. Hutchinson—Rowley v. Adams, exceptions, further directions, and costs—Neame v. Cobb, ditto—Goddard v. Sowerby—Du Hourmelin v. Sheldon, further directions and costs, and two petitions—Hobson v. Bell, exceptions, further directions, and costs.

COURT OF QUEEN'S BENCH.

Middlesex Common Juries.

Palmer v. Brooks—McGowran v. Franklin—Eden v. Dudfield—Elderton v. Mullins—Gooddy and another v. Annandale—Pink v. Carter—Faulkner v. De Prati—Plumer v. Hudson—Doe, demise Hart & others v. Cummings—Abrahams v. Robinson and another.

The last cause is No. 30 in the printed list.

The following are added to the list by order:

Bennett v. Burton—Richards and others v. Baynes—Davis v. Swabey—Smedly v. Fowler.

COURT OF COMMON PLEAS.

Sittings in *Banco*.

Special Paper.

Sittings at *Nisi Prius*, at half-past 9.

Middlesex Common Juries.

Doe demise Goodbody v. Freeman—English v. Walker—Richards v. Stebbing—the Same v. the Same—Berry v. Lindley—Archer v. English and another—Gale v. Hogg—Bignall v. Gale—Senior v. Allinson.

The last cause is No. 41 in the printed list.

COURT OF EXCHEQUER.

Sittings in *Banco*.—New Trial Paper.

Sittings at *Nisi Prius*, at half-past 9.

Middlesex Special Juries.

Coyle v. Woodley.

Middlesex Common Juries.

Radford and others v. Smith—Brandon v. Smith—Turner v. Bird—Paas v. Price—the Same v. Nayler—Cook v. Tenant.

The last cause is the last in the printed list.

CENTRAL CRIMINAL COURT.

SITTINGS, 1839.

Monday	-	-	-	4th February.
Monday	-	-	-	4th March.
Monday	-	-	-	8th April.
Monday	-	-	-	13th May.
Monday	-	-	-	17th June.
Monday	-	-	-	8th July.
Monday	-	-	-	12th August.
Monday	-	-	-	16th September.
Monday	-	-	-	21st October.

TO CORRESPONDENTS.

"F. J. C."—His answer to Problem XI. is not yet complete as to the present state of the law. We commend his dilig-

gence, and he will observe that we do not spare trouble.

"R. P." is under consideration. The question is one not only of importance, but of some magnitude in the detail.

"Alpha," St. Ives.—Do not be discouraged—we invite you to write on—but keep *every part* of the Problem before you in view, and do not attempt to travel out of it. We give a plain question, and we require the law upon *that* question only. We am sure you will understand our meaning.

"H. D. M." We really wish to encourage your industry and good—nay, sound reading. Your answer to Problem XII. merits insertion, but you must give place to "Henricus," this week. See our notice to Correspondents last week. We are fairly smothered with answers to these Problems.

Problem XIV. We wish to throw out a hint that this requires grave consideration and some study.

Answers to Problem XIII.—We cannot insert either of these Answers—all are insufficient; the *practical* part of the question embraces a large surface, and is of great importance to practitioners.

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Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London: and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 9th February, 1839.

Price 6*d.* Stamped Edition, 7*d.*

The Legal Guide.

No. 16.]

SATURDAY, FEBRUARY 16, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from page 211.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

WE have shewn the abolition of that most ancient and highly venerable collection of legal forms, (so called by Blackstone,) *real and mixed actions*, and that the only actions preserved are those of right or dower;—of dower *unde nihil habet, of quare impedit*, and of *ejectment*; and as regards COPYHOLDS, plaints in the nature of real or mixed actions are also abolished, except those for free bench or dower.

The saving clause enacted by sec. 37, is now of no importance, the limited time having expired.

Attention is still required to the saving clause, sec. 38, by which any person, who, on the 1st June, 1835, was deprived of the right of entry by descent cast, discontinuance, or warranty, might have maintained any writ or action now abolished, may still bring *the same* writ or action, but only during the time within which they must, under this act, have brought an ejectment if the right of entry had not been taken away.

Sec. 39 enacts that no descent cast, discontinuance, or warranty which may happen, or be made after the 31st December,

1833, shall toll or defeat any right of entry or action for the recovery of land.

Real actions having been abolished, this enactment became necessary to stay the possibility of the injuries for which those actions had before been the remedy, but it should be observed that the statute takes no notice of *deforcement*.

A *discontinuance* of estates in lands and tenements, is properly an alienation made or suffered by tenant in tail, or by any that is seized in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder are driven to their action, and cannot enter. 10 Rep. 97. Co. Litt. 325. a. The peculiar import of the word discontinuance, is thus shortly but forcibly expressed by M. Houard, “*Interruption du droit, qu'on a sur un fonds, par la vente qu'un autre chargé de conserver ce droit, en a faite.*” See *Anciennes Loix de Francois*, vol. ii. p. 435. It is observed by Mr. Butler, in his note to Co. Litt. 325. a. n. 1. that our doctrine of discontinuance bears some analogy to the doctrine of interruption in the civil law. *There*, interruption, when applied to real property, signifies the ousting of a person from the possession of his land. From that time he ceases to be the possessor of it; and if he does not renew his possession, but permits the dispossessor to retain it, he absolutely loses his right to it, and the disseizor is said to acquire it by prescription. See upon this subject, *Beckford v. Wade*, 17 Ves. J. 87.

Descent cast.—By the common law descents of corporeal inheritances in fee simple

took away the entry of the person who had the right. See Co. Litt. 238. a. The outlines of this doctrine are thus summarily mentioned by Lord Chief Baron Gilbert, in his Law of Tenures, p. 21. Where any man is disseized, the disseizor has only the naked possession, because the disseizee may enter and evict him; but against all other persons the disseizor has a right, and in this respect only can be said to have the right of possession, for in respect to the disseizee he has no right at all. But when a *descent is cast*, the heir of the disseizor has *jus possessionis*, because the disseizee cannot enter upon his possession and evict him, but is put to his real action, because the freehold is cast upon the heir.

The doctrine of *descent cast* did not apply if the claimant was under any legal disabilities during the life of the ancestor, because in such cases there were no laches or neglect in the claimant, and therefore no descent took away his entry, Litt. 1. 3. c. 6; nor did it affect copyholds, see 7 East. Rep. 299; nor cases when the party has not any remedy but by entry as a devisee, id. 321. Co. Litt. 240. b. If a disseizor died after five years' quiet possession, and the disseizee entered, the heir of the former might have maintained an ejectment, for the *right of possession* belonged to him, although the mere right was in the disseizee, see Smyth v. Tyndale, 2 Salk. 685; the adverse enjoyment having ripened into an *apparent right*; and the law would not allow that right (right of possession) to be disturbed without the disseizee, who claimed the superior right, or *right of property*, indicating his claim by a writ of right, which involved trial by battle, abolished by 59 Geo. 3. c. 46.

The *present distinction* between the right of possession, and the right of property is, that though the right of possession may be in one person as against strangers, and the right of property be in another, yet the right of property can exist no longer as a mere right, but only in connection with a right of entry at least.

A *warranty* is a covenant real, annexed to lands or tenements, (of inheritance) whereby a man and his heirs are bound to warrant the same, and either upon voucher,

or by judgment in a writ of *warrantia cartarum* (now abolished) to yield other lands and tene- ments to the value of those that shall be evicted by a former title, or else may be used by way of *rebutter*, see Co. Litt. 365 a., and Mr. Butler's notes; and by 3 & 4 W. 4. c. 74. s. 14, all warranties of land, which shall be made after the 31st Dec. 1833, by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

This abolition of real actions brings us again to the observations we have already made upon the title a purchaser should now require, (a) which we will endeavour to support by the opinions and arguments of Convey- ancers of established reputation. We have already shewn an illustration made by *Mr. Brodie* (b) as to the limitation of time to which abstracts should be confined under this statute, and the reader will find that gentleman's opinion, on the effect of this statute, with reference chiefly to the rule requiring a sixty years' title, inserted at large in a very able work (c) recently published, where the subject is discussed with considerable ability and much practical knowledge. The writer of that work observes, that, "the inquiry most interesting to the conveyancer which arose on the passing of the Act under consider- ation, was, whether it would exert any, and if any, what degree of influence, upon the established practice in regard to the period for which a title to real property should be deduced. The discussion anticipated the full operation of the Act; for the abolition of real actions was subject to the saving already noticed (ss. 36, 37, 38). By some it was taken for granted that a sixty years' title would no longer be required, but that forty years, which was the most extended period (d) allowed by the Act, (s. 17) would be the future limit; while others considered that the *practice would remain unaltered*.

(a) *Ante*, pp. 2, 3, 50.

(b) *Ante*, p. 2.

(c) *Hayes's Conveyancing*.

(d) See *Doe v. Bramston*, 3 Adolph. & E. 63; 4 Nev. & M. 664.

The writer ventured to support the *latter opinion*, by the following arguments. In order to solve the question, it is necessary to consider how far the practice is founded upon the old statutory limitation, and how far that foundation is removed by new enactments. Those who assume, that, after the lapse of sixty years, which was the period of limitation to a writ of right, the extreme remedy of the old law, all danger of eviction was at an end, and that, *therefore*, sixty years was adopted as the period for the deduction of titles, are clearly in error, since in the case of a sale or mortgage of land, limited for life, or in tail, the remainderman or revisioner might certainly have recovered within 20 years after his right accrued by the determination, at any period, however distant from the transaction, (e) of the estate for life or in tail, notwithstanding any length of enjoyment as against the owner or successive owners of that estate; and 20 years was the *shortest* allowance, for the time of limitation was liable to be extended, perhaps indefinitely, by disabilities on the part of the claimants."

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XII.

(Concluded from p. 233.)

What is an Estate in Dower?—and what are the Requisites to Dower?

The law of dower has been much altered by the 3 & 4 Wil. 4. c. 105, which came into operation on the 1st January, 1834. Previous to the passing of that Act, three things were necessary to the creation of dower, viz. marriage, seizin, and death of the husband; but by the new Dower Act, the legal seizin of the husband is no longer necessary, for by the 2nd section of the Act it is enacted, "that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than

an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land." And by the 3rd section, "when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof. Provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced."

By the old law, if the husband aliened the lands, he aliened them subject to dower; but now no widow, married since the 1st of January, 1834, can be entitled to dower out of lands absolutely disposed of by her husband in his lifetime, or by his will. (See section 4.)

3rd. Of the different species of dower.—There were formerly five species of dower, viz. Dower by the common law, which I have already described. Dower by custom, as that the wife shall have half of the husband's lands—in some places the whole—and in some only a quarter, Litt. s. 37. Co. Litt. 33 b. 21 Edw. 4. 53. 4.; by custom a woman may be endowed of the profits of mines, &c. Dal. 2. These are the only two species of dower now in existence. Dower, *ad ostium ecclesiae*, was, where a man of full age publicly at the church door, after affiance made and troth plighted between them, did endow his wife with the whole, or such quantity as he pleased of his lands, and in such case the wife might have entered without the assignment of any one. Litt. s. 39. Dower *ex assensu patris*, was a species of dower *ad ostium ecclesiae*, and was made when the husband's father was alive, the son, by his consent expressly given, endowing his wife with part of his father's lands. But these two last species of dower were abolished by the 3 & 4 Wil. 4. c. 105. s. 13. The remaining one, viz. dower *de la plus belle*, or *de la plus beale*, was abolished together with the military tenures to which it belonged. 2 Bl. Com. 133.

4thly, The incidents to dower.—The estate in dower attaches on the instant of marriage. 1 Cru. Dig. 184, 188. And the

(e) See 12 Vea. J. 248.

tenant holds of the heir by fealty, Gilb. Uses, 357. discharged from all incumbrances, and is entitled to emblements, 2 Inst. 80; 1 Cru. Dig. 175; but see Co. Litt. 32a. n. 7.

5thly, The assignment of dower.—By virtue of the charter of Henry 1, and afterwards by Magna Charta, the widow is allowed to remain in the capital mansion-house of her husband's for the space of forty days after his death, which term is called her quarantine, (a) though before the Conquest she might have had it for a year. Co. Litt. 32b. The wife during her quarantine shall have *de bonis viri*, 2 Inst. 17. During these forty days the dower must be assigned by the heir of the husband or his guardian; and if the heir or guardian should not assign her dower, or assign it unfairly, the widow has her remedy at law, and the sheriff is appointed to assign it; but the most usual way is to file a bill in equity. If excessive dower is assigned by the heir when an infant, or by the guardian, a writ of admeasurement of dower lies, Taunt. 402. If she is endowed of such things as are divisible, they must be set out by metes and bounds; but if they are not capable of being divided, then she must be endowed specially, as of the third presentation to a church, the third profits of an office, and the like. 2 Bl. Com. 136. Co. Litt. 32.

6thly, The remedy of dower.—This is either by action or by bill in equity. The remedy by action before assignment is by writ of dower *unde nihil habet*, but after assignment, by writ of dower only. But the most usual way is by bill in equity, when every assistance is given her to establish her right to dower, and complete relief when the right is ascertained. Curtis v. Curtis, 2 Bro. C.C. 634; Mundy v. Mundy, 4 Bro. C.C. 294; and Ves. jun. 112.

I come now to the last part of my inquiry, viz. the method of barring or destroying dower.—A woman may not only be barred of her dower, by a divorce, elopement, being an alien, and by the treason of her

(a) This term is made use of in law to signify the number of 40 days, whether applied to this occasion or any other; in particular, it signifies the 40 days which persons coming from infected countries are obliged to wait before they are permitted to land in England.—ED.

husband, as I have already shown, but also by detaining the title deeds from the heir, until she restores them. Co. Litt. 39. She also might have been barred of her dower by levying a fine, or suffering a recovery of the lands during her coverture, when those modes of assurances were in existence. By the statute of Gloucester, 6 Edw. 1. c. 7. if a dowager aliens the lands assigned her for dower, she forfeits them *ipso facto*; and the heir may recover them by action. By the 3 & 4 Wil. 4. c. 105. the power of the husband over the dower of the wife has been much enlarged. By sec. 5. of the act it is enacted, that all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts, and engagements, to which his land shall be liable, shall be valid and effectual, as against the right of his widow to dower. It is also enacted by sec. 6. that a widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, (or by his will, sec. 7.) it shall be declared, "that his widow shall not be entitled to dower out of such land." So that the wife may be barred of her dower by her husband by any deed executed in his lifetime, or by his will. It is necessary to bear in mind that this act only extends to the dower of widows married since the 1st January, 1834. The title to dower of widows married on or before that time could only be defeated by fine or recovery, when those assurances existed; but since their abolition by the 3 & 4 Wil. 4. c. 74. can be barred by the deed substituted in their stead. The right of dower has been greatly diminished by jointures as regulated by the statute 27 Hen. 8. c. 10, and by the general practice of conveying lands on a purchase, to *uses* to bar dower,—a contrivance, it is said, invented by Mr. Fearne to evade the claim to dower, and which has been the practice of conveyancers for the last fifty years. Under the new act a declaration in a deed, that dower shall not attach is sufficient.

HENRICUS.
Middle Temple, Feb. 4, 1839.

PROBLEM XVI.

WHAT IS AN ESTATE OF INHERITANCE IN
FEE SIMPLE?

Imperial Parliament.

HOUSE OF COMMONS.

LEGAL BUSINESS.—Feb. 12.

ENGLAND.

Vendors and Purchasers.

Sir E. Sugden obtained leave to bring in a bill for the better protection of purchasers against judgments, Crown debts, and fiats in bankruptcy. The remedies he proposed in the several cases were—

First, as to judgments, that there might be one registry office, and that every judgment creditor should renew his entry every five years, or lose the benefit of it.

Second, that all accountants of the Crown should be entered in a register, to be kept in the Court of Exchequer.

And third, that where a person purchased an estate without notice of any prior act of bankruptcy on the part of the vendor, the sale should not be invalidated; but that if he had received notice, that the estate should be liable for 12 months.

Feb. 14.

Liberty of the Press.

LIBEL.

Mr. O'Connell moved for leave to bring in a Bill to secure the Liberty of the Press, and to check vexatious actions for libel.

SCOTLAND.

Bankruptcy.

Writs.

Heritable Securities.

Registration of Leases.

Securities for Debt.

Crown Charters.

The Lord-Advocate obtained leave to bring in the following bills—viz., a Bill for Regulating the Sequestration of the Estates of Bankrupts in Scotland.

A Bill to amend the Law of Scotland in matters relating to Bankruptcy.

A Bill to facilitate the preparation of Writs in Scotland.

A Bill to facilitate the constitution, transmission, and extinction of Heritable Securities for Debts in Scotland.

A Bill to provide for the Registration of Leases of long duration in Scotland, and to facilitate the constitution, transmission, and extinction of Securities for Debt therein.

And a Bill to regulate and improve the passing of Crown Charters in Scotland.

ADMINISTRATION OF JUSTICE.

Mr. Wallace, moved for a select committee to enquire into the mode of administering justice in Scotland; and said he would endeavour to divest it of everything which was calculated to give it the complexion of party. From returns he held in his hand from the courts of common law in Westminster, and from the Court of Session, of which he was speaking, in Scotland, for the same year, 1836, it appeared that the cases in the former amounted, during that year, to upwards of 90,000, of which 46,000 had been in the Queen's Bench, and of which 1,600 had been litigated. Now, in the Court of Session, there were thirteen supreme judges. The number of reclaiming notices before the five Lords ordinary in 1836, amounted to 1,770; in the inner Court to 456; the proceedings chiefly formal, being in number 1,734; the total amounting but to 3,960 cases for 13 judges, while in England, with ten judges, they had had upwards of 90,000. And now a word or two with regard to the sheriffs. He had got the returns of last year reduced to figures, which were very extraordinary. By the amended return, which he held in his hand, of the sheriffs for the county of Renfrew, under the act of *sederunt*, made by the Court of Session, it appeared that the average endurance of actions in their courts—all short actions being excluded—was no less a time than 1,193 days, or three years and 98 days; that the average time they gave judgment was four days, and that the average time of waiting in the sheriff's house for judgment was 277 days. He might be told that a royal commission had been appointed, and had sat for the purpose of doing what he proposed to do by the committee for which he was moving. But he would read to the house the opinion of one of the present judges respecting that commission; his words were these: "My friends, as there is no reporter present I may quietly tell you that you need be under no apprehension on account of the commission, or think that it will injure the court of session practice. The commissioners are a set of old advocates and writers, and are too shrewd and sensible to break their own heads."—Committee Ordered.

Law Reports.

ROLLS COURT.—Jan. 26.

LITTLER v. THOMSON.

INJUNCTION.

Nursery Ground—Whether Trees and Hedge Rows are to be considered as the Stock in Trade belonging to the Lessee?

Motion to dissolve an injunction for restraining the defendant from selling, cutting down, or removing any full-grown trees, or

any other than such trees or shrubs as might be removed by the defendant in the ordinary course of his business as a nurseryman from a nursery-ground at Mile-end, of which he was the occupant under a lease that was expired.

Mr. Kindersley, for the defendant, said it was an *ex parte* injunction, granted upon the statement of the plaintiff, who had purchased a nursery-ground; that the defendant had been in possession under a lease which expired at Michaelmas, 1836; that he was holding over, and selling off not only the stock and shrubs, but also large trees which he was not entitled to remove. The lease was for sixty years, from Michaelmas, 1776; and it appeared that shortly before September, 1836, the defendant proposed, if allowed to remain in possession for six months after the end of the lease, to pay 100*l.*, and this being acceded to, the defendant paid the 100*l.*, and was to continue until March 25, 1837. After which the plaintiff applied for possession, which the defendant refused to give, but it was given last autumn. On October 17, 1838, the defendant distributed handbills, advertising the sale of his nursery stock. The plaintiff said he did not infer from those bills that the defendant intended to sell any large standard trees, but to sell only what the plaintiff considered to be the nursery stock; but that, on the 22nd of October, the defendant printed a catalogue, which contained these words—"together with the whole of the nursery-stock, consisting of large and ornamental trees, and shrubs, forest trees, &c.;" and he stated that the catalogue included various large standard trees, standing for ornament, growing upon the part of the land retained by the defendant, of too large a growth to be transplanted alive, many of which were planted before the date of the lease, in 1776. Many witnesses swore the trees could not be transplanted, but the defendant's witnesses said they might by means of modern improvements—the purple beach, the cedar of Lebanon, *gymnopticus glinditschia*, &c. which he said were exotics, and to be considered as planted for nursery purposes.

Mr. Pemberton, for the plaintiff, in support of the injunction, said, no injury was by it imposed upon the defendant, for he had not been restrained from selling any shrubs. The injunction was granted on the 29th of October last, and in the next number of the *Gardener's Gazette* an attack appeared upon the plaintiff charging his witnesses with ignorance and perjury. It stated the *cause to be the common cause of all nurserymen against landlords*, and that the principle of it was utterly to ruin the trade in which the defendant and all other nurserymen were concerned, and expressed a hope that the defendant would spare no pains or expense to bring the parties to justice. It stated that by injunction Thomson was precluded from selling any standard trees or fruit trees. This was not true, for the injunction did not prevent the defendant from removing or selling anything he was entitled to sell. It said that "In Thomson's person the interest of nurserymen

in general was involved." On the 7th of November there was another article, and on the 22d of December other attacks were made, in the grossest and most abusive terms, upon the parties concerned in the cause, pointing out that the law, if laid down, would be ruinous to all the nurserymen, and that the affidavits completely displaced the plaintiff's case. He trusted that this mode of defending the cause would meet with the severest reprobation from the Court. *Ex parte* injunctions, if obtained by stating what was untrue, or suppressing what was material, would be always dissolved. The party complaining must come forward at the time when injured. Possession of part of the premises was to be given in May, 1838, and there was a controversy as to the time when the other part was to be given up. That which was delivered up was to be built on; it was of necessity that every thing should be removed before the building could be erected. The plaintiff understood that the defendant was to clear off; but the defendant denied that. The defendant had not come at the earliest period he could to dissolve the injunction. The question was whether the defendant could be justified in doing what he had threatened to do. He was restrained from removing any full-grown or standard timber, fruit, or other trees, or any hedge on the land, other than such trees or shrubs as might or could be removed in the ordinary course of the business of a nurseryman. The defendant's argument was, not that the lease or the contract with the plaintiff gave the defendant any right, but that under the ordinary course of the business of nurserymen he was entitled to remove what he had contemplated removing. On that course of business the law was incontrovertible—it was the same between landlord and tenant as between heir and executor. The rule was universal, and was stated by Mr. Baron Parke in "*Macintosh v. Trotter*," 3 Meeson & Welby. Whatever was attached to the freehold, belonged to the freehold. Those who sought to remove were to make out the exception. Even plants in pots, if let into the ground, would belong to the owner of the soil. Relaxation had been made for the purposes of trade, and in consequence a nurseryman had a right to remove what by the course of his business he could remove, and nothing else. Where land was let with trees standing upon it, the lessee had no more right to remove them because the land was let as a nursery ground than he would have if let as an orchard. There was no difficulty in ascertaining what could be transplanted. A nursery ground, like a nursery room, was for the growth of young plants. It was no part of the trade of a nurseryman to grow oaks or beech for transplantation. What was planted for the purpose of being removed was planted for the sake of trade, and might therefore be removed; but even these plants, if suffered to grow, might be out of the exemption allowed in favour of trade, and the nurseryman must prove what he removes to be within the exemption. The defendant had to

prove his right to the subjects of controversy, the cherry trees, the purple beech, the glinditschia, &c. Nurserymen used many plants for transplanting, but there were other purposes for which they also used them, as grafting, that the grafts might be sold as specimens or show trees, and they were not to be removed. There was a difference between trees and shrubs; the presumption was that shrubs were to be removed, and trees not. The purple beech was a standard tree. Cobbett said there was no timber to compare to the locust tree. The test was, were they planted as nursery or timber trees? There was no right to remove the yew hedges, for they were not planted to be removed or sold. He trusted that the injunction would be continued.

Mr. Kindersley replied, and argued that exotic plants brought over for nursery purposes were not to be considered in the light of timber trees, although the wood might make good timber, for they were planted for the nursery business. The exotic cedar of Lebanon, with which Solomon built the Temple, might be exceeding good timber, but a nurseryman would consider such a plant only as an exotic, and an article of his trade. That was the case of the purple beech and the other trees, which all fell within the exemption allowed for the sake of trade, and might be removed.

Lord LANGDALE said, the question is, whether the trees and hedge-rows planted in the garden are to be considered as the stock in trade belonging to the lessee? It is admitted that dissolving the injunction would be settling the question, and that the defendant would immediately proceed to cut down and sell the trees, &c. Therefore dissolving the injunction would be destroying the property, which was the subject matter in dispute. It was contended that all trees of every kind belonged to the lessee, and could be sold, but he considered there might be trees and hedge-rows which were planted for shelter, and could not belong to the lessee. It was said, trees annexed to the soil belonged to the soil, but it did not follow that every tree was part of the stock in trade belonging to a nurseryman. He would not decide the question until the defendant had made his affidavits, and then it might be mentioned again. There must be some further inquiry upon the subject. He had his opinion, but would not state it until the motion was mentioned again.

The property in trees is vested in the owner of the inheritance of the land upon which they grow; for the property in *trees*, or that which is likely to become timber, is in the *landlord*, and the property in *bushes*, or trees, not timber, is in the *tenant*; even when they are cut—the landlord cannot maintain trespass against a stranger for cutting bushes and thorns growing in a hedge, although cut improperly, if assented to by the tenant; see *Berriman v. Peacock*,

9 Bing. 384. S. C. 2 Moore & S. 524. In *Holder v. Coates, Mood & M.* 112. it was recently held by Littledale J. that if a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted; see *Waterman v. Soaper*, 1 Ld. Raym. 737. *Masters v. Pollic*, 2 Roll. Rep. 141. Anon. id. 255. With regard to *nursery grounds* it was held in *Wyndham v. Way, Taunt.* 316. that a farmer who raises young fruit trees is not entitled to sell them, but it is otherwise of a nurseryman by trade, even a border of box cannot be removed by the tenant who planted it, that is not a gardener; see *Empson v. Soden*, 1 Nev. & M. 720. S. C. 4 Barn. & Cr. 655.—ED.

Feb. 9.

GREEN & ANOTHER v. CAMPBELL & OTHERS.
Trusts for the separate use of unmarried women.

In this case, it appeared that in 1829 Sir J. Stewart paid his addresses to the plaintiff's wife, then Miss Hornman, and was accepted by her, but the match afterwards went off. Upon that occasion, Sir J. J. Stewart, by way of compensation, executed a deed by which he covenanted to transfer to the defendants 10,000*l.* Consols, upon trust to pay the dividends during the life of the lady into her own hands, or to such persons as she should by writing signed by her, but not by way of anticipation, appoint, for her separate use, and after her death the principal was to be paid to Sir J. J. Stewart or his representatives. There was also a proviso in the deed that the trustees were, at the request of the lady, to be signified by a deed to be executed by her in the presence of two witnesses, at any time within ten years, to raise 5000*l.* out of the stock, and pay it to her, and thereupon the income was to cease. The stock was accordingly transferred, and was in the names of the defendants. Miss Hornman afterwards married the plaintiff, and as Mrs. Green, she executed a deed-poll, appointing the 5,000*l.* to be paid to herself in lieu of her life interest in the dividends of the 10,000*l.* stock. Application was accordingly made to the trustees, but they refused compliance by the direction of Sir J. J. Stewart, and the suit was instituted to compel a transfer by the trustees.

Lord LANGDALE.—The stock was vested in trustees, that the dividends should be paid to such persons as the lady might appoint, for her separate use, without power of anticipation. These words must have been made use of in contemplation of her marrying, for they could have no other object in view; and therefore it was not intended that marriage should take away her option. The deed, notwithstanding her coverture, must be considered as a valid

request to the trustees. The 5000*l.* must be paid into court, and the lady must be separately examined how and in what manner she desired to have it applied. If the opposition to the bill had been made to secure the lady's separate interest, it would have been reasonable to have given the costs to Sir J. J. Stewart, but that was not the case, and they must come out of the fund.

We refer to the Editor's Letter to the Lord Chancellor (*a*) upon this highly important subject. We will here add what is the *civil law*. By the civil law the father gave the *dote*, which was the estate of the wife given on the marriage; and if it consisted of *matter moveable*, the husband had the possession, but was bound to restitution at his death; and even an action was allowed to the wife, in case the husband fell to decay, to recover during his life. If it consisted of *things immovable*, the husband could not alien without the consent of his wife, by the *Julian law*. And by *Justinian's Reformation*, he could not alien, though with her consent. *Constante matrimonio rei dotalis dominium civile penes maritum est naturale penes uxorem.* Dig. li. 23. tit. 2. *De jure dotium.* Ib. tit. 5. *De fundo dotali.*

BAIL COURT.

(Before Mr. Justice PATTESON.)

Hilary Term, 1839.

WINTLE v. LORD CHETWYND.

Fieri facias,—insufficient return.

A *fieri facias* had been issued upon a judgment directed to the sheriff of Oxfordshire, upon which the sheriff returned that by virtue of that writ, and of another writ of *fieri facias* to him directed, he had taken goods of the defendant, the value of which to him was unknown, and which remained in his hands for want of buyers.

Mr. Hoggins for the plaintiff, applied for a rule to shew cause why the sheriff should not amend the return, or why it should not be quashed, upon the ground, that as it stood, it was informal and meant nothing.

Rule granted.

PREROGATIVE COURT.—Jan. 24.

MUNDY v. SLAUGHTER.

In re will, T. Chitty.

Executors—Witnesses in a suit—their competency as such after renunciation.

It appeared that the testator had bequeathed the residue of his property to his three executors. One of them (Mr. Butterfield), in

order to qualify himself to be examined as a witness in this cause, had renounced his executorship, executed a conveyance of his interest in the real estate to one of his co-executors, and released his legacy. The conveyance bore date antecedent to the renunciation being recorded.

The *Queen's Advocate* contended that under these circumstances, Mr. Butterfield had not divested himself of an interest under the will, so as to render him a competent witness to be examined in this suit.

Sir H. Jenner held that by the renunciation, (although executed after the conveyance) the executor had sufficiently divested himself of his interest so as to be a competent witness in the suit.

FORMS OF WRITS.

It is ordered, that the following Forms of Writs, framed by the Judges pursuant to the statute 1 & 2 VICTORIA, c. 110, s. 20, be used from and after the first day of March next, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary, but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

No. I.—*Writ of Elegit upon a Judgment in the Court of Queen's Bench, in an action of assumpsit.*

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of _____ greeting. Whereas A. B., lately in our court before us at Westminster, by the judgment of the same court, recovered against C. D. £_____, which, in our said court before us, were adjudged to the said A. B., for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings then lately made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and afterwards the said A. B. came into our said court before us, and, according to the form of the statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any person in trust for him, was seized or possessed of on the _____ day of _____, in the year of our Lord _____, on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said C. D. on the

said — day of — (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said statutes, until the damages aforesaid, together with interest upon the said sum of £—, at the rate of four pounds *per centum* per annum, from the — day of —, in the year of our Lord — (b) shall have been levied. Therefore we command you that, without delay, you cause to be delivered to the said A.B. by a reasonable price and extent all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C.D., or any person in trust for him, was seized or possessed of on the said — day of — (c) or at any time afterwards, or over which the said C.D. on the said — day of — (c), or at any time afterwards had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A.B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

No. II.—*Writ of Elegit on a Rule made in the Court of Queen's Bench for payment of money.*

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of — greeting. Whereas lately in our court before us at Westminster, by a rule of the said court entitled, &c. [as the case may be] the sum of £— was by the said court ordered to be paid by C.D. to A.B. and afterwards the said A.B. came into our said court before us,

and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C.D. or any person in trust for him, was seized, or possessed of, on the — day of —, in the year of our Lord —, on which day the said rule was made, or at any time afterwards, or over which the said C.D. on the said — day of — (d), or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £—, together with interest upon the said sum of £—, at the rate of four pounds *per centum* per annum, from the said — day of —, in the year of our Lord — (e), shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A.B. by a reasonable price and extent, all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C.D., or any person in trust for him, was seized or possessed of, on the said — day of — (f), or at any time afterwards, or over which the said C.D. on the said — day of — (f), or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold the said goods and chattels to the said A.B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £—, together with interest as aforesaid, shall have been levied, and in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

(a) The day on which the judgment was entered up.

(b) The day on which the judgment was entered up, or in case the judgment was entered up prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838.

(c) The day on which the judgment was entered up.

(d) The day on which the rule was made.

(e) The day on which the rule was made, or in case it was made prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord, 1838.

(f) The day on which the rule was made.

No. III.—*Writ of Elegit on a Rule made in the Court of Queen's Bench for payment of money and costs.*

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of — greeting. Whereas, lately in our court before us at Westminster, by a rule of the said court, entitled, &c. [*as the case may be*] the sum of £— was, by the said court, ordered to be paid by C. D. to A. B., together with the costs of the said rule, which said costs were afterwards, on the — day of —, taxed and allowed by our said court at the sum of £—. And afterwards, the said A. B. came into our said court before us, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seized or possessed of on the — day of — in the year of our Lord —(g), or at any time afterwards, or over which the said C. D., on the said — day of —(g), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest upon the said two several sums of £— and £—, at the rate of four pounds *per centum* per annum, from the said — day of —(h), shall have been levied. Therefore we command you, that without delay, you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seized or possessed of on the said — day of —(i), or at any time afterwards, or over which the said C. D., on the said — day of —(i), or at any time afterwards had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his pro-

(g) The day on which the costs of the rule were taxed.

(h) The day on which the costs of the rule were taxed, or in case that day were prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord, 1838.

(i) The day on which the costs of the rule were taxed.

per goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

(To be continued.)

REVIEW OF NEW BOOKS.

COMMENTARIES on the LAW of BAILMENTS, with illustrations from the Civil and Foreign Law. By JOSEPH STORY, LL.D. Dane Professor of Law in Harvard University. London: John Richards & Co. Law Booksellers and Publishers, 194, Fleet Street, 1839.

We are indebted to R. CHARNOCK, Esq. of Gray's Inn for this edition of Dr. Story's well known work on the Law of Bailments, which, he informs us in his preface, is not to be found in this country but with great difficulty, and that so great did he experience the fact, that after many attempts in all directions, public and private, to obtain a copy, he did at length find one in a private library; and as purchasing it could not be thought of, he incurred the expence of employing an amanuensis; and thus enabled, he enriched his own library with this desideratum. The difficulty experienced in procuring the book, it appears, induced the Editor to print it in this country. It must, therefore, be looked at as a reprint of Dr. Story's book. As a theoretical and elementary work, it is a valuable acquisition to the profession.

Dr. Story relates, in his preface, his design in these Commentaries, which was to present a systematical view of the whole of the common law in relation to bailments, and to illustrate it by, and compare it throughout with, the civil law, and the modern jurisprudence of continental Europe. The learned American Doctor pays anything but a compliment to English Jurists. He says—

"There is a remarkable difference in the manner of treating juridical subjects between

the *Foreign* and the *English Jurists*. The former, almost universally discuss every subject with an elaborate, *theoretical*, fulness and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with few exceptions, write, what they are pleased to call *practical* treatises, which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely any attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences."

We may have occasion to remark upon this severe reflection at a future day, as our present work extends itself; for the present, therefore, we will leave it in silence. The book itself well merits attention. The author has borrowed largely (as might be supposed) from foreign sources, although treating on the English Law of Bailments. It was principally designed for students, and to their serious attention we recommend it.

CIRCUITS OF THE COMMISSIONERS FOR THE RELIEF OF INSOLVENT DEBTORS.

SPRING CIRCUITS, 1839.

H. R. REYNOLDS, Esq. Chief Commissioner.

Berkshire, at Reading, Tuesday, Feb. 19.
Oxfordshire, at Oxford, Thursday, Feb. 21.
Worcestershire, at Worcester and City, Saturday, Feb. 23.
Radnorshire, at Presteigne, Tuesday, Feb. 26.
Herefordshire, at Hereford, Wednesday, Feb. 27.
Monmouthshire, at Monmouth, Friday, March 1.
Brecknockshire, at Brecon, Monday, March 4.
Cardiganshire, at Cardigan, Wednesday, March 6.
Pembrokeshire, at Haverfordwest and town, Friday, March 8.
Carmarthenshire, at Carmarthen and Borough, Monday, March 11.
Glamorganshire, at Swansea, Wednesday, March 13.
Glamorganshire, at Cardiff, Friday, March 15.
Gloucestershire, at Gloucester and City, Monday, March 18.
At the City of Bristol, Thursday, March 21.
Somersetshire, at Bath, Saturday, March 23.
Somersetshire, at Wells, Tuesday, March 26.
Devonshire, at Exeter and City, Thursday, March 28.
Devonshire, at Plymouth, Monday, April 1.
Cornwall, at Bodmin, Wednesday, April 3.
Dorsetshire, at Dorchester, Saturday, April 6.
Wiltshire, at Salisbury, Monday, April 8.
At the town of Southampton, Tuesday, April 9.
Hampshire, at Winchester, Wednesday, April 10.

NORTHERN CIRCUIT.

J. G. HARRIS, Esq. Commissioner.

Rutlandshire, at Oakham, Thursday, Feb. 21.
Yorkshire, at Sheffield, Friday, Feb. 22.
Yorkshire, at Wakefield, Monday, Feb. 25.
At the City of York, Saturday, March 2.
Yorkshire, at York Castle, Monday, March 4.
At the City of Kingston-upon-Hull, Wednesday, March 6.
Yorkshire, at Richmond, Friday, March 8.
Durham, at Durham, Saturday, March 9.
Northumberland, at Newcastle-upon-Tyne and Town, Tuesday, March 12.
Cumberland, at Carlisle, Friday, March 15.
Westmoreland, at Appleby, Saturday, March 16.
Westmoreland, at Kendal, same day.
Lancashire, at Lancaster, Monday, March 18.
Lancashire, at Preston, Monday, March 25.
Lancashire, at Liverpool, Tuesday, March 26.
Cheshire, at Chester and City, Thursday, March 28.
Anglesey, at Beaumaris, Monday, April 1.
Carnarvonshire, at Carnarvon, Tuesday, April 2.
Merionethshire, at Dolgelly, Thursday, April 4.
Montgomeryshire, at Welch Pool, Saturday, April 6.
Denbighshire, at Ruthin, Tuesday, April 9.
Flintshire, at Mold, Wednesday, April 10.

MIDLAND CIRCUIT.

T. B. BOWEN, Esq. Commissioner.

Essex, at Chelmsford, Friday, March 1.
Essex, at Colchester, Saturday, March 2.
Suffolk, at Ipswich, Monday, March 4.
Norfolk, at Yarmouth, Wednesday, March 6.
Norfolk, at Norwich, and City, Thursday, March 7.
Norfolk, at Lynn, Saturday, March 9.
Suffolk, at Bury St. Edmunds, Monday, March 11.
Cambridgeshire, at Cambridge, Tuesday, March 12.
Huntingdonshire, at Huntingdon, Wednesday, March 13.
Northamptonshire, at Peterborough, Thursday, March 14.
Lincolnshire, at Lincoln and City, Friday, March 15.
At the town of Nottingham, Monday, March 18.
Nottinghamshire, at Nottingham, Tuesday, March 19.
Derbyshire, at Derby, Wednesday, March 20.
Leicestershire, at Leicester, Friday, March 22.
At the City of Lichfield, Saturday, March 23.
Staffordshire, at Stafford, Monday, March 25.
Shropshire, at Shrewsbury, Thursday, March 28.
Warwickshire, at Birmingham, Saturday, March 30.
Shropshire, at Oldbury, Monday, April 1.
At the City of Coventry, Tuesday, April 2.
Warwickshire, at Warwick, Wednesday, April 3.

<i>Northamptonshire</i> , at Northampton, Saturday, April 6.	<i>At the City of Canterbury</i> , Saturday, March 16.
<i>Bedfordshire</i> , at Bedford, Monday, April 8.	<i>Kent</i> , at Dovor, Monday, March 18.
<i>Buckinghamshire</i> , at Aylesbury, Tuesday, April 9.	<i>Kent</i> , at Maidstone, Tuesday, March 19.
	<i>Hertfordshire</i> , at Hertford, Tuesday, March 26.
HOME CIRCUIT.	
W. J. LAW, Esq. Commissioner.	
<i>Sussex</i> , at Horsham, Tuesday, Feb. 26.	

**A LIST OF ARTICLED CLERKS APPLYING TO BE ADMITTED AS ATTORNEYS
IN THE COURT OF QUEEN'S BENCH, EASTER TERM, 1839.**

(Continued from p. 207.)

<i>Clerk's Name and Residence.</i>	<i>To whom articled, assigned, &c., and Residence.</i>
Gamble, George Spencer, 38, Dorset-street, Portman-sq.; and King-street, Portman-sq.	Robert Crabtree, Halesworth.
Good, George Frederick, Saffron Walden . . .	John Fiske, Saffron Walden.
Gibbons, Robert, 10, Henrietta-st., Brunswick-sq., Gainsborough; and Devonshire-street	Samuel Bellamy, Gainsborough.
Gibson, George, 14, Millman-st., Bedford-row; Leazes-ter.; Calthorpe-st.; and Upp Hall	Joseph Willes, Gateshead.
Govett, John Clement, Staines; and Clapham Girdlestone, Wm. Bolton, Wells next the Sea	Charles John Shebbeare, Clapham; assigned to Benjamin Field, Clapham.
Gregory, William, the Younger, Bristol . . .	James Turner, Bedford-row; assigned to Thos. Garwood, Wells next the Sea.
Grubb, William Dawson, 14, Bank Buildings; and Lower Mitcham, Surrey	William Gregory, the Elder, Bristol.
Griffin, William Henry, 28, Friday-street . .	Henry Heald, Austin Friars.
Hayward, William Webb, 6, Gower-st. North; Shaftesbury-ter. Pimlico; and Gt. Ormond-st.	William Henry Green, Basinghall-street.
Horner, Robert Ryder, Cheltenham . . .	Thomas Fellows, Rickmansworth.
Houchen, John, 6, Charles-st., Soho-sq.; and Great Yarmouth	Francis Price, Cheltenham.
Herbert, Samuel, 59, Conduit-st., Hanover-square; and Painswick	George Lucas, Great Yarmouth.
Hill, Henry Edward, 13, Chapel-st., Pentonville, Wimborne Minster; and Chadwell-st.	George Ware, 33, Blackman-street.
Hutson, John, 354, York-st., King's-sq.; and 25, King-st., Clerkenwell	Edward Castleman, Wimborne Minster.
Jackson, Thos. Henry, Kingston; and Portsea Jackson, George, 13, and 15, Featherstone Buildings; and Plymouth	Mark Jameson, Berwick-upon-Tweed; assigned to Thomas Kirk, Symond's Inn.
Kay, Samuel, the Younger, Well's Cottage, Well's-st., Camberwell; and Manchester	Nathaniel Griffin, Portsea; assigned to George Caught, Portsea.
Kettle, Rupert Alfred, 15, Ely Place; and Kenton-street, Brunswick-square	Herbert Mends Gibson, Plymouth.
Kendall, James, 20, Chenies-street; and Northallerton	Samuel Kay, the Elder, Manchester.
Kenny, William Fenton, 4, Barnsbury Place, Islington; and Halifax	Richard Fryer, the Younger, Wolverhampton; assigned to Edward H. Rickards, Lincoln's Inn Fields.
Kitson, Edward Bellamy, Somerton; and Crewkerne	John Sanders Walton, Northallerton.
Kingdon, Joseph Francis, 17, Gt. Russell-st.; Dorset-st., Salisbury-sq.; and Gt. Torrington	Edward Nelson Alexander, Halifax.
Knipe, John Williams, Worcester	John Marsh Templeman, Crewkerne.
Latham, John, 57, King's-sq., Goswell-road; Sandbach; and Adelphi-terrace	Francis Kingdon, Great Torrington; assigned to W. Gill Grubb, Great Torrington.
Lyndon, Charles, Stockbridge-terrace, Pimlico	William Laslett, Worcester.
Lloyd, Robert, Ruthin	Thomas Ives Bayne Hostage, Northwich; assigned to William Latham, Sandbach.
Lowry, Joseph Stamper, 3, George's-terrace, Gray's Inn-road; and Crosby-upon-Eden	Cobbett Derby, Harcourt Buildings, Temple.
Marsh, John, 9, Staple Inn . . .	David Evans, Liverpool; assigned to Joseph Peers, Ruthin.
	Henry Jackson, Kerby Stephen; assigned to William Carrick, Brampton.
	Thomas Edmund Marsh, Llanidloes; assigned to Thomas Yates, Welshpool; assigned to James Cross, Staple Inn.

Clerk's Name and Residence.

Munday, William, Kennington-lane	To whom articled, assigned, &c., and Residence. William Smith, John-street, Bedford-row.
Margetts, Henry Clarke, 3, William-st., Regent's Park; St. Ives; and 63, Chancery-lane	John Lawrence, St. Ives.
Marshall, Henry Fighting, 1, Little George-street, Westminster	John Clutton, 48, High-street, Southwark.
Nash, John Howell, 3, Prince's-court, Storey's-gate; and Chipping Wycombe	John Nash, Chipping Wycombe.
Ormerod, Henry Mere, 37, Queen's-sq.; Manchester; Featherstone-buildings; and Southampton-row	Joseph Demson, Manchester; assigned to G. Wareing Ormerod, Manchester.
Petch, Robert, the Younger, 11, Everett-street, Brunswick-sq.; Kirbymoorside; and Gloucester-street, Red Lion-square	Robert Petch, Kirbymoorside.
Pownall, Thomas Turner, 5, Warwick-court, Holborn; and Godley	Joseph Hebbert, Hyde, Cheshire.
Prichard, Charles Edward, Park Field, near Ross; Sidmouth-street; and Wells-street	John Bury, Bewdley.
Pruen, Septimus Alexander Conant, Cheltenham; and 25, Southampton-street, Strand	Edward Pruen, Cheltenham.
Pollock, Lodowick Anderson, 15, New Ormond-street; and Ramsgate	George Redaway, Clement's Inn; assigned to Thomas Wellard King, Ramsgate; assigned to T. H. Grove Snowden, Ramsgate.
Prideaux, George Fisher, 63, Upper Seymour-street; and Bristol	Greville Prideaux, Bristol.
Pugh, Charles, 27, Duke-street, West Smith-field; and Weymouth	Robert Henning Parr, Poole.
Parker, William Phillips, 24, Cheyne-walk, Chelsea	John Collier, Carey-street.
Payne, James Edwin, 30, Walbrook; and Ampney	George Eyre, Ewelme.
Roscoe, Thomas, 48, Southampton-row; and 4, Adelphi-terrace	James Roscoe, Knutsford; assigned to John Cole, Adelphi Terrace.
Ramsden, Thomas, Wakefield; and Manchester	William Pickard, Wakefield; assigned to James Whitham, Wakefield.
Rea, John, 44, Southampton-buildings; Alnwick; and Middleton House	William Dickson, Alnwick.
Robinson, Henry, 2, Snow-hill; Sheffield; and Whittington	Wotton Byrchinshaw Thomas, Chesterfield; assigned to John Brown, Sheffield.
Rule, Frederick, 5, Guilford-street	Kirk Thomas, 10, Symond's Inn.
Sheridan, Edward Castel, 6, Bouvierie-street	William Lawrence, Peterborough.
Smith, Thomas, 17, Henrietta-st., Brunswick-square; and Wrington	Joseph Fisher, Cleeve.
Shields, Thomas, 20, Everett-street, Durham; and Guildford-street, East-street	Thos. Christopher Maynard, Durham; assigned to Joseph Blower, Lincoln's Inn Fields.
Scales, Edward, 15, Featherstone-buildings; Plymouth; and Edmund-place	George Pridham and Joseph Pridham, Plymouth.
Sedgwick, Samuel Goodwin, 5, Soley-terrace, Clerkenwell; and Manchester	Thomas Potter, Manchester.
Simpson, Thomas, Stafford	David Thomas, Stafford.
Smallwood, Henry George, Monmouth	James Powles, Monmouth.
Shaw, Thomas, Paradise-place; and Hudcar within Bury	William Plant Woodcock, Bury.
Shingley, George Deeks, 27, New-st., Dorset-square; and Milton-street	John Ambrose, Manningtree.
Square, John Henry, 20, Great James-street; and Kingsbridge	John Square, Kingsbridge.
Simpson, Palgrave, Claremont-square	Robert Crabtree, Halesworth.
Sudlow, John James Joseph, Compton-terrace, Islington	William Fisher, Chancery-lane.
Staple, John, 21, King-street, Covent Garden	James Johnston, 26, Carey-street.
Todd, Robert, 37, Sidmouth-st.; Kingston-upon-Hull; and New Boswell-court	Arthur Levett, Kingston-upon-Hull.
Taylor, William James, Lancaster	Thomas Rawsthorne, Lancaster.
Taylor, Pearson, Cockermouth	Robert Benson, Cockermouth.
Turnbull, John, 41, Great Castle-st.; Haydon-bridge, and Durham	John Burrell, Durham.
Teulon, Peter Ross, 22, Queen-st., Golden-sq.	Joseph Pope Hammet, Southampton Buildings.
Tombs, Edward Thos., 41, Cambridge-terrace, Hyde Park; and Derby	Charles T. Reynolds Dewe, Derby.

Clerk's Name and Residence.	To whom articled, assigned, &c., and Residence.
Taylor, Clement, 49, Woburn-place, Russell-sq.; Norwich; and Tavistock-place	Adam Tayler, the Younger, Norwich.
Trotter, Thos. Dixon Marr, 15, Marchmont-st., Russell-sq.; Upper Chadwell-st.; Alfred-st.; Everett-st.; and Newcastle-upon-Tyne	Percival Fenwick, Newcastle-upon-Tyne.
Turner, Joseph, 111, High-st., Southwark	Frederick William Carter, High-street, Southwark; assigned to Christopher Jordeson, High-street, Southwark.
Tippitts, Thomas, Dursley	Edward Bloxome, the Elder, Dursley.
Vickermann, Charles Ranken, 12, Hamilton-place, New Road	Charles Ranken, Gray's Inn.
Vollans, John William Thompson, Kingston-upon-Hull	George Miller, Kingston-upon-Hull; assigned to John Thorney, Kingston-upon-Hull.
Welsby, William, 15, Alfred-st., Bedford-sq.; and Ormskirk	John Welsby, Ormskirk.
Wilkin, Thomas Martin, 97, Charlotte-street, Fitzroy-square	Thomas Wilkin, Southampton; assigned to Thos. Pocock, Bartholomew-close.
Whish, John Buchanan, 22, Everett-street, Russell-square; and Hastings	William Wise, Rugby.
Woodburne, Thomas, 6, Arthur-street, Gray's Inn-road; and Preston	William Dickson, Preston.
Wood, James, 5, Brown's-buildings, Islington; and Bradford	Greenwood Bentley, the Elder, Bradford.
Wortham, James Raymond, 13, Warwick-court, Holborn; Southampton-buildings; and Royston	Thomas Wortham, Royston.
Williams, Henry Wild, 12, Hamilton-terrace, St. John's Wood-road	John William Allen, Carlisle-st., Soho-square.
Warren, Henry, 5, Wellington-st., Goswell-st.; and St. Stephen's	John Buckton, Canterbury.
White, William, 12, Great Castle-street; and Hexham	John Bell, Hexham.
Whitfield, William, Rotherham	John Oxley, Rotherham.
Wemyss, James Robert, 36, Frederick-street, Gray's Inn-road	John Aubrey Whitcombe, Gloucester.

ADDED TO THE LIST PURSUANT TO JUDGES ORDERS.

Bohun and Rix, Beccles.
 John Matthews, Hungerford; assigned to
 Thomas Halbert, Hungerford.
 James Robinson, Kingston-upon-Hull.
 Charles Smale, Bideford.
 Charles Ireland Shirreff, 7, Lincoln's Inn

Fields; assigned to John Packwood, Cheltenham.
 John Linton Simmons, Keynsham.
 Joseph Kinder, 8, London-street, City.
 Timothy Beaver, Wakefield.

IRELAND—SPRING ASSIZES.

MUNSTER CIRCUIT.

Clare, Feb. 26; Limerick, March 2; City, same day; Kerry, March 9; Cork, March 14; City, same day.

LEINSTER CIRCUIT.

Wicklow, Feb. 26; Wexford, March 1; Waterford, March 4; City, same day; South Tipperary (Clonmel) March 8; Kilkenny (County and City), March 16th; North Tipperary (Nenagh), March 20.

LIST OF COMMISSIONERS appointed under the Statute 3 & 4 W. 4. c. 42 s. 42, for TAKING AFFIDAVITS in SCOTLAND and IRELAND, to be used and read in the Courts of Law and Equity in England.

IN IRELAND.

James Davis, Dublin.
 Alfred Taylor, Dublin.

William Battle, Selby.
 Thomas Exham, jun., Cork.
 Brabazon Pearson Smith, Dublin.
 James Dowman, Cork.
 George Corner, jun., Dublin.
 John Hitchcock, Dublin.
 William Murphy, Cork.
 Philip Redmond, Wexford.
 Joseph Fanning, Dublin.
 Joseph W. Belcher, Dublin.
 William Davis, Dublin.

IN SCOTLAND.

Isaac Bailey, Edinburgh.
 James Rose, Edinburgh.
 George Marshall, Berwick-upon-Tweed.
 John Gilmore, Edinburgh.
 Richard Mackenzie, Edinburgh.
 John Ord Mackenzie, Edinburgh.
 John Archibald Campbell, Edinburgh.
 James Cumming, Dundee.
 James Drew, Glasgow.
 Alexander Pittendigh, Aberdeen.
 Andrew B. Yuille, Glasgow.

EQUITY EXCHEQUER.

SITTINGS after Hilary Term 1839,
MR. BARON ALDERSON.

Friday, 15th,	{ Causes.
Monday, 18th,	
Tuesday, 18th,	{ Further Directions, Exceptions to Reports and Causes.
Wednesday, 20th,	
	Petitions and Motions.

Before the MASTER OF THE ROLLS, at the Rolls.

Saturday, 16th,	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Monday, 18th,	
Tuesday, 19th,	
Wednesday, 20th,	
Thursday, 21st, Motions.	
Friday, 22nd,	{ Petitions on the General Paper.
Saturday, 23rd,	
Monday, 25th,	
Tuesday, 26th,	
Wednesday, 27th,	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Thursday, 28th,	
Friday, March 1st,	
Saturday, 2nd,	
Monday, 4th,	Motions.
Tuesday, 5th,	
Wednesday, 6th,	
Thursday, 7th,	
Friday, 8th,	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday, 8th,	
Monday, 11th,	
Tuesday, 12th,	
Wednesday, 13th,	
Saturday, 16th,	
Monday, 18th,	
Tuesday, 19th,	
Wednesday, 20th, Motions.	
Thursday, 21st,	{ Petitions in the General Paper.

Short and Consent Causes and Consent Petitions every Tuesday at the sitting of the Court.

WESTMINSTER SESSIONS.—Feb. 13.

These sessions commenced at the Guildhall, Westminster.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR.—I feel highly flattered, I can assure you, by your kind notice of my answer to your Problem XII., and am perfectly satisfied with the reason assigned in No. 14. for its non-insertion. At the same time I consider that, in justice not only to myself, but to all your correspondents, there should be a general understanding as to the limits within which each answer is to be confined, for I think I may state, (without advancing

too much) that if I had not considered myself bound to answer the whole of your Problem XII. in one number, I might have produced something much more worthy of insertion in your valuable journal; but, conceiving it my duty to curtail it, I did so, at some inconvenience, and endeavoured to answer the Problem (*as far as I considered it extended*) within such limit. Your correspondent "Henricus" has taken a wide range, and intends considering the subject under seven heads, the second of which he has not yet completed, at which rate, it will take more than three months at least before it is finished. Moreover, it appears to me, that under these heads, if properly treated on, will be included *all the subject of your XIV.* as well as your XIII Problem, and considering it as such, I shall not take up your valuable time in answering that Problem, but leave it to "Henricus," who no doubt will do ample justice to so important a subject. I should not have troubled you with these lines, did I not know that it is your constant aim and intent, to extend your kind assistance to all, and to give each and every of your correspondents an equal chance in answering these Problems, than which, in my humble opinion there has not been a better or more advantageous system adopted, or one more suited to benefit the profession at large, among all the mass of improvements of the present day; I hope you will not attribute this communication to any desire, on my part, of complaining, or of giving you unnecessary trouble, but to my true and only motive, viz., that of ascertaining *within what limits* you intend these Problems to be answered, remaining, with thanks for past and present attention,— Your most obedient servant,

H. D. M.

12th Feb. 1839.

As this letter concerns all our correspondents, we have inserted it *verbatim*. We do not wish to confine the Answer to *any limits*. We only require that the Problem, and *only the Problem*, should be answered. We do not want extraneous matter, and if it be possible, we wish to receive the entire answer at one time, for the reason given by us in No. 14. The Answer of "Henricus"

we received entire, but our original matter last week precluded the insertion of the whole. We will do all we can for every one. We do not see why H. D. M. should not have written up the law on the subject, and left the insertion of his answer to our discretion. He will observe that Nos. 14 & 15, contain Answers to Problem XII., from different individuals, and we certainly have the desire to encourage his industry. We wish to impress upon the minds of all Students, that it is by this sort of writing up alone that a sound knowledge of the subject can be gained. Problem XIV. is one of great importance, and is distinct from Problem XII. It is still open to H. D. M., or any other student, as we have not room this week to insert an Answer to it.—ED.

Business in the Courts.

COURT OF CHANCERY.

Chapman v. Severne, appeal, part heard.

VICE-CHANCELLOR'S COURT, *Lincoln's Inn*—at 10.

Short Causes, unopposed petitions.

After the Petitions—*Halford v. Knowles*, to be spoke to—*Goldney v. Blissett*, cause by order—*Morrison v. Morrison*, three petitions and motions by order—*Attwood v. Barton*, three demurrers, part heard.

ROLLS' COURT.

Rowley v. Adams, part heard—*Davis v. Elmes*, demurser—*Neame v. Cobb*, exceptions, further directions, and costs—*Goddard v. Sowerby*—*Hobson v. Bell*, exceptions, further directions, and costs—*Cox v. King*, exceptions—*Hurst v. Deakin*, exceptions, further directions, and costs—*Manners v. Bryan*, ditto—*Lyde v. Marquis of Bath*—*Taylor v. White*, exceptions—*Guppy v. Few*, exceptions—*Cottrell v. Watkins*, ditto.

COURT OF QUEEN'S BENCH.

Middlesex Special Juries—*The Queen v. J. G. Wrench and others*—*Delisser, Esq., v. Towne, Gent.*—*The Queen v. London and Birmingham Railway*—*Semple v. the same*.

Middlesex Common Juries—*Souther v. Richmond* and another—*Doe, dem. Penfold and others v. Conway*—*The same v. Green*—*Melton v. Primrose*—*Guest v. Reynolds and others*—*The Queen v. Hawden and others*—*Rapp v. Lord*—*Edward Thynne*. The last cause is No. 61 on the printed list.

COURT OF COMMON PLEAS.

London Common Juries—*Farden v. Fluther*—*Webber v. Jones*—*Forder v. Drake*—*Lamburn v. Cruden*—*Powell v. Moore*—*Ingram and another v. Winks*—*Homan and another v. Cart*—*Sinclair and another v. Wisby*—*Pequeur v. Cockhead*—*Barker v. Pound*—*Sleath v. Wilson*—*Carlow v. Hinton*, undefended. The last defended cause is No. 45 on the printed list.

COURT OF EXCHEQUER.

London Common Juries—*Boddington v. Harris*—*Mason v. Pooley*—*Fox v. Davis*—*Venning v. Richmond*—*Beaumont v. Colvill*—*Rock v. Nunn*—*Gray v. Bacon*—*Larkin v. Battyes*—*Shaw v. Kirkley*—*Beckley v. King*—*Haubayne v. Hickmar*—*Wright v. Jones*. The last cause is No. 38 on the printed list.

EQUITY EXCHEQUER COURT,

Serjeant's Inn Hall—at 10.

Skeffington v. Whitchurch, to be spoke to—*Angell v. Dawson*, ditto—*Ward v. Sharp*, short cause—*Batt v. Temprell*, ditto.

Causes—*Davys v. Boucher*, at defendant's request—*Hutchinson v. Morrit*—*Bailey v. Dennett*—*Dixon v. Atkinson*—*White v. Hillacre*—*Serjeant v. Chaffy*—The same v. the same.

TO CORRESPONDENTS.

“Omicron.” Thanks.—It is only those who are IN THE PRESS, that can know its labours, troubles, annoyances and cares.

“C. S. G.” Norwich. All that he wishes, he will find in the last and present numbers. We study to omit nothing that can by possibility be of use to the profession.

“R. P.” The consideration of this answer must stand over till next week.

“Alpha,” St. Ives.—We have not the Journal referred to in our Library, nor is it cited in the Courts as an authority. We see no good reason to differ from the judgment in the case we before referred to.

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THE LEGAL GUIDE.

PART 3 containing Nos. 10 to 13, both inclusive, with Table of Contents to the whole. This part contains Original Essays upon all the New Laws relating to Advowsons and Ecclesiastical Benefices, as also to Ecclesiastical Writs, and upon the present uncertain state of the Law in relation to Trusts for the separate use of unmarried Women. Part 4 will be published on the 1st of March.

John Richards & Co., 194, Fleet Street.

Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing-Office, Giesen Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 16th February, 1839.

Price 6*d.* Stamped Edition, 7*d.*

The Legal Guide.

No. 17.] SATURDAY, FEBRUARY 23, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from page 243.)

ON THE TITLE A PURCHASER MAY
REQUIRE.

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

WE will now turn our attention to the danger to be apprehended of eviction by a remainder-man or reversioner *after an estate tail*, which is removed or considerably diminished by this statute; but in making this observation, we must do so with much caution, so as not to mislead our readers upon the safety of a title thus situated for 40 years, because the section (a) of the statute which relates to assurances that are *insufficient* to bar the remainders, is very limited in its operation, and because possession under such an assurance, if it created a base fee, will not begin to be adverse within the two previous sections, (b) until the base fee, which gave a lawful title to the possession, determines by the failure of issue in tail.

As we have before (c) shewn, 20 years' possession adverse to a *tenant in tail* operates against those in remainder, and the only action now left to the remainder-man is that of ejectment, and the period limited for bringing that action (d) cannot be ex-

tended by disabilities, or otherwise, beyond 40 years (e). This section of the statute was called into action in the Court of King's Bench, by the ejectment case, *Doe dem. Corbyn v. Branston*, (f) where one Whitwell died in 1774, seized in fee of lands in Northamptonshire, without issue, having by his will devised to his wife, who survived him. She in the same year married the lessor of the plaintiff Corbyn, who was the eldest son of *this marriage*. She continued in possession from the death of her first husband until her second marriage, after which event, she with her second husband remained in possession for some years, and at a period not shewn, they left the premises, and never returned to them, and both died at St. Albans, the wife in 1828, and the husband in 1832. Neither Mr. or Mrs. Corbyn exercised any act of ownership, or occupation of the premises after they left them, and this period of time was stated to be more than 40 years before the commencement of the action, but it is not shewn to be within 40 years of Mrs. Corbyn's death. The plaintiff offered evidence to shew that no fine had been levied by his father or mother, and it was contended that Mrs. Corbyn as a *feme covert* was under *disability*. *Littledale, J.* (before whom the cause was tried at the Northampton assizes, 1835,) considered that the action was barred by s. 17. of this statute, and nonsuited the plaintiff with leave to set it aside.

- (a) S. 23. ante, p.
(b) Ss. 21, 22. ante, p. 18.
(c) Id.
(d) S. 2. ante, p. 2.

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(e) S. 17. ante.

(f) 3 Adolp. & Ellis, 63.

In Easter Term, 1835, accordingly a motion was made to set aside the nonsuit, and on the 4th May, 1835, Lord Denman, C. J. delivered the following judgment of the Court.

"The fact being clear, that within the terms of this statute, s. 3. the plaintiff's mother was dispossessed, or discontinued the possession or receipt of the rents above 40 years before the action brought, *the action is clearly barred* by s. 17. Some argument was raised on the question, whether the possession was adverse or not; but the terms of that clause are unequivocal, and one of its objects was to avoid the necessity of enquiring into facts of so ancient a date.

"If the person actually in possession could be shewn to have held under him, through whom the plaintiff claims, the possession of the former might be regarded as the possession of the latter; but in this case there was not a single fact from which such an inference could be drawn. On the contrary, the departure of the former possessors to a distance, without appearing to have received any rent, or made any demand, is the strongest evidence of their intending to abandon, at once, all occupation and all claim of ownership. And as the title of the plaintiff's ancestor rested on no documents, but was merely evidenced by possession at an early period, that ancestor's entire description of the premises for so long a time, goes far to shew a consciousness that the anterior occupation was without title. It is true that, if Mrs. Corbyn was the owner, her husband was tenant by the courtesy, and their son's right of possession did not accrue till after his father's death; but this furnishes no answer to *the positive enactment* of limitation, in the 17th clause (of this Act). It is true also, that in the cases (a) cited at the bar, this court shewed a strong indisposition to presume a possession adverse, which might be lawful consistently with the facts found. Of these cases (b) no more need be

said on the present occasion, than that they were not brought within the late statute,"—and the rule was refused.

It was from this decision, at so early a period after passing the statute, that many took it for granted, a title for sixty years was no longer required, but that forty years would be the most extended period required by the statute. But *no such limitation applies*, or ever did apply, or could, with justice and reason, be extended either at law or in equity, (c) to a *remainder-man* or reversioner, *expectant on an estate for life*, who, under the old law had, besides his ordinary remedy by ejectment, a writ of intrusion, to which the same limitation was not fixed, (d) and who, though deprived by the new law of his real action, is left wholly unaffected by matter anterior to the time when his right first regularly acquires in point of enjoyment.

The decision in the case cited only went to establish this law, *that possession adverse to a tenancy in tail*, if held for forty years, shall constitute a perfect title, as against the issue and remainder-man where there has been disabilities; and the same law will follow, *in such cases*, where there has been *no* disability upon an adverse possession of twenty years. Another able writer, (e) in giving his opinion upon this statute says, "a purchaser, before the late Act of 3 & 4 W. 4. c. 27, had a right to require a title, commencing at least sixty years previously to the time of his purchase, because the old statute of limitations (f) could not, in a shorter period, confer a title. In Paine v. Miller, (g) Lord Eldon was of opinion, that an abstract, not going further back than

been so anxious to protect a long possession, that no plaintiff was entitled to so little favour as a plaintiff in a writ of right. See Charlwood v. Morgan; Baylis v. Manning, 1 New Rep. 64, 233. Maidment v. Jakes, 2 id. 429.

(c) Gore v. Stackpoole, 1 Dow. P. R. 18; Price v. Copper, 1 Sim. & S. 347; Blake v. Foster, 2 Ball & B. 387.

(d) Piercy dem. Gardner, ten., 3 Bingh. N. C. 748; Cuthbert v. Creasy, 4 Bligh. P. R. O. S. 125.

(e) Sir Edward Sugden, Vend. and Purch.

(f) 32 Hen. 8. c. 2; 21 Jac. 1. c. 16; and see Barnewall v. Harris, 1 Taunt 430.

(g) 6 Ves. J. 349; see Robinson v. Elliott, 1 Russ. 599.

(a) Holl v. Doe dem. Surtees, 5 Barn. & A. 687; Doe dem. Souter v. Hull, 2 Dow. & R. 38; Doe dem. Smith v. Pike, 3 Barn. & A. 738; Doe dem. Roffey v. Harbrow, 1 Nev. & M. 422.

(b) The courts have always, from an early period,

forty-three years, was a serious objection to the title. Even sixty years, were not sometimes sufficient. For instance, if it might reasonably be presumed from the contents of the abstract, that *estates tail* were subsisting, the purchaser might demand the production of the prior title. The statutes of limitation could not, in such cases, be relied on; remainder-men having had distinct and successive rights, upon which, at least, the statute of James could only begin to operate as they fell into possession. It might have been thought, in the common case of a man claiming by descent a reversion expectant upon particular estates, created by his ancestor's will, that a writ of right would not lie after sixty years from his ancestor's death, although the particular estates had but recently determined. But, however this might be, the objection still remained, for an ejectment might have been brought at any time, within twenty years after the estate fell into possession. So, if an abstract begin with a conveyance, by a person who is stated to be heir-at-law of any person, the purchaser may require proof of the ancestor's intestacy. But the law is altogether altered by the 3 & 4 W. 4. c. 27, which limits the general time to recover to twenty years, with a saving of ten years to persons under disability, but *not to exceed, in any case, forty years, although the ten years are not expired.* The act allows no further time for successive disabilities, and makes the bar of the tenant, in fact, extend to all whom he might have barred. This will ultimately tend to shorten abstracts considerably, and, in the result, forty years will probably be considered the proper period, instead of sixty, for an abstract to extend over; but still *cases must frequently arise where it will be necessary to call for an earlier title.* As fines are abolished, a short bar, as formerly, cannot now be made."—With every respect for this learned and able writer, and with all due deference, we submit that, this last observation must extend to *all cases of possession held adversely to a tenant for life,* and that such a possession, during a life protracted by extreme longevity, will afford no security to a purchaser against eviction by a remainder-man or reversioner claiming

against him. So also must it extend to all cases of possession, held *adversely to long terms of years,* as we have before noticed and illustrated. (A)

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XIV.

What are the changes made in the Law of Dower by the Stat. 3 & 4 Wil. 4. c. 105. commonly called the Dower Act?

In order fully to understand the changes that have been effected by the above statute, it may not seem out of place shortly to review the Law of Dower as it stood previously to the passing of the present Dower Act.

The Law of Dower then gave to a surviving wife a right to have assigned to her for life one-third of all her husband's lands and hereditaments, of which he died seized in law; and should the heir neglect or refuse to assign, she could compel a just assignment by legal process, and generally recover compensation for the detention; but to entitle her to damages in dower, it must be alleged and proved that the husband died seized of an estate of inheritance, (Jones v. Jones, 2 C. & J. 601.) Equitable estates were not subject to dower, and the general principles on which courts of equity have proceeded, was, that dower was to be considered a *mere* legal right, and that therefore equity ought not to create the right where it did not subsist at law, as where an estate was subject to a mortgage in fee at the time of the marriage, and continued so during the coverture, the widow was held not entitled to dower, as at law the whole legal inheritance was vested in the mortgagee, and the right of redemption was merely an *equitable* right insufficient to create a claim of dower (Nixon v. Saville, 1 Br. C.C. 326.) By the old law also, after a title of dower had once attached, it was not in the power of the husband alone to defeat it by any act in the nature of alienation or charge (3 Lev. 386. Co. Litt. 32.) It was a right attaching by implication of

(A) Ante, p. 50.

law, which, although it might never take effect (as if the wife died in the husband's lifetime), yet from the moment that the facts of *marriage* and *seisin* had concurred, was so fixed as to become a title paramount to that of any person claiming under the husband by any subsequent act (Co. Litt. 32. a. F. N. B. 147 E.) The alienation of the husband, therefore, whether voluntarily as by deed or will, or involuntarily as by bankruptcy, &c. would be not to defeat the wife's right to dower against the husband's alienee against whom dower might be recovered in the same way as against the heir of the husband dying seised, (Shep. T. 275. 7 Rep. 8. 72; see Park on Dower, pp. 237, 238.) Legacies in bar of dower were entitled to preference over other legacies, and in case the assets should prove deficient, the widow was not to abate in proportion to the other legatees, (Burridge v. Bradly, 1 P. Wms. 127; Blower v. Morret, 2 Ves. sen. 420.) By sec. 12, of the Dower Act, this preference is still preserved.

(*To be continued.*)

PROBLEM XVII.

LAW OF INHERITANCE.

What is the Law of Inheritance in England ?
And what changes were made by the
Statute 3 & 4 W. 4. c. 106?

Imperial Parliament.

HOUSE OF LORDS.

LEGAL BUSINESS.—Feb. 19. *Private Bills.*

ORDERED, that no petition for a private bill shall be received after the 20th March, and that no report from the Judges on a private bill, shall be received after the 30th April. On the motion of LORD SHAFTESBURY.

Borough Courts.

The Lord Chancellor presented a bill for the better regulation of courts in boroughs.

Read a first time, and ordered to be read a second time on Thursday next.

Feb. 21.

Read a second time.—Ordered to be committed this day.

HOUSE OF COMMONS. ENGLAND.

COURT OF CHANCERY.—Feb. 15.

Mr. Blewitt moved for returns of the number of bills filed in Her Majesty's High Court of Chancery, in the years 1835, 1836, 1837, 1838; of the number of answers filed in the several years 1750 to 1754, inclusive; also for the several years 1760 to 1764 inclusive; also for the several years 1800 to 1804 inclusive; also for the year 1808, and each succeeding year, to the 31st December, 1838; also for the total number of folios contained in the bills, and of the total number of folios contained in the answers, filed in each of the years above specified; also of the number of causes, exceptions, and further directions, pleas and demurers, set down to be heard in and for the years 1836, 1837, 1838, and the number of decrees and orders made on the hearing of the same; and of the number of causes, exceptions, &c., ready for hearing on the first day of each term, and also at the close of the sittings after each term in each of the above years; of the number of re-hearings and appeals before the Lord Chancellor, set down in each of the same years, and standing for hearing on the first day of each term, and the last day, &c. Also of the number of cause petitions presented and answered by the Lord Chancellor in each of the years 1836, 1837, 1838; and of the number of petitions answered and set down for hearing at the Rolls. The hon. Member observed, that, as the returns were merely in continuation of some moved for in 1836 by the learned Solicitor-General, he apprehended there would be no objection to his motion.

Mr. Pemberton rose principally to inquire whether the government had it in contemplation to lay before the house in the course of the present session any measure for the improvement of the administration of justice in the Courts of Chancery and higher tribunals of the country. With respect to the state of business in the Courts of Chancery, he believed that, except on one occasion, when, owing to the absence from illness of one of the judges, his court was wholly shut up. There never was a larger amount of arrears in those courts than at present. He believed there were, at that moment, not less than 700 causes set down for hearing. That during the last term not one single case, standing on what is called the general paper, in the Vice-Chancellor's Court, came on to be heard. The number of causes on the general paper in the Rolls Court, disposed of during the same period, was one and-a-half. Was this owing to the noble judge who presided in that court? He felt the utmost confidence that it was not. No man could exhibit greater assiduity in the discharge of his duties; no man could more completely confine himself to doing that which he thinks to be substantial justice, than his noble friend. It remained to be asked, then, what was the remedy? The remedies hitherto tried had turned out anything but remedies. It would be in the

recollection of many hon. members present, with what a loud obloquy it was customary for some persons to assail the late Lord Eldon when presiding in Chancery, on the ground of his indecision and delay of justice. Now let the house consider that the business of that Court was not divided then; Lord Eldon had to bear the whole weight of the business in bankruptcy, which, as well as other business, had since been removed from the Court. In short, the business at that time was at least double its present amount. Yet now, although, as far as he was aware, the ordinary business of the court had not increased to any considerable degree above what it was when Lord Eldon discharged it, with the additions he had referred to, the amount of arrears was greater than ever it was when Lord Eldon held the seals, and when he was daily abused for delays of justice. He must say he trusted Her Majesty's Government were prepared to abolish at least one of those courts, which had been erected with a view of relieving the pressure in the Chancellor's Court, but which had turned out such abortions, that he thought it idle to talk of sustaining them. Then, again, with respect to the Exchequer Court, which, as the house were aware, was partially a court of Chancery, that is, a court for the administration of business in equity; how was justice administered? By judges who had not practised in equity; and by a bar who did not attend regularly. In fact it was a kind of bastard court, and certainly did not give satisfaction to the country. There was another court, that of the judicial committee of the privy council, which he believed had not worked well. It was, in his mind, a great objection to that court, that it should be presided over by a judge who was not filling any judicial station or fettered with any judicial responsibilities and obligations; it was an objection, too, that as the amount of business before the court was too trifling to secure the attendance of a regular bar, its sittings were in some degree dependent upon the possibility of obtaining the attendance of counsel. These were objections not undeserving of consideration, when it was remembered that this was a court of ultimate appeal. In the House of Lords, again, he believed there never before were more judgments in arrear than at present. Having repeatedly, session after session, given notice of a motion on this subject, he was determined not to neglect that opportunity without calling the attention of the house to these enormous evils.

Lord J. Russell said, it had been frequently a matter of deliberation and consideration what steps should be taken, and when they should be taken, with respect to the Court of Chancery. The Lord Chancellor had proposed a bill founded upon the best opinion which he and those who acted with him could give on this subject: it was found that there was the widest difference of opinion; and he believed the Lord Chancellor proposed a measure on this subject, which certainly went to remedy certain evils in the Court of Chancery,

going to diminish the number of appeals; because, if he recollects aright, one of the provisions was, a party might appeal to either the Lord Chancellor, or the House of Lords, but having done so, he was not afterwards to be at liberty to appeal to the House of Lords. That was one of the provisions to diminish the number of appeals; but, there were various other provisions to provide for the despatch of business in the Court of Chancery. But when this question came to be discussed, there was the widest difference of opinion. The noble and learned *Lord Langdale* stated that such an office as that of the present Lord Chancellor should be abolished altogether; that there should be no such person as a political judge sitting in the Cabinet; that, on the contrary, there should be one person placed at the head of the Court of Equity, let them call him by what title they liked; and another person sitting in the Cabinet without judicial functions, but only as the adviser, as it were, of all measures of legislation to be introduced from time to time by the Government. That was a total and absolute change of the institutions of this country so far as the office of Lord Chancellor was concerned. Lord *Lyndhurst* was of a totally different opinion: he thought the measure of the Lord Chancellor went too far, and he was rather for increasing the number of the judges in the Court of Chancery, for making an additional court, or two additional courts, for keeping the institution exactly as it was, with some other provisions. When there was this great difference of opinion amongst the most learned persons, and amongst those most competent to give an opinion on the subject, the natural opinion was, that any measure must fail that might be brought forward, and it became for some time totally hopeless to introduce any measure on the subject.

Motion agreed to.

Copyhold and Customary Lands.

Mr. J. Stewart moved for leave to bring in a bill for the *enfranchisement* of lands of *copyhold* and *customary* tenure. He referred to the bill on the same subject, introduced last session, the committee upon which, he said, had made a report recommending the entire *abolition of this tenure*, and that he brought forward the present bill with the sanction of the Attorney-General.

Leave Granted.

AFFIRMATIONS BILL.

Mr. Hawes moved the second reading of the Affirmations Bill. The object of the bill was to enable men who objected to oaths to give their evidence in that form which would be most binding on their consciences, and he must say that it was for the interests of all parties that honest and conscientious men should not be placed in a worse situation than more careless and less scrupulous individuals. It was objected in another place to the bill of last year, that under its provisions a man might come into a court and shield

himself from taking an oath on his own mere statement on the moment that he had a conscientious objection to take an oath, and thus that the ends of justice might be defeated. To meet this objection, the present bill provided that any person having such objection should, previously to claiming exemption, have registered his name before one of the officers empowered to administer the oaths of allegiance and supremacy, and on the payment of a small fee, should then be exempted.

Bill read a second time.

Mr. Goulburn gave notice that he would divide the house against it on its committal.

Ordered to be committed on Friday next.

IRELAND.—Feb. 21.

Ecclesiastical Courts.

Mr. Winston Barron moved for leave to bring in a bill for consolidating and reforming the ecclesiastical courts of Ireland.

Viscount Morpeth expressed the consent of the Government.

Dr. Lushington said the bill was framed, in point of fact, on the model of the report issued by the English Ecclesiastical Commission, which was appointed by the Duke of Wellington in 1828, and of which he had the honour to be a member along with the Archbishop of Canterbury, the bishop of Lincoln, and some other prelates, the Late Lord Chief Justice Tenterden, Lord Denman, and others of the judges. A bill, in pursuance of the recommendations of this report, for the reform of the English Ecclesiastical Courts had passed that house, and reached the House of Lords, where it had received the fullest attention; but it had eventually miscarried, because the bishops were of opinion that such a measure ought to be preceded by a clergy discipline bill. He believed the right reverend bench were by no means opposed to the principle of that measure. He had taken occasion, while it was pending, to confer with the Archbishop of Canterbury, and to tell him that the bill went to take from him patronage to the amount of 10,000*l.* a year. The Archbishop said, "give me ten minutes to consider what course I shall take." Shortly after which he said, "I am quite ready to accede to the bill." He believed the other prelates were quite as favourable to that measure. From that, the one now before the house was copied pretty nearly, and, without pledging himself to all the details, he begged to express his concurrence generally to the measure.—*Leave granted.*

SCOTLAND.—Feb. 15.

Salaries of the Judges.

The Lord-Advocate said, it became his duty to move general resolutions on which to found his bill; but first, he should observe, that great changes had been made amongst the Scottish judges. Five judges of the Exchequer had been dispensed with. The Court of Admiralty had been abolished, four commis-

sioners had been dismissed, and two judges of the Court of Session, making in the whole a saving of 54,000*l.* a year. In stating this, he wished at the same time to say, that he did not desire to see the Scottish judges deprived of that fair retiring allowance to which their duties and station fully entitled them. He certainly should contend, that judges who had attained the age of seventy, and had been fifteen years on the bench should be permitted to retire on full income. If the question were asked what public benefit would be derived from the increase of the salaries of the puissne judges, he would say, that by removing the anomaly of some having only 2,000*l.*, while others had 2,600*l.*, a great constitutional object would be gained; for, certainly, it was wrong that a judge on the bench should be induced constantly to look forward to promotion, with a view to an increase of his salary, which was in fact but a very small per centage on the great reductions which had already been effected in the fees of the court, to the annual amount, as was calculated, of 14,000*l.* He could not sit down without alluding to the suggestion that the number of judges should be further reduced, or that additional duties should be imposed on them. With regard to the first point, they had the evidence, uncontradicted and all one way, of practical and experienced men, that judicial reduction had been already carried far enough; and if the committee would for a moment consider the constitution of the court, they would at once perceive the danger of further reduction. The five puissne judges were men of great ability and most extensive legal acquirements; the cases in the first instance came before them, and they were fully employed from 9 o'clock in the morning frequently till 3 or 4 in the afternoon. It was true they did not always sit in court; but there were many cases of accounts. He knew of one where there were no less than 2,000 documents to be examined, extending over a long period of time, and which had occupied an accountant for three years, involving many difficult questions, which in English courts were usually referred to an arbitrator, and in equity to Masters in Chancery, the duty of investigating which fell upon the judges of the Court of Session, particularly the five lords ordinary, who performed that duty most effectually out of court, and whose number could not therefore be diminished. There were also two chambers, consisting each of four judges, neither of which could be reduced without depriving them altogether of any court of review, and throwing the whole judicature of Scotland into endless and irremediable confusion. He concluded by moving two resolutions, as the foundation of the bill he intended to introduce.

First resolution:—"That Her Majesty be enabled to grant to every puissne judge in Scotland of seventy years, having acted as such for fifteen years, an annuity on his resignation of office of the same amount as the salary thereto attached."—*Agreed to.*

Second resolution:—"That it is the opinion of this committee that provision be made by law to enable Her Majesty to increase the salaries and the retired allowances of certain judges in Scotland," &c.

Law Reports.

ROLLS COURT.—Feb. 11.

HAWKINS v. HALL.

Attachment for Costs—irregular service of subpoena, and demand of payment.—Whether a plaintiff, who illegally holds a defendant in custody, can legally detain him while in custody by another writ, at his own suit?

The Court having ordered the first writ to be set aside,

Mr. Kindersley moved on behalf of the plaintiff, to discharge him out of custody upon an attachment, at the instance of the defendant, for costs. The plaintiff filed a bill against the defendant which was dismissed with costs, for which a subpoena was issued, which was served upon the plaintiff at Boulogne, out of the jurisdiction of the Court, and the payment of the costs was there demanded. The costs not having been paid, the defendant obtained an attachment against the plaintiff; upon which, when he afterwards came to England, he was arrested, and, while in custody, several detainers were lodged against him. A motion was made to set aside the attachment and discharge the plaintiff out of custody, and Lord Langdale made an order accordingly, upon the ground that the service of the subpoena had been irregular, and consequently that there was no good foundation for the attachment. Upon the same day *after the order was pronounced, but before it could be drawn up*, another subpoena for the same costs was served, and another demand for their amount was made upon the plaintiff whilst he remained in custody. The plaintiff, being free from the attachment, applied to the courts of law to be discharged out of custody in the several actions in which detainers had been lodged against him, and the last of the rules for his discharge was made absolute upon the 30th of last month, but in consequence of some inaccuracy in drawing it up, the rule was amended, and was not lodged with the marshal in the Queen's Bench until two o'clock on the 31st of January. The plaintiff was then informed by the turnkey that all was right, and that he might leave the prison as soon as he pleased, whereupon he stated his intention not to leave it until night, but he paid his fees between four and five o'clock. There was no evidence to show that in the mean time the plaintiff might not have gone out of the prison freely whenever he pleased. About four o'clock an officer with a second attachment, obtained by the defendant, and also another officer with a writ of *ca. sa.* issued out by another party,

were on the watch to arrest plaintiff, who endeavoured to hide himself in the Queen's Bench Prison, and did, in fact, conceal himself in one of the prisoners' room until he was discovered between nine and ten o'clock at night, and compelled to go into the lobby of the prison, where he was immediately arrested under one of the processes, and was detained under the other. It did not appear upon the evidence whether this arrest was made upon the attachment or the *ca. sa.*

Lord LANGDALE said it was clear that the plaintiff was endeavouring to avoid satisfying a just demand, but, whatever his fraud or misconduct might be, he must be proceeded against by legal methods, and if the process issued against him was irregular, he was entitled to be discharged. The motion for the discharge was made upon the grounds—*first*, that the subpoena for costs had been irregularly served upon him; and *secondly*, that at the time of the arrest he was entitled to be privileged, and to leave the prison freely for the purpose of returning home. The question whether a man who was entitled to leave the prison in the middle of the day, and at liberty so to do, but did not think fit to avail himself of that liberty, resolving to wait until night, plainly with an intention of then escaping, and who being soon after under the apprehension of being arrested, instead of appearing and claiming his privilege, secreted himself as long as he could, was entitled to such a privilege as was then asked, was a question not necessary for his Lordship to decide; for it appeared to him that the service of the subpoena was irregular. He did not concur in the argument, that a subpoena for costs might not be regularly served upon a party who was in prison, or upon a party even irregularly and improperly in custody, at the suit of persons not connected with the person issuing the subpoena; but the question was, whether the same man who had caused another to be illegally arrested and detained should himself be at liberty so far to avail himself of his own wrong as to take an advantage of it for the purpose of serving a writ issued at his own suit, and intended to be enforced by process of contempt. He had not met with any authority distinctly applying to this subject, but he apprehended that at common law the same plaintiff, who illegally held a defendant in custody, could not legally charge him whilst in custody with a declaration at his own suit, and it appeared to him that very serious mischief might be produced if service of process out of this court, under such circumstances, were allowed to be good. His Lordship therefore came to the conclusion, although he owned with considerable reluctance, that the service of the subpoena for costs, and the attachment for non-payment, were irregular, and consequently that the plaintiff must be discharged, and the defendant must pay the costs of the application.

QUEENS' BENCH. Jan. 24.

Sittings in Banco.

PACK v. TARPLEY.

QUI TAM.—*Justice of the Peace—person acting as such without a proper qualification.*

This was an action brought against the defendant, who was the Vicar of Crewe, in the county of Northampton, for acting as a justice of the peace without having a proper qualification. The act of parliament, the 18th of George 2. c. 20, enacts that no person should be capable of acting as a justice of the peace who should not have property in fee or for life, in lands and tenements, of the clear yearly value of 100*l.* over and above what would satisfy all incumbrances and all rents and charges payable out of the same, or who should be entitled to the reversion of any such property of the yearly value of 300*l.* The defendant was the Incumbent of the vicarage, which was of the annual value of 500*l.* A writ of *sequestrari facias* had been sued out, directed to the Bishop of Peterborough, and endorsed for the sum of 2,276*l.* The bishop had issued a sequestration, and the sequestor was in possession of the lands belonging to the vicarage. The vicarage, however, had been assigned by the bishop to the defendant, together with 120*l.* a year, in order that he might do the duties of the vicar. It had been objected that it was not shown how the profits of the vicarage were applied. The answer to that was, that the sequestor was in possession.

Lord DENMAN in pronouncing the judgment of the Court, said—The decision of the Court would turn upon that part of the clause of the act of parliament relating to incumbrances. The question would be, whether it appeared by the facts that the defendant had an estate for life of the clear yearly value of 100*l.* above all incumbrances. According to the construction of the 13th of Elizabeth, c. 20, the Court could have no hesitation in holding that the sequestration was an incumbrance which affected the estate for life of the party. Did, then, the yearly sum of 100*l.* come into the pocket of the party as vicar? The difficulty arose from his being in possession of the vicarage-house; he was in the house as vicar, and the bishop could not turn him out; but it did not appear that the house itself was of the clear yearly value of 100*l.*, and as the onus of proof lay upon the defendant, in the absence of that proof the Court could not say that it was of that value. The stipends, therefore, must be taken into consideration; the sequestor was in the possession of all the ground and land belonging to the vicarage; the annual income, therefore, allowed by the bishop to the defendant must be considered as being in the discretion of the bishop, although the bishop could not appoint any person to serve the church instead of the vicar. Yet the Court was of opinion that the defendant took under the bishop, and not as vicar; therefore

it could not be said that the defendant had an estate of the clear yearly value of 100*l.*, and the defendant had failed to establish his qualification.

Judgment for the plaintiff.

COMMON PLEAS.

Hilary Term, 1839.

RE ANN HOLBORN.

Husband and Wife—Act for the Abolition of Fines and Recoveries, 3 & 4 W. 4. c. 74. ss. 77, 91.—Lunatic Husband.

Mr. R. N. Williams moved, under the 91st section of the Statute for Abolishing Fines and Recoveries, for a summary order on the part of Mrs. Ann Holborn, whose husband had been placed in a lunatic asylum in 1836, and had been there ever since in an unsound state of mind, that she might execute a release of her dower, without the concurrence of her husband.—*Order granted.*

Under the same sections of the statute, upon the affidavit of a married woman, stating that her husband had absconded in 1831, after committing an act of bankruptcy, and had never been heard of since, but was believed to be in America, an order was made for her to execute a conveyance of real property without the concurrence of her husband; see Exp. Mary Gill, 1 Bligh, N. R. 168.

So where an affidavit was made by a married woman, tenant in tail in possession of land, that she was so entitled, that she and her husband lived separate from each other, and that he had been found a lunatic by inquisition, 1833, an order was made for her executing a conveyance without the concurrence of her husband; see Exp. Thomas, 4 Moore & S. 331.

So where an affidavit was made by a married woman, entitled in her own right to copyhold that she had been compelled to mortgage, stating that she was married in 1816, that in 1820 her husband left her, and she had never heard of or received any information respecting him since, and that his present residence was wholly unknown to her, and that if her application was not granted she would be liable to incur a forfeiture. An order was made for dispensing with her husband's concurrence; see Exp. Shuttleworth, 4 Moore & S. 332. n. (b)

Upon the orders made in these cases we think it right to observe, that before the

passing this statute no case occurred where the Court had authenticated a fine levied by a married woman alone, without her husband's concurrence. In Moreau's case, 2 Blackst. Rep. 1205, the Court allowed a fine to be acknowledged *de bene esse* where the husband was abroad.

It is true, that a fine levied by a married woman entitled to lands of inheritance as a *feme sole*, without the concurrence of her husband, bound *her and her heirs*, because they were estopped from claiming the lands, and could not be admitted to answer contrary to the record, that she was a married woman. But the husband could at all times avoid the fine by entry, when the whole estate revested in husband and wife; because no act of the wife alone can transfer that interest which the marriage has vested in the husband; see Hob. 225; Earl of Bedford's case, 7 Rep. 8., and a case is reported 1 Sid. 122., in which it was held that a fine levied by a married woman alone is void.

There is also a case where husband and wife had both sold an estate, and had both executed a conveyance to a purchaser, who had paid the purchase money;—upon attempting to pass the fine, it appeared that the husband was in a state of *mental incapacity*; and the wife, as one of the cognisors, being a *feme covert*, the fine was refused without an order of the Court, which upon application being made, refused to make any order on the subject, but intimated that there was no objection to the acknowledgement of the fine being being taken, adding, *valent quantum valere potest*; see Stead v. Izzard, 1 Bos. & P. N.R. 312. In like manner the Court refused its interference, that a fine should pass, levied by a married woman alone, her husband being bankrupt, and had gone beyond sea; see Exp. Abney, 1 Taunt. 37. Also where husband and wife had sold a rent-charge payable to the wife for life, and both executed the conveyance, and the husband received the purchase money—the husband separated from his wife, who could not find him, and the court refused an application that the wife might levy a fine of the rent-charge without her husband; see Exp. St. George, 8 Taunt. 590.—ED.

Sittings in Banco.

DALTON & ANOTHER v. GIBB.

Plea of Infancy.—Replication.—Necessaries.—What circumstances shall make an Infant liable.—Motion for New Trial.

This action was tried before Lord Chief Justice TINDAL, at the last Middlesex sittings, and a verdict was found for the plaintiff.

The action was brought to recover from the defendant the balance of an account for silk-mercery supplied by the plaintiff to the defendant. The defendant pleaded infancy, and the plaintiff replied that the goods were necessaries.

The facts of the case were thus: the defendant, Miss Gibb, and her mother, had been staying at the Brunswick Hotel, Hanover-square, for a period of seven months. They kept a carriage, a coachman, and a lady's maid. The defendant's father was abroad, and her mother was in embarrassed circumstances. The goods in question were ordered by the defendant, and generally sent home to the hotel. She usually called in the carriage, and her mother sometimes accompanied her to the door, but remained sitting in the carriage. The young lady had been heard to say that she had considerable expectations upon the death of her grandfather, and her own and her mother's appearance was that of gentle-women in a superior condition of life. They were obliged to leave the hotel because they could not pay their bill. The goods supplied by the plaintiffs amounted in four months to £34, of which £10. had been paid on account.

Mr. Hayes now moved for a new trial, contending that there was no evidence of the actual and real condition in life of the defendant, the fact of her mother keeping a carriage and stopping at a fashionable hotel, without a shilling to defray her expenses, furnished no evidence whatever on that subject. It was the duty of the plaintiffs to have made inquiries as to the defendant's circumstances and condition before they trusted her, which they might have done both of her mother and at the hotel where she was staying; but they neglected to do so, and consequently they were not entitled to recover.

The COURT were of opinion that, although as a general principle it was the duty of a tradesman before he gave credit to an infant, to make inquiry of his friends as to whether or not he required the articles ordered by him, yet that principle did not apply in the present case, because it appeared that the defendant's mother accompanied her in the carriage to the plaintiff's door, and therefore must have known for what purpose she had gone to their shop. Besides, the goods were either taken home in the carriage or sent to the hotel, where the mother must have seen them. There was no necessity therefore for asking the mother whether or not she sanctioned the defendant's purchasing these goods, as she proved by her conduct that she did so. Under all the circumstances of the case, there was sufficient evidence of the defendant's condition in life

before the jury to enable them to say whether or not the goods supplied were necessities; and they having found that they were, the Court saw no reason to disturb the verdict.

Rule refused.

COURT OF REVIEW.—Jan. 14.

JOINT STOCK COMPANIES.

EX PARTE ANN REBECCA RICHARDSON, IN RE CHRISTOPHER RICHARDSON, A BANKRUPT.

Equitable Mortgages of Share Certificates in Cases of Bankruptcy—whether they pass to the Assignees—Notice of Deposit whether strictly requisite.

Miss Richardson presented a petition, praying that she might be declared equitable mortgagee on two shares in the German Mining Company, and that they might be sold and the proceeds appropriated to her benefit; the bankrupt was one of the original shareholders in this company. The property consists of certain mines in the districts of Dillenburgh and Hackenburgh, in Nassau, and at Wippenthal in the kingdom of Prussia. The produce consists of copper, silver, lead, and iron; and the property was transferred by deeds registered in the German courts to three English trustees for the benefit of 36 shareholders. And the facts of the case on the part of the petitioner were, that Mr. Richardson applied to the petitioner, his sister, for a loan on the security of these shares, and was empowered by her to sell £2,000. Three per cent. Annuities, as payment for them. The certificates of the shares were handed to her, together with a memorandum of the deposit, and the same were, with other property belonging to her, enclosed in a packet, sealed with her own seal, and deposited in her brother's iron safe, she being at the time an inmate of his house. Shortly afterwards the petitioner went to the Continent, and her brother becoming embarrassed during her absence, she took up her residence with a friend on her return. The packet was then delivered to the petitioner, who, on opening it, found the documents in question. There was a clear equitable mortgage, the consideration beyond dispute, the property of the lady in the funds having been sold out and received by the bankrupt. The deposit of the shares took place on the 1st of March, 1837, and the bankrupt's declaration of insolvency occurred on the 7th of December, some weeks subsequent to the petitioner's return from abroad. The affidavit of Mr. Barnard Hebeler, one of the directors, and a personal friend of the family, would, together with the evidence of the secretary to the company, prove the notice relative to the shares. Mr. Hebeler deposed that the bankrupt applied to him for a loan, when he advised him to part with his shares, but was told that they were already pledged to the petitioner for £2,000.; that on a subsequent occasion, the day of the bankrupt's insolvency, at a meeting of the directors, allusion having been made to arrears

of calls due on Mr. Richardson's shares, he notified the transfer to the sister, and an inquiry was made by the secretary to know who should be applied to for payment.

Evidence was gone into to prove these facts, and from which it appeared that Mr. Richardson paid the calls on the shares, and since the bankruptcy they had been paid by the assignees. There had been no formal notice of the transfer, only a verbal mention of it was made to the secretary, who deposed that, had it been a formal notice of transfer, he should have made a minute of it, which he had not done. It was the custom in the company to ask leave of the board for transfer of shares. When this is not done, the shares were treated as if in the hands of the original holders. Such applications were previous to transfer; the board knew nothing of depositions.

Mr. Bacon for the petitioner, held that formal written notice was not requisite, as proved by the decision in the case of "Smith and Smith," (a) by the Court of Exchequer, where there had merely been a conversation with one of the trustees; and also by the case of *Ex parte Harrison, in re Medley*, 3 Mont. and Ayrton, 506. The transfer of the shares could not have been made by the bankrupt without possession of the certificates, which were in the hands of the petitioner. Before the act of bankruptcy the reputed ownership by the bankrupt had ceased.

Mr. Swanson, for the assignees, contended that the petitioner had not done enough to prevent the operation of the statute transferring property to assignees, as in reputed ownership at the date of insolvency. The certificates only came finally into the petitioner's possession after bankruptcy had ensued. The alleged notice was a casual conversation amongst strangers, without Miss Richardson's cognizance. Assuming this to be personal property, the requisite proceedings had not been taken. The petition, however, spoke of this as "immovable property," and the law of the country prevented its being made a subject of formal security here. The forms required by foreign law had not been complied with by the petitioner; and she could not be recognized under the law of Nassau, the German law. Property there did not pass by such deposits, and persons advancing money on shares have no right of property in mines, no such equitable ownership being known in German law. This was a case of real property, the representatives of the bankrupt being entitled to 2-50ths of the real estate, without reference to the mining transactions. This came under the decision of the Court in "Pollard and Courtenay," relative to property in Scotland; the question had been re-argued before the Lord Chancellor, on appeal, but no decision had been yet given.

Mr. Russell, on the same side, said these shares resembled gas and canal shares. In

(a) Crom. & Mee, 231; 4 Tyr. 52.

the present case they were in the order and disposition of the bankrupt, and must be governed by the decisions of Lords Brougham and Lyndhurst in the Lancaster Canal case. (a)

Sir J. Cross said the point was important. The shares in question were worth 2,000*l.* The petitioner had sold out stock, and lent the proceeds, amounting to 1,800*l.* to her brother on the deposit of the certificates and memorandum as security for the debt, he undertaking by the agreement to complete the transfer when required. The lady placed these documents, with other property, under seal, in the possession of her brother, but not in his accessible possession. He had no power over the shares, and there was a doubt whether notice was strictly requisite. The holder could not transfer the shares without the certificates. The petitioner had therefore entire dominion over the property; the order and disposition were in her. Bankruptcy ensued on the 7th of December in the evening, when the declaration of insolvency was filed; but the directors of the company had knowledge in the morning of that day of the extinction of the reputed ownership. The petitioner was entitled to have the property sold for her benefit, and to become a creditor in the event of a deficiency.

Sir G. Rose said, that where these cases of transfer occurred in bankrupts' families, it was the duty of assignees to examine into them. Nothing, however, could have been more fair by the petitioner, or more honest by the bankrupt, than these transactions, as shown by the inquiry before the commissioner. The shares were worth the money advanced, the actual consideration. He (Sir G. Rose) should have deeply regretted if this lady could have been deprived of her property through her kindness to her brother. The certificates, perhaps, remained in the custody of the bankrupt, but that was immaterial; the property has been identified as the subject of transfer, and if it had come into the possession of the assignees, the Court would have ordered it to be transferred to the petitioner. The bankrupt might have broken the seal and disposed of the property, but, it being found existent, what could affect the petitioner's right? If not reclaimed till after the bankruptcy, it was of no consequence. No person wishing to have the benefit of such property ought to omit securing it by notice to the company. The conversation with Mr. Hebele was a notice to a trustee, and was sufficient to affect the order and disposition. But, in the present case, it had been mentioned before all the board, which was amply sufficient. Whether or not express authority had been given by Miss Richardson, she was entitled to the adoption of the incidental notice. Though a bankrupt was up to the ears in insolvency, notice at any fractional period of time before the act of bankruptcy

was sufficient to effect a release. If this was to be taken as real property, no notice was requisite, the authority having been completed by the writing on the deposit of the certificates. The German law on transfer was not in this case of any effect, this being merely a transfer of documents representing shares of interest in property. The assignees must be restrained from proceedings at law for the recovery of these shares. The petitioner declared entitled to relief as prayed, together with the costs, there having been a memorandum in writing.

This is a case of the very *first importance* to the *commercial world*, in establishing the currency of share certificates, which have hitherto not been for the purpose of raising money. *A deposit of such shares for an advance of money bona fide, is valid as an equitable mortgage against assignees in cases of bankruptcy; such is the law as determined by this case.*

Where the property consists of land, it is very usual, in order to avoid the expense of a legal mortgage, for the borrower to place the title-deeds of his estate in the hands of the lender, with a written declaration that they are so deposited as a security for a certain sum advanced. If the borrower afterwards become bankrupt, the estate, though left in his possession down to the very moment of his bankruptcy, is thus rendered liable in the first place to the repayment of the loan so specifically advanced upon the credit of it.

Where the subject matter consists of goods whereof the property passes by delivery, there (except in the case of shipping, which is regulated by a special enactment) a mortgage, without transfer of the actual possession, is unavailing; because (except as before excepted with respect to shipping) the bankrupt law enacts that all goods or chattels of which the bankrupt, at the time of his bankruptcy, was the reputed owner, shall, if they were then (by the true owner's consent) in the bankrupt's possession, order, or disposition, be distributable for the benefit of the bankrupt's general creditors. For the most part, therefore, this kind of property can be effectually pledged as a security for a loan, only when actually delivered over into the keeping or control of the lender.

There is a large class of intermediate cases,

(b) Lancaster Canal Co. v. Dilworth, 1 Dea. & Ch. 411.

where the property is in the hands of a third person; as where it consists of goods in the East India Company's warehouses, which it is that Company's usage to deliver to any person bearing the warrants for those goods; wines and other goods in the docks, which will also be delivered in a similar manner; or where it consists of money due, or to become due, from any person or persons upon bond, policy, or other contract to pay. If a trader be desirous of borrowing on the security of such goods or money, he can give the lender a title to them without actual delivery—in the case of the goods, by the mere transfer of the warrants—and in the case of the money, by the transfer of the bond, policy, or other written contract to pay, if any such there be, and notice to the person liable for it that it has been thus pledged to a lender. The lender, after these precautions, is safe against the effect of the borrower's bankruptcy, the borrower having no "possession" of the goods or money, and being thus divested even of the "order and disposition" of them.

The shares of a joint-stock company are of a nature not precisely analogous to any of the before-mentioned properties. But they have most of them this incident of landed estate, that every fresh transfer of them requires a deed, which is usually a short plain printed instrument, filed and kept by the officer of the company; for the mere certificates, which are given to the shareholder, generally pass no title whatever to the shares, and are mere memoranda. The deed filed with the Company's officer is the only actual title. Since joint-stock companies have come to be so numerous, and their shares so valuable, it has become a most important question how these shares could be made the subjects of security by way of mortgage, legal or equitable. They could not be *legally* mortgaged without a transfer to the lender; an *equitable* mortgage was then considered and acted upon. The title-deeds of the shares are in the hands of the company's officer as depositary for the shareholder. The shareholder and the lender need only give him a joint notice that the shareholder has agreed to make those deeds a security to the lender for a

sum of money which the lender is advancing on them, and the officer is immediately converted from a depositary for the shareholder into a depositary for the lender. Let the shareholder then hand the certificates to the lender, so as to deprive himself of every symbol of possession; let him also give to the lender a written agreement that he will make, whenever called on, a formal transfer to the lender, and the lender has a complete equitable mortgage. The shareholder is still the registered owner, and subject to all calls and liabilities; but by the notice to the officer he has divested himself of the order and disposition of the shares, and thus removed the transaction from the operation of the bankrupt laws. This effect of a notice to the officer is what lenders had failed to perceive; and, failing to perceive it, they were naturally shy of lending their money on the security of shares. This case has now determined the question, and the decision upon it will have the usual effect of bringing to the relief of credit and to commercial circulation a large extent of share property, which lay comparatively unavailable for want of a clear apprehension of the law. Very little seems to turn in the case upon the delivery of the certificates, the notice to the officer being the material point; but as the delivery of the certificates was not expressly treated as unimportant, a careful lender will of course adopt the precaution of *taking the certificates from the borrower*, as well as of serving regular notice on the Company's officer; indeed it has been determined, that where shares stood in the name of a *bankrupt*, who on all occasions appeared to be the only apparent owner, and had possession of the certificates of the shares, but the same belonged to another person in whose favour there existed a secret declaration of trust, that the shares were in the "reputed ownership" of the bankrupt. *Ex parte Watkins*, 2 Mont. & A. 348. which reversed the decision of the C. R. 1 Id. 689. and was a special case argued before the Lords Commissioners in Chancery, 28 July, 1825.

PREROGATIVE COURT. Feb. 12.

DURLING AND ANOTHER v. LOVELAND.

Will disputed for weakness and incapacity—Drawer of the will being a legatee as well as an attorney, and the will not having been read over to the deceased—necessary proof required to establish the Will.

Francis Petworth, the deceased, kept the Bull Inn, at Chislehurst, died on the 7th of April, 1838, aged 76, a widower, without issue, leaving property to the value of between 1000*l.* and 2000*l.* The will, which was dated on the 8th of March, 1838, bequeathed some small annuities, and the residue of the property to the executors, Durling and Parker. Mrs. Loveland, the niece of the deceased, had been twice married, and was the mother of seven children. The will was disputed by her on the ground that it was obtained by imposition from a weak and incapable testator. The deceased had been in the habit of drinking to excess, and was of a somewhat eccentric character, but in his sober moments he was represented as a shrewd man, and his medical attendant, who had given directions that he should be debarred the use of liquors, deposed that he never saw him under its influence for six or seven weeks preceding his death. The fact of execution was proved by two witnesses, who, however, did not hear the will read over to the deceased, and who, since their knowledge of its contents, deposed to their belief that he was not of sound mind, grounding their belief on the repugnancy of the contents to what they considered to be the testator's intentions. Other witnesses deposed to declarations in concurrence with the disposition contained in the will. The will was drawn by Mr. John Frederick Parker, the executor, who is a solicitor.

The Queen's Advocate in support of the will, argued that the testimony of the medical attendant of the deceased clearly proved his capacity, though his memory was impaired, and that there was sufficient evidence even of recognition to support the instrument, notwithstanding the attempt of the subscribing witnesses to depose against their own act. The principles which governed such a case as this, where the drawer of the will was a legatee, and where there was no proof of instructions or reading over, had recently received a luminous exposition in the judgment of the Judicial Committee of the Privy Council in December last, delivered by Mr. Baron Parke, in the case of "Barry v. Butlin," which seemed to qualify, though it was not at variance with, the principles laid down by Sir John Nicholl.

Sir H. JENNER—Where do you cite it from?

The Queen's Advocate—From the *Monthly Law Magazine* for February, 1839. It seems to have been taken very accurately, *ipsissimis verbis.*

Sir H. JENNER—How does that appear? Has the work ever been allowed to be cited as authority elsewhere? I believe the report to be very accurate; I have read it myself, and I have no doubt it is accurate; but my difficulty is, can I permit a magazine to be cited in this court as an authority?

The Queen's Advocate—I was present, and can vouch for the accuracy of the report.

Sir H. JENNER—I have not a doubt of it, and if the work had been allowed to be cited elsewhere as an authority, I should be ready to admit it here, because I believe it to be as accurate as can be.

The Queen's Advocate would then read the report as part of his argument. Mr. Baron Parke, after referring to certain expressions reported to have fallen from the late Sir John Nicholl in the cases of "Parke v. Olatt," (a) and "Billinghurst v. Vickers," (b) namely, that "the proof must go, not merely to the act of signing, but to the knowledge of the contents of the paper;" and that "where the capacity is doubtful, there must be proof of instructions or reading over;" proceeded to say that "if the learned judge meant merely that there are cases of wills prepared by a legatee so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence amounting to clear proof of actual knowledge of the contents by the supposed testator, and that the instructions proceeding from him, or the reading over the instrument by or to him, were the most satisfactory evidence of such knowledge, we fully concur in the proposition so understood. But if the words are to be construed strictly—if it is intended to be stated, as a rule of law, that in every case in which the party preparing the will derives a benefit under it, not only a certain measure, but a particular species of proof, is thereupon required from the party propounding the will, we feel bound to say that we conceive the doctrine to be incorrect." "All that can be truly said is, that if a person,

whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all; varying according to the circumstances, but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary, in all such cases even if the testator's capacity be doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for or reading over the instrument: they form, no doubt, the most satisfactory, but they are not the only satisfactory, descrip-

(a) 2 Phill. 323.

(b) 1 Id. 193.

tion of proof, by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it." The proof in this case, the learned advocate contended, came fully up to what was here required.

Dr. Haggard argued that the disposition was at variance with the deceased's declaration that it would be in favour of his poor relations, and it had not been shown why and when he changed that intention. There was nothing to account for the deceased's making Mr. Durling and Mr. Parker legatees to so large an amount. The latter was almost a stranger; although his father was the deceased's attorney, Mr. John F. Parker had had little intercourse with the deceased. There was nothing leading up to the paper; the evidence proved a bare execution. The executors would divide more than 1,000*l.*, and one of the circumstances of suspicion in these cases adverted to by Mr. Baron Parke was, "the quantum of the legacy, and the proportion it bears to the property disposed of." The case against the will was, that it had been obtained by deceit and imposition.

Sir H. Jenner said, he would consider his judgment.

Feb. 20.

**WOOD AND OTHERS AGAINST GOODLACE,
HELPS, AND OTHERS.**

*In the matter of the Will of James Wood,
Banker, late of Gloucester, deceased.*

Before the Judge commenced delivering judgment in this important case, Dr. Robinson applied, on behalf of Mr. Phillpotts, for leave to read an affidavit in defence of his character, which had been attacked in the argument.

Sir H. Jenner said that Mr. Phillpotts, who had appeared by a proctor, had had an opportunity of being heard by counsel, or in person, and that in this stage of the proceedings he could not receive the affidavit without the consent of the other parties.

The proctors for the other parties stated, that they had no communication with Mr. Phillpotts on the subject of this application, which was without their knowledge.

The Court decided that the affidavit was inadmissible.

The facts of this most extraordinary case, are fully detailed in the judgment pronounced by Sir H. Jenner, which we have not room for in this Number, but it shall appear in our next.

FORMS OF WRITS.

(Continued from p. 250.)

No. IV.—*Writ of Elegit on a Judgment of an inferior Court in an Action of Assumpsit removed into the Court of Queen's Bench.*

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of — greeting. Whereas, A. B., lately in [insert the style of the court], by the judgment of the said court, recovered against C. D. the sum of £—, which, in the said court, were adjudged to the said A. B., for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings, then lately made by the said C. D. to the said A. B., as for his costs and charges by him, about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record. And whereas the said judgment was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [or of —, one of the justices of our said court before us at Westminster, as the case may be], in pursuance of the statute, in that case made and provided, and the costs attendant upon the application for the said order and upon the said removal were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by our said court, before us at Westminster, at the sum of £—. And afterwards the said A. B. came into our said court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D. or any person in trust for him, was seized or possessed of, on the said — day of —, in the — year of our Lord — aforesaid (a), or at any time afterwards, or over which the said C. D., on the said — day of — (a), or at any time afterwards had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid and the said costs so taxed and allowed by our said court before us at Westminster as aforesaid, together with interest upon the said two several sums of £— and £—, at the rate of four pounds per centum per annum, from the — day of

(a) The day on which the costs of removing the judgment were taxed.

— aforesaid (b), shall have been levied. Therefore we command you, that without delay, you cause to be delivered to the said A.B., by a reasonable price and extent, all the goods and chattels of the said C.D., in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C.D., or any one in trust for him, was seized, or possessed of, on the said — day of

(b), or at any time afterwards or over which the said C.D., on the said — day of (b), or at any time afterwards had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A.B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, and the said costs so taxed and allowed by our said court before us at Westminster as aforesaid, and interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —

(To be continued.)

REVIEW OF NEW BOOKS.

The Law of REAL PROPERTY, with the Statutes relating thereto down to the present time, in Two Volumes. Vol. I. containing Realty, whether corporal or incorporeal, the nature thereof, and the rights, injuries, and remedies of the same; together with the principal Statutes relating thereto, from A.D. 1101 to A.D. 1838. By OWEN FLINTOFF, Esq., A.M. and Barrister at Law. London: Henry Butterworth, Law Bookseller and Publisher, 7, Fleet-street, 1839.

The first volume of this new work upon Real Property is before us. The second volume, it appears, is not yet published, so that at present the work is incomplete; and we collect from the author's advertisement, that there is a chance that the second

volume may never appear, unless the profession buy up the first volume,—the only mode by which approval of the merits of the work can be shewn;—upon this approbation depends the appearance of the second volume, which is to contain no less important features than an index and table of cases, and a legal interpretation of the contents of the first volume.

As real property lawyers, we can feel the difficulties an author has to encounter in writing such a work as this; indeed, we fully enter into this writer's expression that "no work of ordinary limits would embrace the whole law of real property." It is therefore with pain that we see such a work brought out in such a way. How is it possible, we ask, for any reviewer to express an opinion upon the first portion of a work, the very essence of which may never appear. We direct the author's attention to his introduction, where he says—

The first volume is to treat of *realty* together with the principal statutes relating thereto down to the present time; the second volume is to treat of *real property*, under the three distinguishing characters of *legal*, *customary*, and *equitable*. The first volume will, therefore, comprise the substance, or that in which real property may be had; and the second volume, the estate or property had therein. *Realty* and the *estate* therein make up the idea of real property.

The substance, therefore, we have got, according to the author's shewing; and if that be approved of, he promises to instruct us how to make use of it, by shortly publishing the second volume. We wish it would appear, so as to enlighten our understanding and make us duly appreciate a work of this nature. We can speak in approving terms of the plan the author has adopted, except as to the insertion of so many statutes, that occupy more than half the book—347 pages out of 641; and for 294 pages, which is in fact the amount of the treatise, the price (1*l.*) is too large, particularly when compared with other works of the same class by eminent men. We shall reserve our further remarks until we see the second volume, for till then we feel we can neither do justice to the author or his book.

(b) The day on which the costs of removing the judgment were taxed.

SHERIFF'S COURTS, LONDON.

Notice is hereby given that the Judge of the Sheriff's Courts, London, has appointed the undermentioned days for the trial of issues, directed to be tried before him under the provisions of the Law Amendment Act of the 3rd and 4th Will. 4. c. 42. And all writs for the trial of such issues must be left at the Sheriff's Court Office in White Cross Street, four days before the day of trial.

By order of the Judge.

1839.

February, Thursday 21.
March, Thursday 7. Friday 22.
April, Thursday 11. Friday 26.
May, Friday 3. Thursday 16.
June, Thursday 6. Friday 21.
July, Friday 12. Thursday 25.
September, Thursday 19. Friday 27.
October, Thursday 10. Friday 25.
November, Thursday 14. Friday 29.
December, Friday 6. Thursday 19.

Business in the Courts.**COURT OF CHANCERY.**

Chapman v. Severne, appeal, part heard.
Appeal Motions.—*Rawson v. Samuel* (2)
—*Borton v. Blakmore*—*Hill v. Gomme*—*Steadman v. Webb*—*Dubless v. Flint*—*Ikin v. Gale*.

**VICE-CHANCELLOR'S COURT,
*Lincoln's Inn.***

Short Causes.—*Holt v. Frewer*—*Attorney-General v. Blake*—*Waddelow v. Thornton*—*Jackson v. Bing*—*Yates v. Tyrrell*—*Jackson v. Jackson*—*Hitchcock v. Clendinnen*—*Burn v. Carvalho*—*Gully v. Gully*—*Sample v. Oliver*—*Smith v. Drayson*, further directions and costs—*Reid v. Baille*, ditto—*Procter v. Kenning*, ditto—*Symes v. Davidson*, ditto—*Williams v. Symons*, ditto—*Reed v. Freer*.

After the short causes unopposed petitions.
After the Petitions.—*Ramsay v. Preedy*, petition by order—*Cann v. Brideley*, ditto—*Baxter v. Pitcher*, demurrer—*Dearman v. Wyche*, plea—*Allison v. Herring*, plea—*Young v. Lord Waterpark*, 2 demurrer—*Gee v. Woolston*, demurrer—*Lidbetter v. Long*, ditto—*Miles v. Thomas*, ditto—*Lockwood v. Smith*, ditto—*Cartwright v. Harcourt*, ditto—*Lushington v. Price*, ditto—*Stuart v. Brockwell*, ditto—*Davenport v. Mortimer*, ditto.

ROLLS' COURT.

Petitions, the unopposed to be taken first.
After the Petitions.—*Newton v. Cunliff*, by order—*Culbush v. Culbush*, exceptions, further directions, and costs, by order.

After which Motions.

**COURT OF QUEEN'S BENCH,
Guildhall—Half-past nine.**

London Special Juries.—*The Queen v. Millingen* and another—*Emys, Esq., v. Bennett* and others—*Furze v. Sharwood*.

London Common Juries.—*Callender v. Hopkins*—*Mansell v. Greenway*—*Page v. Bish* and another—*Doe demise Beckford v. Latham*—*Fletcher v. Marillier* and another—*Pridmore demise Sheffield* and others *v. Scott*—*Sweeney v. Whaley*.

The last cause is No. 61 on the printed list.

**COURT OF COMMON PLEAS,
Guildhall.**

London Special Jury.—*Norris v. Stamp*, part heard.

**COURT OF EXCHEQUER,
Guildhall.**

London Common Juries.—*Davis v. Shepard*—*Ward v. Pearson*—*Ward v. Byrne*—*Tollitt v. Shenstone*—*Thomson v. Milne*—*Hardy v. Astell*. The last cause is No. 84 on the printed list.

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The Legal Guide.

No. 18.]

SATURDAY, MARCH 2, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from page 259.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

IN continuation of our observations upon the title a purchaser should now require, and with the intention of cautioning *practitioners* against assuming that the act operates as of course, to render a forty years' title strictly marketable,—we will suppose the title of a vendor to commence forty years' back, with a conveyance from Styles to Johnson, in fee, and there is nothing on the face of that conveyance that shall raise any suspicion as to the soundness of Styles's title. Yet Styles, or his predecessors, may have dispossessed Brown, a tenant for life, or even Styles himself may have been only tenant for life, or tenant *per auter vie*, or tenant for years in possession, or mortgagee in possession, or he may have made some *tortious* conveyance by which any real right he might have possessed became forfeited. In the case of a tenancy for life, while that life is in existence, or if it has fallen within twenty years, or if, having fallen twenty years ago or upwards, the reversioner has been under disability, and his right consequently saved; a purchaser in adverse possession must be subject to eviction. We will fur-

ther illustrate our opinion upon the necessity of calling for an earlier title, by quoting another writer (*a*) on the same subject, who says,—“With this opinion the practice of the profession seems to accord; and courts of equity, or at least their officers, the Masters, continue to act upon the old rule, without any relaxation. One feels, however, some hesitation in acceding to the notion, that the rule in question was established in reference exclusively to the duration of human life, without regard to the limitation of real actions; seeing the exact correspondence between the periods of title and limitation, and that the rule, if framed with a view to the claim of a remainder-man, falls short of its aim, as even an estate for life (to say nothing of an estate tail) may outlast the period of sixty years. The probability is, that when it became necessary to establish the *minimum* extent to which abstracts of title, under all circumstances, should reach, sixty years were fixed on as being the period when an adverse possession would confer an *unimpeachable* title, *with little or no regard to the case of a tenancy for life, or a tenancy in tail, either of which would evidently have suggested the necessity of a more extended range of investigation*. Indeed, as an estate tail is of indefinite duration, no length of time could reach such a case; and, therefore, the recent statute has wisely included tenants in tail and ulterior remainder-men in the same bar (ss. 22. 23). But though a consideration of the possible

(a) Jarman, in his work upon Conveyancing.

existence of remainders may not have had so large a share as has been ascribed to it on the establishment of the present doctrine respecting titles, it may constitute a sufficient ground for adhering to it; for, if that doctrine has hitherto left a purchaser in too precarious a condition, *now is the time to augment his security by refusing to contract the period of title, in analogy to the abridged remedy.* Had the present rule afforded ample protection under the old statute of limitations, it is obvious that the approaching alteration of the law would have warranted and required its modification; but the truth seems to be, that a purchaser's scope of inquiry ought never to have been limited to the mere period when an adverse possession could ripen into a rightful title, but should have extended *additionally* over such a period as would comprehend *a life in being*, or rather the period which the law allows for the suspension of the vesting of estates, because, *until the termination of such period, the possession may not have become adverse.* It seems then that the rule against perpetuities forms one of the strong holds of a purchaser's security; and as, under that rule, it may happen that a limited and terminable ownership may subsist for more than sixty years (namely, for a life and twenty-one years), it is impossible, without hazard of doing injustice, to pronounce a title of *shorter duration than sixty years to be marketable.* Still, however, it cannot be denied, that with such a title a purchaser will now be in a better situation than formerly; thence, probably, there will be some abatement of that strictness of requisition in regard to evidence of title, which has prevailed of late years, and has driven vendors to the countervailing expedient of introducing stipulations restrictive of a purchaser's demands." We think these illustrations, perhaps, sufficient to support the opinions we have given upon this important subject; but as this essay is directed to practical men as well as students, we will add the opinion of Mr. Brodie, who says, "It is a common notion that the present length of abstracts is with reference to the limitation of sixty years. This is quite a mistake. *It is with reference to the duration*

of human life; and so long as the law will not allow a remainder man expectant on an estate for life, to be barred by a possession adverse to the tenant for life, a purchaser will be entitled to require a title to be shewn for the same period as heretofore under the old law." (a) Even the real property commissioners, by their first report, in taking notice of the length of abstracts of title, and that shortening the period of diminution might reduce them, say, "although to guard against the fabrication of *fee simple titles* by persons in possession under particular estates, it will still be requisite to investigate titles for a greater number of years than the period of limitation which may be prescribed." It seems, therefore, to be the general opinion of conveyancers, that until some rule shall be established by authority, practitioners must keep to the old rule. The sound rule appears to be, that a sixty years' title being shewn, if a deed or other document, not in the vendor's possession, be so recited or noticed as to cast a reasonable doubt upon the otherwise apparent title, the purchaser is not bound to accept the title till the doubt is removed by the production of the instrument, or by other means; but, that if the recital or notice be not of that character, it imposes no liability on the vendor; (b) and even now a vendor, unless protected by express stipulation, is compellable to produce, on oath, all the documentary evidence of title in his possession or power, however remote the period to which that evidence may refer.

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.
ANSWER TO PROBLEM XIV.

(Concluded from p. 260.)

What are the changes made in the Law of Dower by the Stat. 3 & 4 Wil. 4. o. 105. commonly called the Dower Act?

Having thus sketched the law as it was, let us now proceed to set forth the im-

(a) See Hayes's Conveyancing, 438.

(b) See Prosser v. Watts, 6 Madd. 59; also 1 Sudden, Vend. & Pur. 330. as to cases where an abstract begins with a conveyance by a person who is stated to be heir at law of any person, in which that writer says a purchaser may require proof of the ancestor's intestacy. This doctrine is, however, doubted.

portant changes made by the act, the principal objects of which are,—1st, *To make equitable estates in possession subject to dower, and to dispense with the necessity of the actual seisin of the husband*, to effect which, by sec. 2. it is enacted, “that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal, and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy) then his widow shall be entitled in equity to dower of the same land. The only exception in this clause, it will be observed, is an estate in joint tenancy, the widow of a joint tenant in fee or tail never having been entitled to dower on the ground that upon the death of one of the joint tenants the estate went to the survivor, who was then in from the original grantor, and might plead the deed creating the estate as originally made to him without naming his companion. (Litt. s. 45; Co. Litt. 37 b. 30 a, 183 a.) And if a joint tenant aliened his share, his wife should not be endowed. (Fitz. N.B. 150; Br. Dow. pl. 30; Cro. Jac. 615.) And by sec. 3. it is further enacted, “that where a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.” Seisin therefore is not now necessary to give title to dower, and the time within such right of entry must be prosecuted is now prescribed by statutes 3 & 4 Wil. 4. c. 27.

2d, *To prevent the right of dower attaching to lands disposed of by the husband by deed or will, and to give priority to partial charges created by the husband over the right of dower.* This is effected by ss. 4, 5, 8. and—

3d, *To enable the husband by deed or will*

to bar the right of dower, which by ss. 6 and 7, may be accomplished by inserting a declaration that the estate so devised shall not be subject to his wife's dower. But it is to be remembered, these enactments will not prevent courts of equity from enforcing covenants or agreements of husbands not to bar the right to dower out of these lands (sec. 11.) Such are the principal objects of the act.

A devise by a husband to his wife of “any land out of which his widow would be entitled to dower if the same were not so devised, or any share or interest therein (sec. 9.) shall effectually bar her dower as to any land of her said husband; and it will be observed, that where any interest in land liable to dower is given to the wife, in order to preserve the right of dower, an intention to that effect must be declared; although no gift to the wife out of personal estate (sec. 10.) is to defeat the right of dower, unless an intention to do so be declared by the will. It was decided by the House of Lords, that a devise to the widow of a part of the land out of which she was dowable, did not exclude her from her right of dower, the sole possession of a part of the lands out of which dower is to issue, not being deemed inconsistent with the assertion of a legal right to the third of the whole estate, (Lawrence v. Lawrence, 2 Vern. 365. S.C. Freem. 244. 3 Br. P.C. 484. See Roodly v. Nixon, 3 Russ. 192.) but a bequest of personality never operated in bar of dower unless an intention to that effect clearly appeared. (Ayres v. Willis, 1 Ves. sen. 230.)

Dower *ad ostium ecclesiarum* and *ex assensu patris* (which have long become obsolete, and an account of which may be found in Co. Litt. 34 a. 2 Bl. Com. 132, 133.) are by sec. 13. abolished. And by the 14th section, the act is only to extend to the dower of a widow who was married after the 1st January, 1834, and shall not give to any will or deed executed before that day, the effect of defeating or prejudicing any right to dower.

R. P.

Lincoln's Inn.

PROBLEM XIX.

 WHAT IS AN ESTATE IN PARCENARY ?

Imperial Parliament.

HOUSE OF LORDS.

ENGLAND.

LEGAL BUSINESS.—*Feb. 26.**Borough Courts Bill (a).*

Lord Brougham said there were already before Parliament twenty-one bills for the establishment of courts for the recovery of small debts, and the Earl of Devon had just presented a petition for a court of a similar description. The course that was at present pursued with reference to the formation of these courts was exceedingly faulty. There was no uniformity in the system. There were two hundred and eighty of these courts established already, and it would be well for their lordships to observe, that by every step which they took to support them, they raised against themselves, if they intended to adopt a general measure on the subject, a host of local interests. He had more than once stated his opinion as to the propriety of having a general act. To effect a reform in the existing system he had introduced the Local Courts Bill, which had been rejected. The subject was one of immense importance, and he begged of Her Majesty's Ministers to take it up. The present arrangement for the protection of life and property in the country originated when the agricultural population was exceedingly thin, and manor courts, constables, sub-constables, &c., answered every necessary purpose. Circumstances were now, however, wholly altered; and he thought that if some such courts as he alluded to were established, a local police might be formed, that would be very useful for the prevention of crime and the seizure of offenders, without putting to risk or hazard the liberty of the subject, such force being placed under an efficient judicial control. In his opinion, such courts would be a great blessing to the people. In the case for instance, of juvenile offenders, punishment would immediately follow the commission of crime, instead of imprisonment before trial amongst hardened criminals. Look to the case of a boy charged with stealing apples. Instead of being whipped as a truant boy, he was committed to prison, and was thus early initiated in vice. He had seen in the dock, next to a forger, a boy charged with a minor offence. He was acquitted; but that boy, before being

brought to trial, had been for months the associate of hardened felons in gaol. Would it not be infinitely better, if a youthful delinquent committed an offence deserving a month's imprisonment, that he should be at once punished by the criminal judge on the spot, instead of being sent to gaol, there to remain, perhaps for two months, before his trial? The establishment of local courts, such as he contemplated, might also be made ancillary to proceedings in equity. Much delay, expense, and vexation might be avoided, if on disputed points an order was sent down from Chancery, directing that issue should be joined in the court attached to the locality, instead of having it tried in town. There were, he conceived, other branches of equity which would be benefited and assisted by such an arrangement. Many of the inquiries in the Master's-office might, for instance, be sent down to these courts. It had long been his opinion that a public prosecutor was absolutely indispensable for the due administration of justice in criminal cases. Any person who had witnessed the benefit derived from an officer of that description in Scotland would agree with him in that opinion. He thought, when the Central Criminal Court was established, that such an experiment might have been tried, and would have been successful. Since the Prisoners' Counsel Bill had passed, such an officer had become more especially necessary. At present, the judge could hardly do his duty in the criminal courts. The prisoner was generally defended by able counsel, while the prosecutor perhaps had none. In such cases the judge was obliged to step a little out of his way, and, in some degree, to perform the functions of counsel. Nothing surely could be more ungracious than for a judge to be compelled to combat the ingenious speech of a learned and able counsel. He could conceive nothing worse for the administration of justice, or more unfair towards the judge.

The Lord Chancellor said that nothing would more tend to improve the administration of justice, both criminal and civil, than a well-regulated system of local judicatures. The facilities which it would afford the public of recovering small debts speedily and at little cost would be but a small part of the benefit which must arise from the institution of such a system as that he had referred to. No plan could be more ill-devised than that which was resorted to every day, he might say, for transacting some of the business of the courts of equity. Let him allude, for instance, to the issuing of a commission of lunacy to be executed in the country. There was no person to whom the Chancellor could direct the commission; there was no legal authority whom he could appoint to discharge the required functions. He should say that the business of this commission, which was at present attended with great expense, as well as of the commission for examining witnesses, might be much more effectually, satisfactorily, and economically transacted, through the medium of properly qualified authorities established on

 (a) *Ante*, p. 260.

the spot. He need scarcely advert to the improvement which some system of this kind might introduce in the criminal administration of justice; if it was desirable and necessary that criminal justice should be more frequently administered, some new provision must be made for that purpose. He had not the slightest doubt that a new system, well constituted, would be the most economical arrangement that could be devised. Let their lordships consider only the practice which prevailed in regard to the administration of criminal justice in the counties. Under the present system a man committed to prison to be tried at the quarter sessions might be kept in prison a month or even longer before he was put upon his trial. He was glad that the subject had been again brought under the notice of their lordships, who, he trusted, would be induced to consider it with the view to the passing of some legislative measure.

Lord Abinger said, he recollects some few years ago to have heard, in the House of Commons, most eloquent declamations uttered against the existence of local jurisdictions, until at last the House of Commons was schooled into their abolition. That, however, passed some time ago, and now it seemed that the period had arrived when all that was then done must be undone, and local jurisdictions again be established. He thought that the establishment in each county of judicial tribunals to try causes would create great inconvenience, from the diversity of their decisions, and would finally raise a clamour in the country against the system. A fashion had now begun, too, of making the institution of grand juries a topic of declamation. For his part, he must say that he never would consent to the abolition of the grand juries. It was now said that the administration of criminal justice was not so frequent as it should be in each county, and that therefore some new judge must be appointed. Whether there might not be an advantage in having a judge to preside at quarter sessions, he was not prepared to say; but he protested against the cry, which, ascending from low to high quarters, was now beginning to prevail, that the interference of the people of England in the administration of justice should be dispensed with; for, whatever inconvenience or expense might attend the existing system, the advantages greatly outweighed in his opinion the disadvantages. He thought that the jurisdiction of the county magistrates ought to be upheld and encouraged, instead of being weakened or destroyed.

The *Lord Chancellor* explained, that it never was his intention that the local courts should be placed under any other superintendence than that of the courts at Westminster. Any other arrangement would doubtless give rise to a great diversity of decisions.

Lord Denman said the noble and learned lord who began the discussion had pointed out existing defects of considerable magnitude, and he did not believe that a remedy would ever be thought of until those defects were made known as grievances among the public

generally, and therefore the discussion of them in a spirit of moderation was a great public benefit. The necessity of the present bill arose out of one of the provisions of the Corporation Act, which empowered the judges of the borough courts to make rules for the conduct of the business of their courts, subject to the approval of the judges of the superior courts. It had been found that many rules were made on which it was impossible for the judges to act; a committee of the judges had consequently considered the subject, and the result of their deliberations was the present bill, which they considered would remove the difficulties.

Lord Langdale would just advert to one point, and that was the great extent of Chancery business, which rendered the establishment of local courts throughout the country most desirable. At present the system pursued in that court with respect to receiving answers and the examination of witnesses was most complicated, expensive, and inconvenient; but in his opinion there could not be the smallest difficulty in giving such authority as would be requisite for the performance of all acts relating to these local courts. He therefore must say, that it gave him great satisfaction to see this bill introduced, and thought it would be most beneficial to the country.

The bill went through committee, and the report was ordered to be brought up on Thursday next.

HOUSE OF COMMONS.

COUNTY COURTS—DISTRICT SESSIONS.

SUMMARY JURISDICTION.—Feb. 11.

Lord John Russell moved for leave to bring in three bills, viz.

A bill for improving County Courts.

A bill for holding district Sessions of the Peace, and

A bill to regulate and enlarge the summary jurisdiction of Justices.

Ordered.

Church Leases.

Mr. Vernon Smith moved that a select committee be appointed "to enquire into the mode of granting and renewing leases of the landed and other property of the bishops, deans, and chapters, and other ecclesiastical bodies of *England* and *Wales*, and into the probable amount of any increased value which might be obtained by an improved management, with a due consideration of the interests of the established church, and of the present lessees of such property."

Ordered, and committee appointed.

ENGLAND.—Feb. 23.

Affirmations Bill. (a)

Mr. Hawes moved for a committee.

Mr. Goulburn opposed the motion, and

(a) *Ante*, p. 261.

moved as an amendment that the bill be committed "this day six months."

Dr. Lushington said that this was the first time he had heard in that house, or elsewhere, Quakers, Moravians, and Separatists characterized as persons of elastic consciences. They might have erred in their religious notions, but in strict obedience to an obligation of honesty and good faith, if there was any class of people who in the uniform opinion of the country, and certainly according to his own testimony, was supereminent, it was the Society of Friends. Nor ought much to be said of the Moravians; because, where good works were to be done, or self-sacrifices were to be made, they always stood amongst the first. But that they would evince a disregard of the most sacred obligation, and a contempt of the principles of right and wrong,—why, let the house remember their sacrifices and sufferings and long patient endurance, and then say whether the assertion of the hon. and learned was not most erroneous. He would not say that the hon. member ought not to set himself up as a judge of the consciences of others; he would not say, even after his speech, that he might not be perfectly tolerant. Why should they force men by punishment to take an oath? It was their evidence that they wanted. Suppose a man was sent to prison for refusing to take an oath, would he give better evidence afterwards? When the tipstaff conveyed him thither, must he say, "I had a scruple of conscience, but the virtue of that staff has removed it?" This was getting evidence under a sort of *duresse*. The hon. member seemed to think that there was at this time no indulgence for consciences at all. He always thought that every man might take such an oath as was most binding on his own conscience. Not many years ago a gentleman of the Methodist persuasion took it into his head to refuse to be sworn on the New Testament, but offered to be sworn on the Old. What did the Court do? Why, indulged him, and took his evidence. And what said Lord Tenterden on the Queen's trial? Why, that the mode of swearing a witness should be that most binding on his conscience; and he added another observation, which made a deep impression on his mind:—"If a man swears in that mode, never mind the words; he imprecates the divine vengeance on his head, if he swears falsely." In Scotland it had been the practice for the individual to fall on his knees, with the Bible in his hand, and call down all the curses contained in that book on his head if he spoke untruly. He had mentioned his objection to this mode to the then Lord-Advocate, who said it was a reasonable objection, and he should not conform to it. It would be the grossest injustice to suppose that men who entertained a peculiar opinion on this point were not good members of the church of England, though they dissented from it on this particular point. A more dangerous doctrine could not be promulgated, than that any man who partook of her communion, and agreed

in her general doctrines, but differed as to the construction of a particular part of the Scriptures, ought to be excluded from the pale of the church. The wise policy of the church of England had been not to thrust out of her pale those who conformed to her general doctrines, and were honest men. To show how far conscientious scruples went, he knew a person who would not take the oath as administrator of the effects of a relation, to substitute another person, and was contented to lose 4,000*l.* a-year. The estate went to rack and ruin; and, at length, the Crown took administration. At present, it was not the solemn sanction of an oath which influenced the lower classes, so much as the fear of legal consequences.

Mr. Goulburn's amendment was carried by a majority of 125 to 93.

COURT OF REVIEW.—Feb. 27.

The Judges.

Mr. Godson presented a petition from an attorney of Furnival's-inn, complaining of the constitution of the Court of Bankruptcy, and stating that not only were the two puisne judges who at present presided in the Court of Review almost always of a different opinion on the questions which came before them, but that when that court had a Chief Justice, they almost invariably differed. He moved that the petition be printed with the votes, agreed to.

Feb. 28.

Double and Treble Costs—Plea of General Issue—Limitation of Actions.

Sir F. Pollock moved for leave to bring in a bill to amend the law relating to double and treble costs, and to pleading the general issue only in certain cases. He observed that the present state of the law in these respects was productive of much inconvenience and injustice. No road-bill, or dock-bill, or railway-bill now passed without a clause giving double and treble costs, though he could not understand why such parties were to be so protected. He proposed, in the first place, with reference to all local and general bills, to abolish double and treble costs altogether. He proposed that, where a provision now existed that a public officer was to recover double or treble costs, he should receive a full and complete indemnity, but without having unreasonable costs. He proposed likewise to deal with notices of action. There were no less than 700 or 800 acts of parliament requiring notices of action of different kinds. Such a diversity was a great grievance. Notice of action was only just in the case of a public officer who had a right of protection. There was one other point, the limitation of actions. He proposed to limit actions to three calendar months, whereas in some cases the limit extended to six years.

Leave granted.

Law of Libel.

Mr. O'Connell moved for leave to bring in a bill to amend the Law of Libel.

Leave granted.

SCOTLAND.—Feb. 25.

Salaries of the Judges. (a)

The *Lord Advocate* moved the second reading of this bill, which after opposition, was carried by a majority of 139 to 21.

Law Reports.

QUEENS' BENCH. Feb. 11.

Sittings in Nisi Prius.

BURGESS v. PIERCE.

Excessive levy under writ of execution issued upon a warrant of attorney.

This was an action brought to recover compensation in damages on account of the defendant having issued execution on a warrant of attorney, and made a levy on the goods of the plaintiff for a much larger sum than was due.

The plaintiff had given the defendant a warrant of attorney for 46*l.*, payable by instalments. The plaintiff had paid off nearly the whole, if not the full, amount due, when the defendant put an execution into his house for 11*l. 7s. 6d.*, which sum the plaintiff did not owe, and being then unable to pay, the officer remained in possession 19 days, when 24*l. 7s. 6d.*, being the debt and costs, was paid under a protest. The plaintiff's case was made out by evidence.—*Verdict for the plaintiff, damages 24*l. 7s. 6d.**

OUCHTERLONY v. OWEN.—Feb. 21.

Principal and Agent—Commercial Case.

This action was brought to recover a sum alleged to be due to him by the defendant, for money advanced for premiums and for commission on certain policies of insurance.

The plaintiff is an insurance broker, and was applied to by a Mr. Gordon, to effect insurances to the amount of 10,000*l.* on the ship Moira, which the plaintiff refused to do until Mr. Gordon brought an authority for that purpose from the defendant, who was the captain of the ship. Upon having this authority, the insurances were effected by the plaintiff, and the premium and commission, amounting to 79*4d.*, were paid by him, and which sum the plaintiff had requested the defendant to repay, but the defendant refused, and told him to proceed against Mr. Gordon for the amount as he had been the person for whom the plaintiff had done the work. Mr. Gordon having become insolvent, he was unable to pay, and it was contended for the plaintiff that the defendant having created Mr. Gordon his agent, he had no right to turn round on the plaintiff, and say he trusted Mr. Gordon, and therefore he must look to him for payment; but that when the principal was known the creditor might proceed against him and not against the agent.

Mr. Jervis, for the defendant, relied upon the authority of "Thompson v. Davenport,"

9 Barn. & C. 78.; and as, in this case, it was evident Mr. Ouchterlony had trusted Mr. Gordon, he was the party liable. He also stated there had been a charter-party entered into between the defendant and Mr. Gordon for the conveyance of troops to India for the East India Company, in the profits of which transaction Mr. Owen was to participate, and before the ship sailed the defendant requested Mr. Gordon to effect an insurance on the ship for him, which was done by Ouchterlony, who, it was evident, treated Gordon as the responsible party, inasmuch as a bill of parcels for the amount of the premium and commission was sent in to Mr. Gordon by the plaintiff. During the absence of the ship on her voyage, Mr. Gordon became insolvent, and Mr. Ouchterlony became the assignee of his estate. On Mr. Owen's return, the affairs of the ship were intrusted to the management of Messrs. Rickards and Co., and there was a settlement of Mr. Gordon's accounts with Mr. Owen by Mr. Ouchterlony on one side, and Messrs. Rickards on the other, in which settlement the very account now sought to be recovered was included, without any claim made on Mr. Ouchterlony's behalf. Mr. Ouchterlony subsequently arrested Mr. Gordon for the amount of these premiums among other sums, and a cognovit was given by Mr. Gordon for the amount, and, finding he was not likely to recover against Mr. Gordon, the plaintiff had brought the present action against Mr. Owen.

Mr. JUSTICE COLEBRIDGE summed up the evidence to the jury, and told them that the law in his opinion was as laid down by Lord Tenterden in "Thompson and Davenport," which would probably decide the verdict in favour of the defendant. He also requested them to say, first, whether the plaintiff had dealt with Mr. Gordon knowing him to be the agent of Owen; secondly, whether Mr. Gordon had been paid in account by Mr. Owen; and thirdly, whether Mr. Ouchterlony had been paid by any one at all.

The Jury returned a verdict for the defendant, and found that Mr. Gordon had been the party credited by the plaintiff; that Mr. Gordon had been paid in account by Mr. Owen, and that Mr. Ouchterlony would have been paid had not Gordon been insolvent.

Lord Tenterden, C. J. in the case Thompson v. Davenport, expressed his opinion, that he took it to be a general rule, if a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject however to this qualification, that the state of the account

(a) *Ante*, p. 262.

between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him, is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then according to the cases of *Addison v. Gandasoequi*, 4 Taunt. 574; and *Patterson v. The same*, 15 East. Rep. 62.; the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other.

In the same case, Bayley, J. expressed his opinion that, when a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but *he may do so*. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal, would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller, when he had looked to the responsibility of the agent. But the seller, who knows who the principal is, and instead of debiting that principal, debits the agent, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered.

ED.

EXCHEQUER CHAMBER.—Feb. 11.

WRIT OF ERROR.

JONES v. WAIT.

Deed of Separation between Husband and Wife.—*A Promise to pay Money made by a Trustee for the Wife, in consideration that the Husband would execute a Deed of Separation from his Wife—Whether the actual signing such a Deed by the Husband constitutes on his part a sufficient consideration to support the Promise made by the Trustee—Writ of Error from the Common Pleas.*

The original action was brought upon an agreement, whereby the defendant in that action undertook to pay a sum of 366*l.* in consideration that the plaintiff would execute a deed of separation from his own wife. In the court below it was contended, for the defendant, that separation between married persons was looked upon with disfavour by the courts, as being against the policy of the law and the interests of the public; and that although there were many instances in which such separations were allowed, and in which agreements collateral to them had been enforced, yet that a promise to make such a separation had a direct tendency to the total or partial revocation of the nuptial obligation, and that such a promise could never, therefore, constitute a sufficient consideration to support a promise to pay money. Upon the same side instances were given of cases where the performance of an act was legal or even commendable, and in which, nevertheless, a promise to pay money in consideration of such performance was not only void, but illegal. The most familiar example given under this head was that which arose out of the exercise of the elective franchise. It was admitted on all hands to be highly commendable, and even incumbent as a duty upon the elector to exercise the right which the law conferred upon him; but a promise to pay him a sum of money in consideration of his voting even for the candidate who was otherwise the object of his choice and estimation, was an illegal promise, and incapable of being enforced.

The judgment of the Court of Common Pleas was to the following effect—

That as there were confessedly separations in matrimony which were legal, and as nothing appeared in the present instance to show that it was in any degree in opposition to the law, the presumption must be in favour of its legality, and in such circumstances the promise to sign the deed of separation would constitute a good and sufficient consideration to support the promise to pay.

That if a deed of separation had been actually executed, and if the husband being party to that deed had promised to pay a sum of money to a trustee for the wife, such a promise would be binding upon the husband; as would also a promise like that now in question, if made by a person who was an actual trustee for the wife;

And that the actual signing of such a deed

would constitute upon the part of the husband a sufficient consideration to support such promise upon the part of the trustee.

The Court was also of opinion, that as a matter of fact a deed of separation had been at the time of the agreement actually drawn up, although not actually executed, and that the defendant in that action was intended to be the trustee under that arrangement.

The Court, therefore, gave judgment in favour of the plaintiff.

This day the case was heard in error before the Judges of the Queen's Bench and the Barons of the Exchequer, when

Lords DENMAN and ABINGER were of opinion that the judgment of the Court below should be reversed.

The other judges were of opinion that the judgment should be affirmed, and who being the majority,

Judgment was affirmed accordingly.

Engagements between husband and a third party as a trustee for the wife in a Deed of Separation, are valid, and may be enforced also in a court of equity, although that court will not enforce articles of separation, or at least until it has seen whether from the circumstances of the case, there is or is not a probability of the man and wife being reconciled; but not unless a trustee be interposed between them. A sentence in the Ecclesiastical Court for the restitution of conjugal rights is a reason for the Court of Equity for refusing its assistance in such cases; and, in general, if such an agreement between man and wife is not fit to be enforced, the Court will, on a cross bill, order it to be delivered up, though there may be cases in which that Court will not grant relief to either party. See *Worral v. Jacob*, 3 Mer. 267; *Fletcher v. Fletcher*, 2 Cox, 99. See also *Elworthy v. Bird*, 2 Sim. & S. 372; *Compton v. Collinson*, 2 Bro. C. C. 877. A deed of separation is avoided by the husband and wife again living together, *Scholey v. Goodman*, 8 Moore, 350; and in order that a deed of separation should be valid, it must provide for an *immediate* and not for a *future* separation at the will of either party. See *St. John v. St. John*, 11 Ves. J. 526; *Durant v. Titley*, 7 Price, 577; *Hindley v. Westneath*, 6 Barn. & C. 200; *Westneath v. Westneath*, 1 Dow, P. C. 519; except only where, in the deed providing for any *future* separation, it is made necessary that

it should take place with the *approbation of the trustees*; in which latter case the Court, in *Rodney v. Chambers*, 2 East, 283, held it legal, on the ground of such approbation being registered.—E.B.

COURT OF EXCHEQUER.

MONK v. DYKE.

Proof that defendant was a lodger in a house not sufficient to support a plea of justification to an assault by means of the defendant's possession of a dwelling-house.

Trespass. Plea justifying assault, that defendant was possessed of a dwelling-house, and plaintiff forced himself into it, for which cause defendant turned him out—*Replication de injuria*,—and issue joined. At the trial it appeared that the defendant was in fact a lodger in the house wherein the assault took place; and the point being reserved,

Mr. Crowder now argued in support of the verdict, that the plea was proved by evidence of the defendant's being a lodger; a house might consist of one or more rooms, and it was enough if the plea alleged on the face of it that which might be considered with the proof. It is not necessary to state all the possession on which the defendant relies, but such a portion only as is necessary to maintain the action; it is tantamount to taking possession of one or more rooms—a proof of occupation of any part of a dwelling-house is enough to support a plea of possession of a dwelling-house.

Sed per Curiam.—The plea is clearly unsupported by the proof: the defendant's argument goes to the length of saying, that a man in possession of a single brick might plead possession of a house. The rule must be made absolute to enter a verdict for the plaintiff.

Hilary Term, 1839.

Sittings in Banco.

JONES v. HAINES.

Irregularity in Practice—Uniformity of Process Act—Necessity for rigidly adhering to the Forms in the Schedule.

Mr. Wallwyn on a previous day moved to set aside the service of the copy of the writ, and all subsequent proceedings of the plaintiff for irregularity. It appeared that the body of the copy of the writ served was to the effect that the action was brought "on the case promises," and it was objected that it was irregular, because in the first place it did not follow the exact formula given in the schedule to the Act for uniformity of Process. It rather embodied two forms; that "on the case," and that on "promises," which were certainly quite distinct actions, and as this, by its duality, might as well mean one as the other, it was bad for that reason, as also for uncertainty.

The rule nisi having been granted,

Mr. Humphry to-day shewed cause in support of the service, and urged that in such cases of merely clerical errors, the Court would not be too astute in detecting inaccuracies, but would rather lean towards the enforcing of the process of the Court. The defendant could not have been deceived at all.

PARKE, B.—Oh yes he may; he says this will do as well for one as for another form, and that let him adopt whichever he may think it is meant, you can turn him round and say, that you meant to sue him in the other form, and shape a judgment as for want of a plea. We cannot do better than adhere rigidly to the forms laid down in the schedule. They are very plain, and there can be no mistake; but if we are to allow amendments and alterations, we shall give rise to a great laxity of practice, which cannot but prove detrimental to all parties concerned. The rule, therefore, must be made absolute.

Rule absolute accordingly.

PREROGATIVE COURT.

WOOD & OTHERS v. GOODLAKE & OTHERS.
*In the matter of the Will of James Wood,
Banker, late of Gloucester, deceased.*

(Continued from p. 270.)

Sir H. JENNER in delivering judgment said, the case came before the Court under very extraordinary circumstances, whether it was considered with reference to the character of the deceased—to the immense amount of the property at stake—to the amount of the property alleged to have been disposed of by the instruments—to the manner in which the papers appeared to have been dealt with both before and after the death of the deceased, and to the way in which the probate of the Court had been attempted to be obtained;—all these circumstances, together with the nature and extent of the evidence, made it a case of a more complicated nature than had ever come before the notice of the Court. The question to be determined arose with respect to certain testamentary papers which had been propounded as the will of the deceased, Mr. James Wood, of Gloucester, who died on the 20th of April, 1836, aged about 80. The papers were three in number; two of them bore date on the 2d and 3d of December, 1834, and were propounded as together containing the will of the deceased, both being drawn up by Mr. Chadborn, the confidential solicitor of the deceased, and who was appointed in one of the papers an executor and universal legatee. That paper purported to appoint four gentlemen executors, and to "desire" that they would retain to themselves all the personal property subject to debts and such legacies as he should afterwards direct. That paper was signed by the deceased, but was not attested by any witness. The second paper, dated the day following, was executed by the deceased in the presence of three witnesses, and purported to dispose

of all the estate, real and personal, and to give it to his executors and their heirs in equal proportions, subject to his debts and to any legacies or bequests he might thereafter make. This was, therefore, a complete disposition of the whole estate to "his executors," those executors not being named in the paper. The third paper was dated in July, 1835, (there being no day of the month affixed,) and was alleged to be in the handwriting of the deceased, and to be signed by him; and it purported to give a legacy to the corporation of Gloucester to the amount of 60,000*l.* reciting that he had, by a former codicil, given to the same corporation a legacy of 140,000*l.* There were traces in the evidence of other testamentary papers, which had been executed by the deceased, independent of the codicil referred to in the paper of July, 1835 (and which was not forthcoming)—namely, a will executed in 1823 or 1824; another testamentary paper had been seen in 1833; and it was in evidence that the deceased had complained that he had lost certain testamentary papers, which had been carried away without his knowledge. The history of the deceased it was necessary to advert to. He had been a draper and banker for many years at Gloucester, as well as his father and grandfather before him; he was a man of some peculiarity and eccentricity of character, extremely parsimonious, and by that parsimony, and attention to business, with certain adventitious circumstances (such as the bequest of property from other persons), he had amassed at his death a property, real and personal, of the value of nearly a million of money. He was unmarried; he had two sisters, who both pre-deceased him; one of them died unmarried in 1824; the other, Mrs. Willey, died in 1833, a widow, without child. The nearest relations of the deceased, at his death, (as far as the Court had any knowledge,) were two second cousins, both of whom were parties in this suit. One was Mrs. Elizabeth Goodlake, the other Mr. Edward Hitchings. The interest of Mrs. Goodlake had been admitted by the parties who propounded the papers of the 2d and 3d of December, 1834. The interest of Mr. Hitchings had not been admitted by the other parties; but he had been admitted as a contradic^tor to the will; he was, therefore, just as much entitled to the protection of the Court as if he had established his interest. He was the more entitled to the Court's protection, because he had offered an allegation pleading his relationship to the deceased; which the Court, thinking he had been too late, had rejected. Mr. Hitchings had appealed to the Judicial Committee, who had been of opinion that this Court had not done right in rejecting the allegation, and had directed it to be suspended till the hearing of the cause. These two persons, then, Mrs. Goodlake and Mr. Hitchings, appeared in the characters of next of kin, the interest of one being admitted, and that of the other not being admitted, but he being admitted a contradic^tor; and if the Court should be of

opinion that the will is not proved, they would be entitled, in the event of their establishing their relationship, to the whole personal property, amounting to 700,000/- or 800,000/- It did not appear who the deceased's heir-at-law was; the deceased had stated that his heir-at-law was in America.

(To be continued.)

INSOLVENT DEBTORS' COURT.

Feb. 28.

INSOLVENTS ON BAIL.

It has been the custom since the passing of the statute abolishing arrest for debt in cases where insolvents had been liberated on bail until their hearing, when they were heard upon their petitions, and ordered to be discharged from the gaoler, in whose custody they might happen to be, to allow them to go at large at once without waiting for the order of adjudication, which was obtained afterwards.

This day *Mr. Commissioner Law* declared, that he should not pursue the course: the men must continue in custody. They were in custody when they appeared, and the gaolers were not to take notice of a verbal order. He should therefore not pronounce the discharge on the insolvents who were on bail until the adjudications were prepared in writing in the office of the court.

FORMS OF WRITS.

(Continued from p. 271.)

No V.—*Writ of Elegit on an order for payment of Money made in an inferior Court and removed into the Court of Queen's Bench.*

VICTORIA, &c. to the Sheriff of —, greeting. Whereas lately in [insert the style of the court], by a rule of the said court entitled, &c. [as the case may be] the sum of £— were by the said court ordered to be paid by C. D. to A. B., and whereas the said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [or of —, one of the justices of our said court before us at Westminster, as the case may be], in pursuance of the statute in that case made and provided, and the costs attendant upon the application for the said last-mentioned order, and, upon the said removal, were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed in our said court before us at Westminster at the sum of £—, and afterwards the said A. B. came into our said court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beast of the plough, and also all such lands, tenements,

rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D. or any person in trust for him, was seized or possessed of, on the said — day of —, in the year of our Lord — (a), or at any time afterwards, or over which the said C. D. on the said — day of — (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest on the said two several sums of £— and £—, at the rate of four pounds *per centum* per annum, from the said — day of — (b), shall have been levied. Therefore we command you, that without delay, you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D. or any one in trust for him, was seized or possessed of, on the said — day of — (a), or at any time afterwards, or over which the said C. D. on the — day of — (a), or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest as aforesaid, shall have been levied, and in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord.

No. VI.—*Writ of elegit on a rule for payment of money and costs made in an inferior Court and removed into Queen's Bench.*

VICTORIA, by the grace of God, of the United kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of — greeting. Whereas lately in [insert the style of the court], by a rule of the said court, entitled, &c. [as the case may be], the sum of

(a) The day on which the costs of removing the rule of the inferior court into the Court of Queen's Bench were taxed.

£—, was by the said court ordered to be paid by C. D. to A. B. together with the costs of the said rule, which said costs were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by the said court, at the sum of £—, and whereas the said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [or of —, one of the Justices of our said court before us at Westminster, as the case may be], in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal, were afterwards on the — day of —, in the year of our Lord —, taxed and allowed in our said court before us at the sum of £—, and afterwards the said A. B. came into our said court before us at Westminster, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him was seized or possessed of on the said — day of — (a), or at any time afterwards, or over which the said C. D. on the said — day of — (a), or at any time afterwards had any disposing power which he might, without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said three several sums of £— and £—, and £—, together with interest upon the said three several sums of £—, and £—, and £—, at the rate of four pounds *per centum* per annum, from the said — day of — (a), shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D. or any person in trust for him was seized or possessed of, on the said — day of — (a), or at any time afterwards or over which the said C. D. on the said — day of — (a), or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit to hold the said goods and chattels to the said A. B., as his proper goods and chattels, and

also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of £—, and £—, and £—, together with interest as aforesaid shall have been levied, and in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

No. VII.—*Writ of Fieri Facias on a Judgment in the Court of Queen's Bench, in an Action of Assumpsit.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £— which A. B. lately in our court before us at Westminster recovered against him for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings, then lately made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, together with interest upon the said sum of £—, at the rate of four pounds *per centum* per annum, from the — day of —, in the year of our Lord — (a), on which day the judgment aforesaid was entered up, and have that money with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for his damages and interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf, and in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

No. VIII.—*Writ of Fieri Facias on an order of the Court of Queen's Bench for payment of Money.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £—, which lately in our

(a) The day on which the costs of removing the rule of the inferior court into the court of Q. B. were costs.

(a) The day on which the judgment was entered up, or if entered up prior to the 1st of October, 1838, say from the 1st day of October in the year of our Lord 1838, omitting the words on which day the judgment aforesaid was entered up.

court before us at Westminster, by a rule of our said court entitled, &c. [*as the case may be*] were by the said court ordered to be paid by the said C. D. to A. B. and that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum of £—, at the rate of four pounds *per centum* per annum from the — day of —, in the year of our Lord — (a), on which day the said rule was made, and have that money together with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said sum of money so ordered to be paid by the said C. D. to the said A. B. and for interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf, and in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

No. IX.—*Writ of Fieri Facias on an order of the Court of Queen's Bench for payment of money and costs.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £—, which lately in our court before us at Westminster, by a rule of our said court entitled, &c. (*as the case may be*) were by the said court ordered to be paid by the said C. D. to A. B. together with the costs of the said rule, which said costs were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by our said court at the sum of £—, and that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said two several sums of £— and £—, at the rate of four pounds *per centum* per annum, from the said — day of —, in the year of our Lord — (b), and that money, together with such interest as aforesaid, before us at Westminster, immediately after the execution thereof, to be rendered to the said A. B. for the said sum of money so ordered to be paid by the said C. D. to the said A. B. and for costs and interest as aforesaid, and that you do all such things as by the statute passed in the second year of our

reign you are authorised and required to do in this behalf, and in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

No. X.—*Writ of Fieri Facias on a judgment of an inferior Court in an action of assumpsit, removed into the Court of Queen's Bench.*

VICTORIA, by the Grace of God, of the United Kingdom of Great Britian and Ireland, Queen, Defender of the Faith, to the Sheriff of — greeting. We command you, that of the goods and chattels of C. D. in your bailiwick, you cause to be made £— which A. B. lately in [*insert the style of the court*] by the judgment of the said court, recovered against the C. D. for his damages, which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B. as for his costs and charges by him, about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and which judgment was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said

court before us at Westminster, [*or of* —, one of the Justices of our said court before us at Westminster, *as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said order, and upon the said removal, were, on the — day of — in the year of our Lord —, taxed and allowed by our said court before us at Westminster at the sum of £—. And we further command you, that of the said goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of £— (a), together with interest on the said two several sums of £— and £—, at the rate of four pounds *per centum* per annum, from the said — day of —, in the — year of our Lord — (b); and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for his damages aforesaid, and for costs and interest as aforesaid; and that you do all such things as by the statute, passed in the second year of our reign, you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

(*To be continued.*)

(a) The costs attendant upon the removal of the judgment out of an inferior court into the court of Queen's Bench.

(b) The day on which the costs of removal were taxed.

(a) The day on which the rule was made, or if it were made prior to the 1st of October 1838, say from the 1st day of October, in the year of our Lord 1838, omitting the words on which day the said rule was made.

(b) The day on which the costs of the rule were taxed, or if that were prior to the 1st of October 1838, say from the 1st day of October in the year of our Lord 1838.

REVIEW OF NEW BOOKS.

The ECCLESIASTICAL LEGAL GUIDE, to Archbishops, Bishops, and their Secretaries, the Clergy, Patrons of Benefices, Solicitors, Parish Officers, &c. &c., with Forms of the different instruments and particulars of the ceremonies which have been in use many centuries, on account of Ecclesiastical matters, and cases and opinions from eminent counsel and doctors in Civil Law, carefully selected and arranged by A BARRISTER, from the private papers and authentic documents of a succession of Secretaries to Archbishops and Bishops. Part I. London, J. S. Hodson, 112, Fleet Street; Parker, Oxford; Stevenson, Cambridge, 1839.

We confess our aversion to all anonymous publications, and we therefore have delayed for some time opening this volume. It is however now in our way, and we have, as a means of easing our table, entered upon its pages. The author commences by declaring the ignorance of the best informed of the legal profession upon that branch of the Ecclesiastical Law denominated "The Voluntary Jurisdiction of Archbishops and Bishops;" and he gives as a reason that such knowledge has been hitherto confined to the secretaries of the several dioceses, who have ever made a free interchange as to forms and matters of practice among each other, but have studiously preserved those subjects from the rest of the world during several centuries; so that in all cases of need they must be applied to, and hence the necessity for the present work. We cannot congratulate the author upon his preface; indeed, to our minds, the book without the preface might be pronounced useful, more particularly to the clergyman; and as a book of reference the solicitor may also find it of some service; but with the preface the book is any thing but what it pretends to be. First, with regard to the author's declared necessity for his book,—the *exclusiveness* of the secretaries, and the *ignorance* of the profession. We had occasion to review an excellent work upon the same subject some short time since, by *one of these secretaries*—a practical man, (a) which contains ample instructions for most cases. This disposes of

(a) Mr. Hodgeson, see ante, p. 111.

the first part of the author's preface. The second part,—in declaring the usefulness of his work, the author says that "the whole contents is supported by precedents of *unquestionable accuracy*, of which no publication has ever been made, with extracts from statutes bearing on the respective subjects, and observations on each point, which render this work a complete fund of knowledge and utility, and enables any solicitor to commence and prosecute to a *SUCCESSFUL* termination every matter of business connected with the church." Really this gentleman gives a touch of magic to his book, that has spell-bound us. We however recommend him never to write another preface, unless he can make his book respond to it.

THE LONDON MONTHLY MISCELLANY. A Magazine of General Literature, Science, and Art. January, February, and March, 1839. Price 1s. 6d. London: Smith, Elder & Co. 65, Cornhill.

We have read these numbers with great satisfaction, and do not hesitate at pronouncing them equal to some of the best periodicals of the day. The work is well got up — its articles evince considerable talent and judgment, and although containing equal matter with other periodicals of a similar nature, it is far below them in price. As a general work of science and art, it embraces *legal subjects* which deserve attention. No. 6, contains an Historical Account of the Constitution, in an article entitled "What is the British Constitution?" No. 7, contains the Laws of Russia, in an article entitled "Russia and the Russians;" in which the writer tells us that in 1832, a digest or code of laws was finally completed and published in Russia, although it did not come into operation until two years afterwards. This code consists of 35,993 *oukases*, (a) or with the Appendix 42,198. —11,119 of which are of the reign of the Emperor Alexander, (b) and 5,073 of seven years of the reign of the present Emperor. They are contained in 56 large volumes quarto, printed with double columns, and these do not include the laws affecting recently conquered provinces, or the army and navy.—The Number for the present month (8) contains an article upon the Ad-

(a) Laws or Rules of Government.

(b) All the Russian *oukases* emanate from the Emperor alone—he is the sole Legislator.

ministration of Justice in Russia, in which the writer tells us, that the Sovereign is the fountain of all Justice, to be a maxim in the Russian Law, but much more considerable in its extent than that maxim is applied in this country, as the Emperor may if he pleases pronounce judgment and annul it afterwards—and that all civil and criminal processes are carried on with closed doors. We also observe in the present number some "Lyrics" devoted to LINCOLN'S INN, that are somewhat *spicy*, as for instance,

"Without reward I study hard
And live by fate's decree,
Up two long pairs of narrow stairs,
At chambers Number Three."

We strongly recommend this work to our young and old friends,—both will find amusement and information in reading it.

EXAMINATION OF ARTICLED CLERKS.

The Examiners have appointed Tuesday the 30th April next, at Half-past Nine in the forenoon, for the next Examination at the Law Society's Hall, Chancery Lane.

NEW QUESTIONS AND RULES.

The Articles of Clerkship and Assignment (if any), with *Answers to the following Questions*, must be left with the Secretary, at the Hall, on or before the day appointed for the Examination; and when the Articles have not expired, but will expire during the Term, the Candidate may be examined, conditionally, but the Articles must be left within the first seven days of term, and Answers given to the Questions up to that time.

QUESTIONS.

1. What was your age on the day of the date of your articles?

2. Have you served the whole term of your articles at the office where the attorney or attorneys, to whom you were articled or assigned, carried on his or their business? and if not, state the reason.

3. Have you at any time during the term of your articles been absent without the permission of the attorney or attorneys to whom you were articled or assigned? and if so, state the length and occasions of such absence.

4. Have you during the period of your articles been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attorneys to whom you were articled or assigned?

5. Have you since the expiration of your articles been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

QUESTIONS,

To be answered by the Attorney, Agent, Barrister, or Special Pleader, with whom the Clerk may have served any part of his time under Articles.

1. Has A. B. served the whole term of his articles at the office where you carry on your business? and if not, state the reason.

2. Has the said A. B., at any time during the term of his articles, been absent without your permission; and if so, state the length and occasions of such absence.

3. Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articled clerk?

4. Has the said A. B., during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

5. Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney and solicitor?

And I do hereby certify, that the said A. B. hath duly and faithfully served under his articles of clerkship (or assignment, as the case may be) bearing date, &c. for the term therein expressed, and that he is a fit and proper person to be admitted an attorney.

THE EXAMINATION.

A paper containing THE QUESTIONS, which the Clerk is required to answer, will, as usual, be placed in his hands, classed thus:—1. Preliminary. 2. Common and Statute Law, and Practice of the Courts. 3. Conveyancing. 4. Equity and Practice of the Courts. 5. Bankruptcy and Practice of the Courts. 6. Criminal Law, and Proceedings before Justices of the Peace.

The preliminary questions (No. 1.) are matters of course to be answered; and he will be required to answer questions in Common Law and Equity, and one or more of the other branches set out in *his paper*.

BARRISTERS CALLED WITHIN THE BAR AS QUEEN'S COUNSEL, Feb. 22.

Girlestone, Samuel, Esq.

Hayter, William Goodenough, Esq. *Patent of Precedency.*

Richards, Robert V. Esq.

Richards, Griffith, Esq.

Stuart, John, Esq.

Vaughan, W. Esq.

GENTLEMEN CALLED TO THE BAR, IN HILARY TERM LAST.

Lincoln's Inn.

Adlam, Alexander.

Cooper, Carlo.

Dawson, Thomas

Dyson, Thomas Edwards.

Fitzgerald, William Seymour.

Lamb, Edward Augustus.
 Round, Oliver Stephen.
 Smith Hugh Wallis.
 Tyndale, John William Warre.
 Wilson, William Sylvester.

Inner Temple.

Bingley, William Richard.
 Barton, Edward.
 Bowstead, Joseph.
 Chambers, George Wilton.
 Chawner, Richard Croft.
 Edwards, Tenison.
 Ensor, George.
 Hemsworth, Henry William.
 Horn, Frederick.
 Sands, William Samuel.
 Smith, Edward Francis.
 Vredenburg, Watson.
 Winterton, Richard Spooner Jacques.

Gray's Inn.

Cook, Robert.
 Duke, George.
 Howorth, James.
 Jolliffe, William Peter.
 Miller, Samuel.
 Price, Arthur Munton.
 Romaine, William Govett.
 Roots, Augustus.
 Sanders, Thomas.
 Sowton, William March.
 Sweet, George.
 Thorpe, Edward James.
 Whalley, George Hammond.

Middle Temple.

Adams, Arthur Robarts.
 Adams, John.
 Aldam, William.
 Anstey, Thomas Chisholme.
 Austin, Alfred.
 Burgess, Richard.
 Burke, John Bernard.

Business in the Courts.**COURT OF CHANCERY.**

Fairlie v. Hartwell, cause for judgment—In re Taylor, lunatic petition by order—Mundy v. Jolliffe, appeal, part heard.

Causes—Moore v. Langford, further directions—Lawton v. Fletcher—Barton v. Barton—Nicholson v. Foster—The same v. Simpson—Ridler v. Heaver, further directions—Robins v. Cleaver.

VICE-CHANCELLOR'S COURT.

Omer v. Burgess, petition by order—Kent v. the same, two petitions.

After which ten short causes and twenty seven unopposed petitions.

After the petitions—Symes v. Bennett, to be spoke to—Jubber v. Jubber, ditto—Dickenson v. Jones, petition by order—Strickland v. Strickland, exceptions by order—Cartwright v. Harcourt, demurrer—Lushington v. Price, ditto—Davenport v. Mortimer, ditto—Governors of the Corporation of the Sons of the Clergy v. Williams, ditto—Attorney-General

v. Wilson, ditto—Attorney-General v. Adams—Woolff v. Lees—Cole v. Hill.
 Causes.—Ormerod v. Haigh—Morrice v. Langham—The same v. the same.

ROLLS' COURT.

Preston v. Meux, part heard.

QUEEN'S BENCH.

Adjourned till next term.

COMMON PLEAS.

Adjourned till next term.

EXCHEQUER.

Adjourned till next term.

TO CORRESPONDENTS.

"H. D. M." His request has been complied with.

"Henricus." His attention is directed to our *Errata* in p. 255.

"J. E." and "H. D. M." are under consideration.

"A Student," Lincoln's-Inn-Fields. You are quite correct, and have our thanks.

TO SUBSCRIBERS.

A complete Index to this work, with a Title Page, will be published every six months.

This Paper will be forwarded, postage free, to any part of the United Kingdom, to Annual Subscribers. Subscription, 1*l.* 10*s.* for the year, to be paid in advance.

ERRATA.

Page 263, first column, "second resolution," add the words "agreed to."

Page 255, in the fourteenth line from the top, second column, for "three months," read "three numbers."

Page 257, second column, ninth line from the top, for "she in the same year married the lessor of the plaintiff, Corbyn," read "married the father of the lessor of the plaintiff."

*Just published, price 2*s.*,
 THE LEGAL GUIDE.*

PART 4 containing Nos. 14 to 17, both inclusive, with Table of Contents to the whole. This part contains Original Essays on the Laws relating to Real Property, and a letter to the Lord Chancellor, upon the doctrine of the Court of Equity in relation to property settled to the separate use of Unmarried Women, with the view of proving that the doctrine held for the last century is as old as the days of Elizabeth, and that the doctrine referred to by his Lordship, in hearing the appeal case, Tullett v. Armstrong, is an innovation made by the House of Lords, which the Judges at the time were in direct opposition to.

John Richards & Co., 194, Fleet Street.

Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 2nd March, 1839.

Price 6*d.* Stamped Edition, 7*d.*

The Legal Guide.

No. 19.]

SATURDAY, MARCH 9, 1839.

LEGAL AND EQUITABLE MORTGAGEES.

An Essay upon the present state of the Law governing the Liabilities of Legal and Equitable Mortgagees of Leasehold Property.

THE important case of *Moore v. Choat*, (reported by us in another part of this paper) having in express terms overruled *Flight v. Bentley*, (a) where it was held that the depositary of a lease by way of equitable mortgage, is liable in equity as an assignee to the rents and covenants reserved and contained in the lease, although he has not taken possession, has induced us to look up the law, as it has been administered in cases of legal and equitable mortgagees, for the benefit of our readers; a course we have taken in all cases of innovation or change. It is by such means only that we can arrive at any conclusion as to the soundness of the doctrines maintained by the judges; and as in these observations we shall once more have occasion to notice the conflicting opinions of judges, we cannot refrain from adopting the language of a very able writer on the same subject. "Ita lex scripta est," is the cry of many a man who would be angry with another that expressed a doubt whether he possessed ratiocination. About the time of passing the Statute of Uses, some wise man, in the plenitude of legal learning, declared that there could not

be an use upon an use. This very wise declaration, which must have surprised every one who was not sufficiently learned to have lost his common sense, was adopted, and is still adopted; and upon it, (at least chiefly,) has been built the present system of uses and trusts. Another, adopting just so much of an argument as answered his purpose, and rejecting a conclusion which followed from the self-same premises, decreed that there should be no dower of a trust; and chancellor after chancellor submitted to this strange assertion, and followed it in defiance of every thing rational. "We are bound by precedent," say they; "but are we not bound by principle also? Can precedent release us from a moral obligation?"

When we argue from adjudged cases, we argue from conclusions already drawn, and not from premises by which those conclusions must be warranted. The more we are removed from those premises, the greater the probability of error in our conclusions must necessarily be.

But supposing that a person should be so fortunate as to be able to extract something comprehensible out of printed contradiction, yet other contradictions may make their appearance in manuscript; and overthrowing all his hard-earned knowledge, remind him once again of the glorious uncertainty of the law. Is the law of England to depend upon the private note of an individual, (we speak not thus sarcastically at the Vice Chancellor in reference to the note he made of *Lucas v. Comerford*, in his Honor's copy

(a) 7 Sim. 149.

of Brown) (*a*) and to which an individual can only have access? Is a judge to say—"Lo! I have the law of England on this point in my pocket. Here is a note of the case which contains an exact statement of the whole facts, and the decision of my Lord A. or my Lord B. upon them. He was a great—a very great man. I am bound by his decision. All you have been reading was erroneous. The printed books are inaccurate. *I cannot go into principle.* The point is settled by this case." Under such circumstances, who is to know when he is right, or when he is wrong? If conclusions from unquestionable principles are to be overthrown in the last stage of a suit by private memoranda, who can hope to become acquainted with the laws of England? Let not these laws be picked out like diamonds from a dunghill, from among such crude and incoherent, such unintelligible and contradictory matter, as now loads our shelves. Let us seriously consider the evils which must arise from suffering absurdity to be consecrated by use; and when established as a precedent, to interfere with, and perhaps to render nugatory, the undoubted principles of our law. If the laws of England are to depend upon the decision of a judge, we should remember that the decision of a judge may overthrow them.

This decision of the Vice-Chancellor in *Moore v. Choate*, (*b*) is of considerable importance to practitioners, and those who have practical books upon mortgages of *modern* date should immediately correct them, or much mischief may follow the neglect. As an instance, we have looked at a modern book upon mortgages (1837), and we find the following doctrine:—"The depositary of a lease by way of equitable mortgage will be held liable in equity to the rent and covenants although he has not taken possession." The author of the book refers to *Flight v. Bentley* as his authority, but unfortunately goes no further, nor does he take the trouble to say what was the previous doctrine, or to express a doubt upon the soundness of the doctrine he puts forth.

(*a*) *Supra*, p. 295.

(*b*) See the report *supra*, p. 294.

The facts of the case, *Flight v. Bentley*, were precisely the same as those connected with the case of *Moore v. Choate*; the equitable mortgagees had *not taken possession*, and that case involved two questions:—1st, Whether the *assignee of a reversioner* was not entitled, under 32 H. 8. c. 34, to *arrears of rent*, which became due *prior to his assignment*?

2dly, Whether the depositary of a lease for securing a debt is liable to the rent and covenants, although he has *not taken possession* of the premises?

Upon the first question the Vice-Chancellor (before whom the case was heard) consulted the Common Law Judges, and he stated their opinion to be, that though the assignment would give to the assignee the entire title to the rent to become due, on the quarter-day next after the assignment, yet, it was clear, that the assignment would not, at law, pass the antecedent rent; for it had been severed from the reversion, and was a mere chose in action.

The 2nd question the Vice-Chancellor held in the *affirmative*, upon the authority of *Lucas v. Crawford*, (*c*) which is very ill reported. In that case it appears that the bill was by executors of the lessor against the depositary of a lease to rebuild houses upon the premises in the eleventh year of a term of seventy-one years. The creditor by his answer admitted *he was liable to the other covenants*, but denied that he was bound to rebuild. Lord Thurlow Chancellor said, "it was no matter whether the defendant took the lease as a pledge or as a purchase: he could not *take the estate and refuse the burthen*; it was nothing to the lessor; and his Lordship decreed that the defendant should take an assignment of the lease in order to enable the plaintiffs to bring an action at law. His Lordship said he rather thought, upon *reading the answer*, that they would recover even without the assignment; but it was very just that the lessees should assign absolutely, and that the defendant should take it. His Lordship doubted whether the defendant could abandon; and he put the case, suppose that he had a good legal

(*c*) 1 Ves. Jun. 235. 3 Bro. C.C. 166.

assignment instead of a deposit; and his Lordship thought he could not, because, as he had a title *in equity* (see 1 Mer. 65.) to have a legal conveyance, his Lordship considered him as having it; and then it was not in his election, but in the plaintiff's, to make him keep it, and perform the covenants. The decree was for an assignment, and that the defendant should take it, and pay the costs. It should be, however, observed, that in this case *the depositary had taken possession* of the premises, by which he had rendered himself liable. See the judgment in *Wilkins v. Fry*, 1 Mer. 264. The present Vice-Chancellor, as will be seen by his judgment in *Moore v. Choat*, in observing upon *Lucas v. Comerford*, says, that Lord Thurlow seems to have made his decision on the *admission* of the defendant, by his answer, that he was bound to perform the covenants, except the covenant to rebuild. There was also a *covenant* by the lessee that the lease should be subject to the debt, the defendant was also in possession; that Lord Thurlow, on a review of *all the circumstances of that case*, made the decree by which he gave the landlord the benefit of the character of equitable mortgagee, which by *the depositary being in possession with the additional circumstances*, that he was willing to perform some of the covenants, would form a sufficient ground for so doing.

There have been several conflicting opinions upon these subjects, as well as opposite decisions made by judges. In *Cook v. Harris*, 1 Lord Raym. Holt, C.J. held that on an *absolute assignment* the estate vested in the assignee *before entry*; for which reason he seemed to think that the ancient method of pleading, "*virtute cuius*," the assignee entered, and *was possessed*, was disused. In *Sparks v. Smith*, 2 Vern. 276. a lease had been *assigned* by way of mortgage, and the mortgagee never entered: on a bill by the lessor against the mortgagee to compel him to discover whether the lease was not assigned to him and to compel him to perform the lessee's covenants,—the Court said, it was the mortgagee's folly to take an assignment of the whole term, whereby to subject himself to the covenants in the original lease, and not to take a derivative

lease of all the term, but a month, or a week, or a day, as he might have done; yet, inasmuch as he was only a mortgagee *who never was in possession*, the Court would not assist the lessor to charge the mortgagee, or decree him to perform the covenants *in specie*, but left the lessor to recover at law as well as he could, and dismissed the bill with costs. Reg. Lib. 1692. B. fol. 34; but in *Pilkington v. Shaller*, where the mortgagee took an assignment of the lease and *never entered*, the lessor recovered at law against the mortgagee for *rent reserved* in the lease, and upon his filing a bill in equity for relief, the Court dismissed it, observing, the mortgagee had been ill advised to take an assignment of the whole term, whereas if she had only taken a derivative lease, she could *not* have been liable to the rent reserved by the first lease, 2 Vern. 374; but in *Lucas v. Comerford*, the Court so far assisted the lessor as to decree an assignment to the equitable mortgagee, to enable the lessor to bring his action at law.

Lord Mansfield then disturbed the doctrine in *Vernon*; and in the case of *Eaton v. Jacques*, Doug. 438. the Court of King's Bench decided that a mortgagee *who had not entered* was not liable to be sued on the lessee's covenants. Mr. Justice Buller also declared that Lord C. J. Holt was mistaken as to the form of pleading; for the precedents always alleged *virtute cuius*, the assignee *entered* and was possessed; and he did not agree that even if the assignment was *absolute* (nor was there any instance to shew) that an action would lie against the assignee upon the lessee's covenants *before entry*. This applies to an *absolute*, and not to a *conditional assignment*, by way of security. See *Walker v. Reeves*, Doug. 445; see also *Traherne v. Sadleir*, 5 Bro. P.C. 179.

This doctrine was again over-ruled by Lord Kenyon in *Stone v. Evans*, Woodfall, Landl. & Ten. last ed. by Harrison, 170; see Peake, add. Ca. 94. where the original lessee of a term brought an action against a sub-assignee, to whom it had been assigned by way of mortgage, for the recovery of ground-rent paid by the original lessee in respect of the lease

during the time the mortgagee held the legal estate, and Lord Kenyon held the mortgagee liable as assignee, and said his liability is not limited to his possession, but as long as he had the legal estate, so long he continued liable to the covenants in the lease; if he wished to avoid that liability he should have taken an under-lease. As to the case of *Eaton v. Jacques*, he said he would over-rule it without the least reluctance; and again in *Westerdell v. Dale*, 7 Term. Rep. 312, Lord Kenyon said, "as to the cases respecting a mortgagee, whether in or out of possession, he is the legal owner, and must be so considered in a court of law, notwithstanding his title is subject to equitable interests. It is said in one of the cases that a mortgagee is only liable *wken in possession*, and that what proves this point is, that in charging the mortgagee it is necessary to state in pleading, that *he entered and was possessed*; but with great deference to the learned judge who gave that reason, I doubt it: I consider those as formal words.

In the case therefore of a *legal mortgage*, it may be considered as now settled, that where a mortgagee accepts an assignment of all the remaining interests in a term of years, he is liable to the rent and covenants reserved and contained in the lease, so long as he shall hold the legal estate, even though he may not take actual possession of the premises; this was ruled by ten of the judges very recently in *Williams v. Bossanquet*, 1 Brod. & Bing, 238. S. C. 3 Moore, 500.

And in the case of an *equitable mortgage*, now that the case of *Moore v. Choat* has over-ruled *Flight v. Bentley*, it may also be considered as settled that the depositary of a lease (an *equitable mortgagee*) not in possession, is not liable in equity to be made an assignee of the lease, or to the lessor for rent and covenants.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XVI.

What is an Estate of Inheritance in Fee Simple?

In order to render my observations on this subject as explicit as possible, I have determined to consider it as follows:—

1st, As to the nature, origin, and extent of this estate.

2nd, As to where it is vested.

3rd, As to the words necessary to create it.

First, then, as to its nature, origin, and extent.—The estate of freehold of inheritance absolute, or in fee simple, is the highest and most extensive estate, which the law recognises in the subject, and in it every other but an estate tail will merge. It is indefinite and unlimited, being vested in the party and his representatives for ever, giving him an absolute inheritance, clear of any limitation or restrictions, to particular heirs, but descendible to the heirs in general, whether male or female, lineal or collateral. I will now endeavour to prove what I have advanced, viz. that this is the highest estate which the law recognises in the subject, by which it will be seen I have implied, that there is an estate superior to and of greater power than this, and which I shall do by considering its origin. The grand characteristic of real property was *tenure*. The nobles received grants of land from the king, for various services, and they again parcelled it out amongst their numerous dependants or followers, who were distinguished by different degrees of rank; and from the two most honourable kinds of tenure among these, viz. knight service and socage tenure, have proceeded the freeholders of the present day. For some time after this, the tenure was precarious, as for a short time only; afterwards it was for life, returning to the lord on the decease of the tenant. At length, the son of the tenant, and by degrees his issue, were permitted to succeed him after his decease (which was the fee tail); and, finally, it was granted to the tenant and his heirs, which constituted and was the origin of the *estate of inheritance in fee simple*. On failure of heirs the land returned as before to the lord, and unless express mention was made of the heirs, the grant always expired with the life of the grantee,—whence the rule of law requiring the word "*heirs*" to convey the *fee by deed*. Hayes on Conv. p. 6. From this we may perceive, that all the real property of this kingdom is held either mediately or im-

mediately of the king, who alone, we read, hath the *allodium*, or *absolutum et directum dominium*; for “*Premium domini regis est directum dominium cuius nullus author est, nisi Deus;*” and again, “*omnis quidem sub eo, et ipse sub nullo, nisi tantum sub Deo.*” Bract. lib. 1. c. 8. while the tenant hath only the *feudum*, i. e. feud, fief, or fee, or *utile dominium*; and we know that the thing holden is still called the *tenement* (from *teneo*), the holder or possessor, tenant (*tonens*); and the manner of possession, tenure (*tonere*). Thus we say, in expressing the highest estate any subject can have, that he is seized thereof in *his demesne as of fee*. But the word *fee* is now seldom used in its primitive sense, in contradistinction to *allodium*, or absolute property; but generally (whether used solely, or with the adjunct of *simple*) to denote the *most extensive* interest a man can have in a *fee*, in opposition to *fee conditional* at the common law, or *fee tail* by the statute, Bl. Com. ii. p. 106. We see, therefore, that although it is impossible to place any limits to an estate which may continue for ever, yet in all societies it was found requisite to constitute an *ultimus heres*, that the land might be restored on a vacancy of possession to the sovereign power from which it had, or was assumed to have, originally proceeded. This estate, thus considered as an estate of inheritance, extends to, and may be had in *any kind of hereditaments*, whether *corporeal* or *incorporeal*; for “*Foedum est quod quis tenet sibi et heredibus suis, sive sit tenementum, sive redditus.*” Flet. l. 1. c. 5. s. 7. But with this distinction, of a *corporeal* inheritance a man is said to be seized in *his demesne as of fee*, while of the latter (which may be said to be collateral to or issuing from the thing corporate) he shall only be said to be seized *as of fee*, Litt. s. 10. Thus Gaius may be seized *as of fee* of a way leading over the land, of which Titius is seized in *his demesne as of fee*, Bl. Com. ii. p. 106.—I hope that I have now made clear the first part of my answer as to the *nature, origin, and extent* of this estate, and will now turn to the second, viz. *as to where it is vested*. Though numerous smaller estates may issue out of

this, yet the *fee simple* or inheritance is generally vested in some person or other; yet, formerly the fee has been said to be in *abeyance*, (from the French, *bayer*, to expect,) i. e. in remembrance, intendment, and consideration of the law, which, according to Lord Coke, is as much as to say in Latin, “*Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstitio, sed tantummodo est, et consistit in consideratione et intelligentia legis, et quod alii dixerunt *talem rem aut tale rectum fore in nubibus.**” Co. Litt. l. 8. c. 11. Now, if tenant *pur terms d'auter vie* dieth, the freehold is said to be in *abeyance* till the occupant entereth. If a man make a lease for life, the remainder to the right heirs of A, the *fee simple* is said to be in *abeyance* till A dieth, for *nemo est heres viventis*; and in the case of a pastor of a church dying, the freehold is said to be in *abeyance* till a successor be created in whom it vests. Litt. s. 1. But this doctrine is now very! generally exploded, and it is proved beyond a doubt by Mr. Fearne, Cont. Rem. 513, 4th ed., that where a remainder of inheritance is limited in contingency by way of use, or by devise, the inheritance in the mean time, if not otherwise disposed of, as in the case of the devise to the heirs of A, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens to take it out of them; and in the second case abides with the successor, who is brought into view and notice by the induction, and who after it can recover all the rights of the church, which accrued from the death of the predecessor.—We now come to the third and last division, viz., *as to the words necessary, to create this estate*. In the first place, it may be created by *deed* or *will*, but the words required by each in order to pass the *fee*, are very different. Indeed the word “*heirs*” is absolutely necessary to confer this estate in all cases, except in a grant of lands to a sole corporation, when the word “*successors*” is necessary, and in which case the word “*heirs*” would not convey a *fee* any more than the word “*successors*” would in a grant to a natural person. And in a grant to a bishop, or other sole spiritual corporation, this word may also be used instead of

"heirs," though it is not absolutely necessary; Co. Litt. 946. And lastly, in the case of the king, or a corporation aggregate, a fee simple will vest without the word "heirs" or "successors," being inserted in the deed or grant, as in judgment of law they never die. But the general rule is, that the word *heirs* is necessary to create an estate of inheritance, Bl. Com. ii. p. 49., at the same time we read it is a rule, both in law and equity, that *verba debent intelligi cum effectu, et benignæ facienda sunt interpretationes ut res magis valeat quam pereat*, Shep. Touch. 37. But with respect to the creation of this estate by will, the case is altered; for the law regards the intention more than the precise legal import of the words, in which the testator has expressed his meaning: so by a devise to a man for ever, or to one of his assignees for ever, or to one in fee simple, the devisee hath an estate of inheritance, the intention of the devisor being clear from the words of perpetuity annexed, though he hath omitted the legal words of inheritance, *nam qui hæret in litera, hæret in cortice*, Shep. Touch. p. 88. But if in the devise the words of perpetuity be omitted, then an estate for life shall only arise, for *quoties in verba nulla est ambiguitas, ibi nulla expositio contra verba fienda est*, 2 Saund. 157.

H. D. M.

Feb. 27th, 1839.

PROBLEM XIX.

ACTIONS OF TRESPASS TO LAND—OF WHAT KIND ARE THEY, AND WHO MAY BRING THEM?

Imperial Parliament.

HOUSE OF COMMONS.

SCOTLAND.

LEGAL BUSINESS.

Salaries of the Judges. (a)

Mr. Rice said, he thought it might be convenient to state that the Government intended to fill up the blanks in the Scotch judge list;

(a) See ante, pp. 262. 279.

and it was proposed that the salaries of the Lord President and the Lord Justice Clerk should be left as they were, and that the salaries of all the other judges should be raised to the sum of 3,000*l.* a-year.

Sir G. Clerk said, he thought the proposition might be considered as a fair measure towards the last-named judges, but he hoped the Government would consider the very great injustice of not raising the salaries of the two supreme judges at the same time; an addition of 1,000*l.* a-year ought to be made to their salaries, so as to make them 5,000*l.* a-year.

Law Reports.

VICE-CHANCELLOR'S COURT.

Feb. 20.

MOORE v. CHOAT.

Equitable Mortgagee—his liability to rent and covenants in lease deposited with him as security, where he had not entered the possession.

DECISION OF FLIGHT v. BENTLEY, 7 Simons, 149, OVER RULED.

Demurrer to bill filed by the plaintiff Moore, who was the lessor of some premises in Poplar, to recover from the defendant Choat, who was executor of an equitable mortgagee of the lease, 249*l.* for arrear of rent. The lease was granted in 1829 to a person named Andrews, for twenty-one years, at a rent of 46*l.* In 1837 Andrews died in insolvent circumstances, leaving the premises out of repair, and owing above 180*l.* for arrears of rent. About 70*l.* having since become due, the plaintiff applied to the widow to give up the lease, when he discovered that it had been deposited as a security for a debt with Mash in 1830, who had since died, and that Choat, the defendant, was his only surviving executor. It appeared that the plaintiff's solicitor demanded the lease of the solicitor of Mr. Choat, and cautioned him of the liability the defendant had incurred, and that it was stated in reply, that neither Mash nor Choat had ever been in possession, but that, to save further trouble, the lease would be given up on payment of 10*l.* The object of the bill was to have it declared under these circumstances that the defendant was the assignee of the lease, and not at liberty to set up the want of a legal assignment as a defence to an action against him in that character by the plaintiff. The case was founded on the recent decision of "Flight v. Bentley," which sanctioned the doctrine, that the depositary of a lease as a security for money advanced was held in equity to be an assignee and liable to the landlord for the rent as well as to the performance of every covenant the lease contained.

The VICE-CHANCELLOR, in delivering judgment, said, this case was in substance a re-hearing of "Flight v. Bentley." He felt the decision in that case was one which could not be supported, and how it came to be made in the

manner it stood in the reports he was at a loss to comprehend. What rendered it more remarkable was, that he had long ago made a sort of comparison between two reports of the preceding case of "Lucas v. Comerford," (a) of those circumstances which it appeared to him at the time might be fairly collected from them, and had made the following note with his own hand in the margin of his copy of Brown:—"It appears from Vesey, the defendant by his answer admitted he was bound to perform the other covenants, but not the covenant to rebuild," and Lord Thurlow seemed to have made his decision on that admission. He could not comprehend how, with these circumstances affecting the case of "Lucas v. Comerford," the decision in "Flight v. Bentley" ever came to be made—a decision which, as it stood reported, was neither supported by "Lucas v. Comerford," nor any principle recognized by the Court. He understood the law to be, that if a lessee contracted to sell, and a party contracted to purchase of him, it was preposterous to say that thereupon an equity arose for the landlord to say to the purchaser, "You shall take a lease," and to the lessee, "You shall convey." No such case could arise, and no equity could be held for the landlord to interfere with the non-performance of the contract between the lessee and the intended assignee. The utmost effect of the deposit of the lease by way of mortgage would be to create a contract to assign the interest of the lessee to the depositary. A man was not obliged, because he had a contract, to make an assignment. He might exercise his option, and unless he did so by filing a bill of foreclosure, or where there was an express agreement for a sale, and he took steps to effect the sale by a bill for specific performance, he stood, to all intents and purposes, in the character of a total stranger to the tenancy, and with him the landlord had no right to interfere. In "Lucas v. Comerford" there was a covenant by the lessee that the lease should be subject to the debt; the defendant was also in possession, and by his answer submitted to perform some covenants, though he denied his liability to others, and Lord Thurlow, on a review of all the circumstances of that case (not one of which was to be found in the present case, except this species of equitable debt), made the decree by which he gave the landlord the benefit of the character of equitable assignee, which, by the depositary being in possession, with the additional circumstance that he was willing to perform some of the covenants, would form a sufficient ground for so doing. It appeared to him, on the plainest principles of law, that this was a case in which a court of equity could not interfere against Choat, the executor; but, as the parties had been misled by the decision in "Flight v. Bentley," he thought the proper thing to do was simply to allow the demurrer, without costs.

(a) 1 Ves. jun., 235; 3 Bro. C. C. 166.

ROLLS COURT.—March 6.

ASHTON v. M'DOUGALL.

SEPARATE USE of a married woman who had become discovert,—trust for—the woman having married again after her discoverture without any settlement.—Whether the trust fund by such marriage vested in the husband, who had notice of the settlement previous to his marriage, and had done various acts consistent with it.

This was a bill filed by the present husband of Mrs. Ashton, for an account of his wife's estate, on the ground that the property which had been settled upon her by a former husband to her separate use, vested in her absolutely when she became discovert, and by the act of marriage became the property of the second husband free from all restraint.

Mr. Hubbuck, for the plaintiff, moved that the defendant M'Dougall might be directed to transfer two sums of 5,000*l.* and 4,915*l.* 3*s.* 9*d.* Consols, and 54*s.* 17*s.* 8*d.* Long Annuities, into the name of the Accountant-General. It appeared that the defendant M'Dougall was the representative of the surviving trustee of the settlement on the marriage of Mrs. Ashton with her first husband. By that settlement, dated July, 1819, the property in question was settled upon Mrs. Ashton, then an infant, for her separate use, independent of her then husband, or of any future husband, for her life, and after her death for the benefit of her children. The lady attained 21, had children, and then her husband died. She married a second husband, who also died; and then she married the plaintiff, no subsequent settlement having been executed. The parties separated.

Lord LANGDALE said, the plaintiff had had full notice of the settlement, and had done various acts consistent with it. He would not decide the right upon an interlocutory motion or interfere with the present enjoyment of the party. The object of the motion was to deprive the wife of that benefit, the right to which the plaintiff had by various acts acknowledged.

The motion could not be allowed, and the plaintiff must pay the costs of it.

COURT OF EXCHEQUER.

Sittings in Nisi Prius.

Feb. 20.

HELE v. LYNE.

The Stamp Acts—The validity of note on a stamp-die which is called in.

Mr. Thesiger and Mr. Wightman for the plaintiff. The Attorney-General and Mr. Buckle for the defendant.

This was an action on two promissory notes, to one of which, the learned counsel for the defendant objected, on the ground of its bearing a stamp-die which had been long since called in by the commissioners of stamps, un-

der the provisions of the 5 & 6 W. 4. c. 98. s. 8., by which it was enacted, that the commissioners might destroy the dies then in use, and call in the stamps already sold, and substitute new dies in lieu of those destroyed. The section goes on further to state that the commissioners shall change the new stamps for old; and that, after the period fixed for such an exchange, the latter shall be of no validity or legality whatever, and all bills, notes, &c. purporting to be stamped by the old dies, shall not be received in courts of law as stamped documents, but shall be held as so much plain paper.

In furtherance of this objection the *Attorney-General* proceeded to prove that the necessary forms had been adopted by the commissioners, as required by the act, and that they had altered the die and substituted others in the place of those formerly in use, of which latter class was the one now before the court.

Mr. *Wightman* briefly remarked, that he would beg to have the point reserved for future consideration.

Lord *ABINGER* said, he was bound by the law, and must accordingly decide with the objection, though, he must say, that under the circumstances of the case, he could not deem it to be a fair objection. As it was, the plaintiff certainly could not recover on that note.

PREROGATIVE COURT.

*WOOD & OTHERS v. GOODLACE & OTHERS.
In the matter of the Will of James Wood,
Banker, late of Gloucester, deceased.*

(Continued from p. 283.)

These two persons, Mrs. Goodlake and Mr. Hitchings, had appeared by different proctors and different counsel; there had been no privity between them, and there might be sufficient ground for that course. The paper of December 2d, 1834, was headed "Instructions for the will of me, James Wood, Esq., of Gloucester," and it is as follows:—"I request my friends, Alderman Wood, of London, M.P., John Chadborn, of Gloucester, Jacob Osborn, of Gloucester, and John S. Surman, of Gloucester, to be my executors; and I appoint them executors accordingly; and I desire that they will take possession of, and retain to themselves, all my ready monies, securities, and personal estate, subject to the payment of my just debts, and such legacies as I may hereafter direct." As far, therefore, as this paper of instructions went, it gave the whole residue of the personal estate to the executors; but the paper also referred to the real estate in the following terms:—"And with respect to my real estate, I shall dispose of the same to such persons, and in such parts, as I shall by any writing endorsed herein direct. Witness my hand, this 2d December, 1834. JAMES WOOD." It was endorsed, "2d Dec. 1834. Mr. Wood's instructions for his will." The second paper, dated the 3d of December, was originally on a

separate sheet, for it did not at the time form any part of the paper of instructions. It was not therefore a paper "endorsed" on the sheet of instructions, as would seem to have been intended by that first paper; it was a separate sheet, and was to this effect:—"I, James Wood, Esq., do declare this to be my will for disposing my [sic] estates, as directed by my instructions. I declare my wish that my executors shall have all my property which I may not dispose of, and that all my estates, real and personal, shall go amongst them and their heirs in equal proportions, subject to any debts and to any legacies or bequests of any part thereof, if any, which I may hereafter make. In witness whereof, I have to this my last will set my hand this 3d December, 1834.—James Wood. Signed and published by the said testator, as and for his will, in our presence, Ann Lewis, Edward Swann, William Veale." Now this paper purports to be the "will" of the deceased; for it disposes of his whole estate, real and personal, "as directed by his instructions," and it is described as his "last will." It gives his property amongst his executors, but not in the same manner as the former paper purported to give it, for by that paper they were to retain to themselves the personal estate, after payment of debts and legacies, being thus constituted joint tenants; whereas by the second paper they were tenants in common; under the first paper, if any one of the executors and universal legatees should have died, his benefit would have survived to the other executors; whereas under the second paper it would devolve to the next of kin as a lapsed legacy, and to the heir-at-law of the real estate. In the latter paper the names of the executors were not mentioned; and under this paper, standing by itself, no person whatever would be entitled to take the property; and therefore the object of the gentlemen named as executors in the former papers was to obtain probate of both those papers together, as together containing the will of the deceased. The third paper, dated in July, 1835, purported very materially to diminish the interest given to the executors by the two former papers, for it gave 210,000*l.* in legacies to different individuals and to the corporation of Gloucester. This paper had been propounded by several of the legatees named therein,—by the Syndic of the city of Gloucester; by Mr. Phillpotts, who had a legacy under it of 50,000*l.*; by Mr. Counsell, a legatee to the amount of 10,000*l.*; by Mr. Helps, of Cheapside, London, who had a legacy of 30,000*l.*; by Mr. Thomas Wood, a legatee to the amount of 20,000*l.*; and by Mr. Samuel Wood, who had a legacy of 14,000*l.*, and 6,000*l.* to his family. There was also a legacy of 20,000*l.* to Mrs. Goodlake, who did not propound the paper, but, on the contrary, opposed it. The paper concluded—"And I confirm all other bequests, and give the rest of my property to the executors, for their own interest." This paper was mutilated to a certain extent; it was burnt at one corner, and torn in two places, not quite through. Mr.

Phillpotts, one of the legatees named in this paper, had appeared in the first instance by a proctor and by counsel; at the hearing of the case, however, he had appeared by proctor, and not by counsel. The paper was opposed by the executors, and also by Mrs. Goodlake, and ultimately by Mr. Hitchings. Mrs. Goodlake appeared likewise as opposing the will; but her opposition to the will had been extremely faint, though she was strenuous in her opposition to the codicil. On the other hand, Mr. Hitchings directed the whole force of his opposition against the will, his opposition to the codicil being as faint as that of Mrs. Goodlake against the will. The Court, therefore, was in a situation of extreme difficulty in respect to the manner in which the cases were brought forward by parties in name but not in fact. There were five parties before the Court, represented by seven counsel and five proctors, defending different interests—namely, the executors, the legatees in the codicil, Mr. Phillpotts, Mrs. Goodlake, and Mr. Hitchings. It was now necessary to take up again the history of the deceased. He was taken ill on the 17th of April, and to such an extent as rendered it requisite, or at least made it appear necessary, that one of the gentlemen in the house (Mr. Osborn) should despatch a letter to Mr. Alderman Wood in London, who left town next day by the mail, and arrived in Gloucester on the morning of the 19th. The deceased had in some degree recovered from the attack; but it appeared from the evidence of Mr. Cother, his medical attendant, that he was obliged to be carried or dragged up to his bed, from which he never afterwards rose. Next day Mr. Cother found him labouring under a drowsiness, which, though at first supposed to be the effect of the medicine, proved to be that of a pressure on the brain, and he continued in that state of drowsiness or stupor, incapable of attending to business, till the night, when he died.

At this time all the executors were assembled at the house, as well as Mr. Phillpotts, who was an intimate friend of the deceased; and he, in company with Mr. Osborn, proceeded up stairs to the landing-place, or lobby, adjoining the room where the deceased slept, and from a bureau, the key of which was in the possession of Mr. Osborn, he took out a sealed packet, which he carried down stairs, where the executors were assembled; the seal was broken, and the two papers of the 2d and 3d of December, 1834, were taken out of the packet. The learned judge would not at present stop to inquire how or when the papers were deposited in the bureau. On the same day instructions were given to the proctor of the executors to send a commission to Gloucester to swear them, preparatory to taking probate of the two papers. The commission was forwarded on the 23d, but it was not executed till the 25th, when the affidavit of Mr. Phillpotts as to the plight and condition of the papers bore date. When the papers were transmitted to the proctor, and probate was about to be applied for, a *caveat* was entered

by some party, which was afterwards withdrawn. On the 6th of May, the proctor for the executors appeared before a surrogate and prayed probate of the two papers. A proctor (Mr. Pulley) then appeared for a nominal party, and it was assigned to set forth his client's interest. At this time the papers were not before the Court or the registrar, and this assignation was merely formal. On the 13th of May, Mr. Pulley appeared for two parties, Mr. Thomas Wood, and Mr. Thomas Helps. An appearance was also given for Mrs. Goodlake, alleging herself to be the only next of kin, and her interest was immediately admitted by the executors, and he (the learned judge) presumed the admission was in consequence of some special instruction, for the proxy did not authorize the proctor to admit the interest of Mrs. Goodlake. He mentioned this circumstance, because, with other circumstances, it satisfied him that Mrs. Goodlake was a mere nominal opponent of the executors, and, in fact, doing all she could to further their object. It was clear that up to the hearing of the cause, her wish was that the executors should succeed in establishing the papers. At this time, the papers were first brought before the Court, annexed to the commission and the affidavit of Mr. Phillpotts; and all went to show that they had been found in the repositories of the deceased, sealed up in an envelope, on which was written, "The Will of James Wood, Esq., 2d and 3d of December, 1834," sealed with an impression bearing the deceased's initials. Now, the affidavit of Mr. Phillpotts was a very important affidavit. It was dated the 25th of April, and it expressly stated that the deponent, "as a confidential friend of the said deceased, in searching amongst the deceased's papers of moment and concern, found in a private drawer of a bureau, which was locked up in a closet adjoining the bedroom, in which the said deceased died, the envelope marked C, hereunto annexed, endorsed 'The will of James Wood, Esq., 2d and 3d Dec. 1834,' which envelope being sealed up, was then opened by the deponent; and upon opening the same, he, this deponent, found the paper writings now hereunto annexed, and respectively beginning and ending as aforesaid, enclosed therein. And this deponent having now perused and inspected the said several papers, marked A, B, and C, respectively, saith, that the said paper writings are now in every respect in the same plight and condition as when so found by him as predeposited; save only that the seal of the said envelope was broken open by this deponent at the time of the finding the same." Now nothing could be more satisfactory than this affidavit to show that these papers were intended by the deceased to be his will together, notwithstanding that one of them purported to be merely instructions, and the other to be a regularly executed will. When brought before the Court they were attached together at top and bottom by a wafer, and enclosed in what had been a sealed envelope, superscribed,

"The will of James Wood, Esq.;" and under these circumstances, probate in common form was applied for, and was stopped by the *caveat*, and the executors were ultimately put on proof of the will in solemn form. When Mr. Pulley declared he proceeded no further, the only parties were the executors and Mrs. Goodlake, and it would not have been a very prudent course for other parties to have opposed the will, after the affidavit of Mr. Phillpotts; and when the executors propounded the papers, it appeared that Mrs. Goodlake did not administer a single interrogatory to their witnesses. It was apparent that she was acting in concurrence with the executors, from the fact of their proxies evidently coming from the same office, the form of them being quite unusual in this court. With this nominal opposer, the executors propounded the instruments in an allegation in the form of a *condit*, pleading that the deceased set and subscribed his name to the two papers, "and published and delivered the same as together containing his last will, in the presence of three witnesses."

(To be continued.)

FORMS OF WRITS.

(Concluded from p. 285.)

No. XI.—*Writ of Fieri Facias on an order for payment of money made in an inferior court, and removed into the court of Queen's Bench.*

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, we command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made £—, which lately in [insert the style of the court], by a rule of the said court, entitled, &c. [as the case may be], were by the said court ordered to be paid by the said C. D. to A. B., and which rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court, before us at Westminster [or of —, one of the Justices of our said court before us at Westminster, as the case may be], in pursuance of the statute in that case made and provided: and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were, on the — day of — in the year of our Lord —, taxed and allowed by our said court before us at Westminster, at the sum of £—. And we further command you, that of the said goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of £— (a), together with interest on the said two several sums of £— and £—, at the rate of four pounds per centum per annum, from the said — day

(a) The costs of removing the rule of the inferior court into the court of Queen's Bench.

of — (b), and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said monies by the said rule first above mentioned, ordered to be paid by the said C. D. to the said A. B., and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign, you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

No. XII.—*Writ of Fieri Facias on an order for payment of money and costs made in an inferior court and removed into the Court of Queen's Bench.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £—, which lately in [insert the style of the court], by a rule of the said court entitled, &c. [as the case may be] were by the said court ordered to be paid by the said C. D. to A. B., and also £— for the costs of the said rule by the said court also ordered to be paid by the said C. D. to the said A. B., which said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by an order of our said court before us at Westminster, [or of —, one of the justices of our said court before us at Westminster, as the case may be], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order, and, upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed in our said court before us at Westminster at the sum of £—, and we further command you that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £— (c), together with the interest on the said three several sums of £— and £—, and £—, at the rate of four pounds per centum per annum, from the said — day of —, in the year of our Lord — (d), and that you have that money, with such interest as aforesaid, before us at Westminster immediately after the execution hereof, to be rendered to the said A. B. for the monies by the said rule

(b) The day on which the costs of removing the rule of the inferior court into the Court of Queen's Bench were taxed.

(c) The costs of removing the rule from the inferior court into the court of Queen's Bench.

(d) The day on which the costs of removing the rule from the inferior court into the court of Queen's Bench were taxed.

first above mentioned ordered to be paid by the said C. D. to the said A. B., and for costs and interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf, and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

DENMAN.
N. C. TINDAL.
ABINGER.
J. LITTLEDALE.
J. VAUGHAN.
J. PARKE.
J. B. BOSANQUET.
E. M. ALDERSON.
J. PATTESON.
J. GURNEY.
J. WILLIAMS.
J. P. COLERIDGE.
T. COLTMAN.
T. ERSKINE.

SPRING ASSIZES.

NORTHERN CIRCUIT.
Carlisle, Feb. 28.

BEFORE MR. BARON ALDERSON.

DOE DEM. QUAYLE v. NICHOLSON.

Ejection—Marriage Act of 1822 made all previous marriages, by parties under age, without consent, valid, provided, the parties had cohabited together as man and wife.

This was an action of ejection by the children of the defendant's sister, who had married their father, under age, without the consent of her parents, by which the validity of the marriage was denied, and the plaintiffs, the issue of that marriage, said to be illegitimate.

It appeared, that in July, 1837, Mr. William Quayle, of Whitehaven, died, possessed of the property in question. He had had two brothers, John, the elder and father of the plaintiffs, and James, the younger. James still survives. John married a sister of the defendant, in 1817, by license. She was under age, and there was no consent of parents. The parties did not regularly live together, but he residing at Whitehaven, frequently visited her at her father's house. He afterwards took a lodging for her in Whitehaven; but evidence was given to show that the marriage was not disclosed, and that even his fellow-workmen did not know of it. The register was, however, produced, and the only question on that part of the case was, whether, being by license and without consent, it was made good by a subsequent marriage act. This point the Court decided in favour of the plaintiffs. John had issue, a daughter, Elizabeth, and a son John, born after the death of the father, who himself

died about two years after the marriage. The mother still lives. Some time after the death of Mr. Quayle, who died in 1837, as before stated, the defendant, in consideration of 500*l.*, got a conveyance from James, the surviving brother, of all his right and interest in his deceased father's estate. Under this deed, coupled with the alleged bastardy of the plaintiffs, the defendant, who had got into possession of the property, sought to retain it for himself, though there was good reason to believe that in the conveyance by James it was intended that the defendant should be a trustee for the children, by being their next friend.

Mr. Baron ALDERSON said the Marriage Act of 1822 made all previous marriages without consent valid, provided the parties had cohabited together as man and wife. It was proved that the wife of John, then supposed to be a spinster, had affiliated her child Elizabeth upon her husband. This was held not to rebut the proof of the marriage by the register, and was admitted as proof of cohabitation, so as to satisfy the requirements of the statute.

Verdict for the plaintiffs.

Newcastle, March 2.

ATKINSON v. BELL AND OTHERS.

Coal Mines—liability of proprietors of coal mines for damage done to the vegetation in adjacent lands, by smoke and gas, produced from working the mines.

This was an action for damages against the defendants, the owners of a coal-pit, by reason that the waste or coal-dust, thrown from the pit, into large heaps, which either ignited spontaneously, or was set fire to for the purpose of consuming it; and the smoke and gas arising therefrom, destroyed the vegetation in the plaintiff's garden, which was near the coal-pit, at a place called Cobble-Dean. The defendants had compensated him, but, as he alleged, never to a sufficient extent, and at length the effect had become so destructive that he had brought his action to recover the full amount of the injury. In former times the case had been decided by a person on each side looking at it. On the present occasion the same method had been attempted, but failed, and the defendants had paid 15*l.* into court. The question, therefore, was whether greater damage than that had been sustained.

Witnesses spoke to the damage done to potatoes, apple and pear trees, currant and gooseberry bushes, hedges, and other species of garden vegetation, making the damage amount to about 45*l.*

Mr. Alexander addressed the jury for the defendants, and threatened the plaintiff's case with a number of respectable and judgmatical opposing witnesses. The first he called, however, spoke to having seen only part of the damage, and

The learned Judge interposed, and proposed that a verdict should be taken for the plaintiff for 5*l.* beyond the 15*l.* already paid into court.—*Agreed to.*

LIST OF SHERIFFS, UNDER-SHERIFFS, AND DEPUTIES FOR 1839.

ENGLAND.

<i>Counties.</i>	<i>Sheriffs.</i>	<i>Under-sheriffs and Deputies. Office hours, the same as Seal Office.</i>
<i>Bedfordshire</i>	Levi Ames, of East Hyde, Esq.	Mr. Charles Austin, of Luton— <i>Deputy</i> , Mr. Gustavus Thomas Taylor, 18, Featherstone Buildings.
<i>Berkshire</i>	Mortimer George Thoys, of Sulhamstead-house, Esq.	— John Jackson Blandy, Reading— <i>Deputies</i> , Messrs. Adlington and Co., 1, Bedford Row.
<i>Berwick-upon-Tweed</i>	John Wilson, of Berwick-upon-Tweed, Esq.	— W. Willsby, Berwick-upon-Tweed— <i>Deputy</i> , Mr. J. W. Bromley, 1, South Square, Gray's Inn.
<i>Bristol (City of)</i>	Francis Savage, of Bristol, Esq.	— William Ody Hare, Bristol— <i>Agents</i> , Messrs. Bridges and Mason, 28, Red Lion Square.
<i>Buckinghamsh.</i>	Benjamin Way, of Denham, Esq.	— J. Springhall, 3, Raymond Buildings— <i>Deputies</i> , Messrs. Springhall and Co., 3, Raymond Buildings.
<i>Cambridgesh. & Huntingdonsh.</i>	Sir Richard Hussey Hussey, of the Views, Huntingdon, Knight	— Charles Margetts, Huntingdon— <i>Deputies</i> , Messrs. Jones, Trinder, and Tudway, 1, John Street, Bedford Row. Hours in Term, 11 till 5. In Vacation, 11 to 3, except between 10 Aug. and 24 October, and then from 11 to 2.
<i>Canterb. (City of)</i>	J. Mills Davey of Canterbury, Esq.	— Thomas Wilkinson, Canterbury— <i>Deputy</i> , Mr. Thomas Kirk, 10, Symond's Inn.
<i>Cheshire</i>	Thomas Hibbert, of Birtles, Esq.	— James Roseoe, Knutsford, Mr. J. B. Hostage, Chester, Acting U. S.— <i>Deputy</i> , Mr. John Cole, 4, Adelphi Terrace.
<i>Chester</i>	Robert Miller, of Chester, Esq.	— John Finchett Maddock, Chester— <i>Agents</i> , Messrs. Philpot and Son, 3, Southampton St., Bloomsbury.
<i>Cinque Ports</i>	His Grace the Duke of Wellington	— Pain, Dover— <i>Agents</i> , Messrs. Egan and Waterman, 28, Essex St., Strand. Gazetted on Friday last in the room of Sir Richard Rawlinson Vyvyan of Treloavrent, Bart.
<i>Cornwall</i>	Deeble Peter Hoblyn	Measrs. Troughton and Lee, Coventry— <i>Deputies</i> , Messrs. Austen and Hobson, 4, Raymond Buildings.
<i>Coventry (C. of)</i>	T. Stephens, of Coventry, Esq.	Mr. Wilson Perry, of Whitehaven— <i>Deputy</i> , Mr. William E. Stubbs, 15, Furnival's Inn.
<i>Cumberland</i>	Thomas Hartley, of Gillfoot, Esq.	— Cruso, of Leek; Messrs. Simpson, and Messrs. Simpson and Frear, Derby; Acting U. S.— <i>Deputies</i> , Messrs. Jennings, Bolton and Co., 4, Elm Court.
<i>Derbyshire</i>	Broughton Benjamin Pegge Burnell, of Beauchief Abbey, Esq.	— Charles Bruton, Exeter— <i>Deputies</i> , Messrs. Bruton and Clipperton, 17, Bedford Row.
<i>Devonshire</i>	Codrington, Parr, of Stomelands, Esq.	Measrs. Aldridge and Bartlett, of Poole— <i>Deputy</i> , Mr. Witham, 8, Gray's Inn Square.
<i>Dorsetshire</i>	J. Weld, of East Lulworth, Esq.	Mr. W. E. Wooller, Durham— <i>Deputy</i> , Mr. J. Griffith, 6, Raymond Buildings.
<i>Durham</i>	Sir William Chaytor, of Witton-castle, Bart.	— Wm. Mason, Colchester— <i>Deputy</i> , Mr. T. W. Nelson, 1, New Court, Temple.
<i>Essex</i>	John Fletcher Mills, of Lexden-park, Esq.	

<i>Saxey (City of)</i>		Mr. J. Pitta, Exeter— <i>Deputies</i> , Messrs. Keddell and Baker, 36, Fenchurch St.
<i>Gloucestershire</i>	Maynard Colchester, of Westbury-on-Severn, Esq.	— J. Burrup, of Gloucester— <i>Deputies</i> , Messrs. White and Whitmore, 11, Bedford Row.
<i>Gloucester (C.of)</i>		Inquire of Messrs. White and Whitmore, 11, Bedford Row.
<i>Hampshire</i>	John Mills, of Bisterne Ringwood, Esq.	Messrs. Woodham and Seagram, Winchester— <i>Deputies</i> , Messrs. Hicks & Braikenridge, 16, Bartlett's Buildings
<i>Herefordshire</i>	J. Higford, of Abbey Dore, Esq.	Mr. Nicholas Lanwarne, Hereford— <i>Deputies</i> , Messrs. Simpson & Moore, 5, Furnival's Inn.
<i>Herifordshire</i>	Charles Benet Drake Garrard, of Wheathampstead, Esq.	— G. Nicholson, Hereford— <i>Deputies</i> , Messrs. Hawkins and Co., 2, New Boswell Court.
<i>Kent</i>	David Salomons, of Broom-hill, Tunbridge, Esq.	— Wm. Woodgate, of Lincoln's Inn— <i>Deputies</i> , Messrs. Palmer and Co., 24, Bedford Row.—Hours in Term, 11 to 5. In Vacation, 11 to 3, except between 10th Aug. and 24th October, and then from 11 to 2.
<i>Kingston-upon-Hull (T.&C. of the Town of)</i>	Joseph Jones, of Kingston-upon-Hull, Esq.	— J. Hewitt Galloway, of Kingston-upon-Hull— <i>Deputies</i> , Messrs. Hicks and Marris, 5, Gray's Inn Square.
<i>Lancashire</i>	C. Scarisbrick, of Scarisbrick, Esq.	— Thomas Part, Wigan— <i>Deputies</i> , Messrs. Adlington & Co., Bedford R.
<i>Leicestershire</i>	E. Dawson, of Whatton-house, Esq.	— Roger Miles, Leicester— <i>Deputies</i> , Messrs. R. M. & C. Baxter, Lincoln's Inn Fields.
<i>Lincolnshire</i>	George Fieschi Heneage, of Hainton-hall, Esq.	— Daubney, Market Rasen, Mr. Williams, Lincoln, Acting U.S.— <i>Deputy</i> , Mr. Thos. Kirk, 10, Symond's Inn.
<i>Lichfield (City and County of the City of)</i>	T. Ward Griffith, of Lincoln, Esq.	— John Philip Dyott, Lichfield— <i>Deputies</i> , Messrs. Baxter, 48, Lin. Inn F.
<i>Lincol(City of)</i>	John Sharp, of Lincoln, Esq.	— Richard Mason, of Lincoln— <i>Deputies</i> , Messrs. Willis and Co., 6, Tokenhouse Yard.
<i>London & Middlesex</i>	Mr. Alderman Thomas Johnson	— Saml. Frederick Langham, 10, Bartlett's Buildings— <i>Secondaries Office</i> , 5, Basinghall Street.
	Mr. Alderman Thomas Wood	— Robert Ellis, 2, Corbett Court, Gracechurch Street— <i>Sheriff of Middlesex's Office</i> , 24, Red Lion Square.
<i>Norwich (C. of)</i>	Henry Woodcock, of Norwich, Esq.	— Arthur Dalrymple, of Norwich— <i>Agents</i> , Messrs. Adlington and Co., 1, Bedford Row.
<i>Monmouthshire</i>	Colthurst Bateman, of Bertholey-house, Esq.	— Henry Mostyn, of Usk— <i>Deputies</i> , Messrs. White and Whitmore, 11, Bedford Row.
<i>Newcastle-upon-Tyne</i>	William Brownsword Proctor, of Newcastle-upon-Tyne, Esq.	— Thomas Chater, of Newcastle-upon-Tyne— <i>Agents</i> , Messrs. Bell and Broderick, Bow Church Yard.
<i>Norfolk</i>	Sir Thomas Hare, of Stow Barolph, Bart.	— Boys Aldham, Lynn— <i>Deputies</i> , Messrs. Jones, Trinder and Tudway, 1, John St. Bedford Row.—Hours, same as Cambridgeshire.
<i>Northamptonshire</i>	William Drayson, of Floore Fields House, Esq.	Messrs. Flesher & Blencowe, Northampton— <i>Deputies</i> , Messrs. Austen and Hobson, 4, Raymond Buildings.
<i>Northumberland</i>	J. Davidson, of Ridley-Hall, Esq.	Mr. J. Adamson, Newcastle-upon-Tyne— <i>Deputies</i> , Messrs. Clayton and Cookson, 6, New Square, Linc. Inn.
<i>Nottinghamshire</i>	John Evelyn Denison, of Ossington, Esq.	— P. R. Falkner, Newark, Mr. John Brewster, Nottingham, Acting U. S.— <i>Deputies</i> , Messrs. Capes and Stuart, 48, Bedford Row.
<i>Nottingham (Town of)</i>	Francis Butcher Gill, of Nottingham, Gent.	— Christopher Swann, Nottingham— <i>Agents</i> , Messrs. Holme and Co., 10, New Inn.

<i>Oxfordshire</i>	John Harrison Slater Harrison, of Shelwell, Esq.	Mr. S. Cooper, Henley-upon-Thames— <i>Deputy</i> , Mr. Charles Berkeley, 52, Lincoln's Inn Fields.
<i>Poole (Town of)</i>	W. Adey, of Poole, Esq.	— Thomas Arnold, Poole— <i>Deputy</i> , Mr. G. Weller, 29, Essex Street.
<i>Rutlandshire</i>	John Monkton, of Seaton, Esq.	— Hall, Uppingham— <i>Deputies</i> , Messrs Allan and Benbow, 1, Stone Buildings, Lincoln's Inn.
<i>Shropshire</i>	P. Broughton, of Tunstall, Esq.	— Cresswell Pigot, Market Drayton, Mr. J. Peile, Shrewsbury, Acting U. S.— <i>Deputies</i> , Messrs. Alban and Benbow, 1, Stone Buildings, Lincoln's Inn.
<i>Somersetshire</i>	Sir William Coles Medlycott, of Milburne Port, Bart.	— Edward Coles, Taunton— <i>Deputies</i> , Messrs. W. and E. Dyne, 61, Lincoln's Inn Fields.
<i>Southampton (Town of)</i>	William Hooke Steere, of Southampton, Esq.	— Richard Blanchard, Southampton, <i>Agent</i> , Mr. J. M. Cleoburey, 21, Warwick Street, Regent Street.
<i>Staffordshire</i>	W. Moore, of Wychdon-lodge, Esq.	Messrs. Keen and Hand, Stafford— <i>Deputies</i> , Messrs. White and Whitmore, 11, Bedford Row.
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<i>Sussex</i>	Thomas Frewen, of Bricwakll-house, Northiam, Esq.	— Thomas France, Bedford Row.—Hours—see “Kent.”
<i>Warwickshire</i>	Sir Francis Lawley, of Middleton-hall, Bart.	— J. W. Unett, Birmingham— <i>Deputies</i> , Messrs. Tooke and Son, 39, Bedford Row.
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<i>Yorkshire</i>	Char. Robert Tempest, of Broughton, Esq.	— Seymour, of York— <i>Deputy</i> , Mr. Witham, 8, Gray's Inn Square.
<i>York (City of)</i>	E. Horsefall Roper, of York, Esq.	— J. Brook, of York— <i>Agents</i> , Messrs. Bell and Broderick, Bow Church Yard.

(To be concluded in our next.)

REVIEW OF NEW BOOKS.

The whole Town and Country Practice of the Court for relief of INSOLVENT DEBTORS, with full Instructions to Creditors, and all forms, rules, and orders of the Court, under 1 & 2 Vic. cap. 110. By ROBERT ALLEN, Esq. Barrister at Law. London, Shaw and Sons, 137 & 138, Fetter Lane, 1839.

A well written work of this sort is much needed by the profession generally, and now that the practice of the Insolvent Debtors' Court, under the statute abolishing arrest upon mesne process has become *somewhat settled*—for it will be found in the result of the circuits to be *not completely settled*,—such a work will prove particularly acceptable to practitioners in that court.

The work before us is well arranged, and adapted not only for practice, but for general use. The author says in his preface—

"The great changes which empower an insolvent in execution to be bailed, and the creditor to petition, have been treated at length—the forms have been closely examined at the several offices, and the work will, it is hoped, be found a correct guide to the practice; more than to render it so, has not been the ambition of the author."

This is the author's account of his book; in which we see nothing to complain of, but we do complain at seeing a book divided into *parts*, without a table of contents, as is the case here; such neglect has the appearance of haste, or as some would say of "book-making," which every one understands, but which we do not attribute to this author; indeed we think his work deserving the attention of the profession.

MONTHLY INDEX to the METROPOLITAN MORNING PAPERS—*Times*, *Morning Chronicle*, *Morning Herald*, *Morning Post*, and *Morning Advertiser*, for February 1839, from the 25th January to the 23rd February. Published by James Wyld, Charing Cross, East. Price One Shilling.

This is a publication that will be found very useful to most persons. The publisher describes its purchasers as consisting of "Members of the Legislature, men of science, and men of business," to whom it affords a ready index to all the passing events of the month that may have been recorded in the four popular Morning Newspapers.

FLINTOFF

ON THE

LAWS OF REAL PROPERTY.

(See our Review of this work, ante p. 271.)

TO THE EDITOR OF THE LEGAL GUIDE.

6, Stone Buildings, Lincoln's Inn,
23rd February, 1839.

MR. FLINTOFF presents his compliments to the Editor of the Legal Guide, and begs leave to call his attention to the fact, that the number of pages in the first volume of the Law of Real Property, is about 100 more than stated in his criticism. The mistake, which is natural, arises from the *earlier* part of the volume having been inserted after the rest was completed, according to an alteration in the mode of treating the subject, and it will be seen that that part is numbered differently.

Business of the Courts.

COURT OF CHANCERY.

Appeal Motions—Brickford v. Skews, by order—Hill v. Gomme—Stedman v. Webb—Dublin v. Flint—Iken v. Gair—Attorney-General v. Clark.

VICE-CHANCELLOR'S COURT.

Short causes—Ingram v. Smith—Attorney-General v. Rowley—Hessay v. Nutt—Slater v. White—Attorney-General v. Green—Oswin v. Shand, and Petition—Follitt v. Mann—Holt v. Frewin—Dodsworth v. Westmoreland—Ferris v. Ferris—Clarke v. Stewart, further directions—Price v. Munce, ditto—Bedford v. Burke, ditto—Browne v. Browne, ditto.

After which, unopposed petitions, of which twenty-five are in the list.

After the petitions—Cole v. Hall, demurrer—Ormerod v. Haig, ditto—Morris v. Langham, part heard—The same v. The same, ditto—Lowry v. Fulton—Richton v. Cobb, by order—De Visme v. De Visme, exceptions.

ROLLS' COURT.

Cottrell v. Watkins, part heard—Earl of Ilchester v. Carnarvon—Pogson v. Thomas, exceptions—Scoons v. Morrell, exceptions, further directions, and costs—Hancock v. Gilbard, further directions, costs, and two petitions—Paul v. Meek—Bittell v. Turnley—Bosworth v. Tacker—Ryder v. Woolley—Brown v. Browne—Low v. Carter—Evans v. Evans.

QUEEN'S BENCH.

Sittings at *Nisi Prius*, appointed to be held in Middlesex and London, before the Right Hon. THOMAS LORD DENMAN, Lord Chief Justice of the Court of Queen's Bench, in and after Easter Term, 1839.

IN TERM.

MIDDLESEX.	LONDON.
Tuesday - April 16,	
Friday - April 19.	
Monday - May 6.	Tuesday - May 7.

AFTER TERM.

Thursday - May 9. And five following days.	Friday - May 10 To adjourn to a cer- tain day, but not to try causes.
--	--

The court will sit at 11 o'clock in Term, in Middlesex; at 12 in London; and in both at half-past 9 after Term.

N. B. Long causes will probably be postponed from the 16th and the 19th of April to the 9th of May; and all other causes on the lists for the 16th and 19th of April will be taken from day to day until they are tried.

Undefended causes only will be taken on the 6th of May.

Short defended as well as undefended causes entered for the sitting on May 7 will be tried on that day, if the plaintiffs wish it, unless there be a satisfactory affidavit of merits.

TO CORRESPONDENTS.

"Tyro."—Do you not ask too much from us? We will think about it.

"R. P."—Under consideration.

"J. E." is not neglected.

A subscriber shall be attended to next week.

"B. H. T." shall have attention.

"Minos."—Thanks. See the Errata, such an error of the press is almost inexcusable.

TO SUBSCRIBERS.

A complete Index to this work, with a Title Page, will be published every six months.

This Paper will be forwarded, postage free, to any part of the United Kingdom, to Annual Subscribers. Subscription, 1*l.* 10*s.* for the year, to be paid in advance.

ERRATA.

Page 225, first line, for "Honourable," read "Right Honourable," as our MS. intended.

Page 276, for "Problem XIX," read "Problem XVIII."

*Just Published—price 1*l.* 5*s.*, bds.*

Under the Sanction of, and Dedicated by
especial command to, HER MAJESTY,

COMMENTARIES on the CONSTITUTION and LAWS of ENGLAND, incorporated with the POLITICAL TEXT of the late J. L. DE LOLME, LL. D. Advocate: embracing the Alterations to the present Time. By THOMAS GEORGE WESTERN, Esq., F. R. A. S., of the Middle Temple.

"This is a work of great talent; it is one also of great labour and careful and extensive research; and we are satisfied that it will eventually become a standard book. It is a work which is well adapted for the general, as well as the professional reader, for it treats of those constitutional topics which interest all classes of her Majesty's subjects. Mr. Western displays excellent judgment in regard to the ar-

rangement of his book. His own remarks and additional matter are skilfully incorporated with, or appended to the text of De Lolme, as circumstances suggested. He has brought his information and facts down to the latest period; and in an Appendix which he has judiciously added, he has given the new code of laws regulating real property and testamentary dispositions. This latter part of the work is exceedingly valuable. The work is very properly exempted from every thing of a political character. We are glad, however, to perceive that the author has not shrunk from the unreserved expression of his opinions on several subjects bearing immediately on the great interests of justice, humanity, and religion, which naturally came in his way. We fully concur with him in all he has said in reprobation of imprisonment for debt, and in opposition to the infliction of capital punishments. Mr. Western, we repeat, has produced a work of great and permanent value. He is a man of sound judgment, and of extensive information on the topics treated; while he expresses himself with much clearness and precision. De Lolme's book, which had in a manner become obsolete, in consequence of the great alterations which have taken place in our laws since it was written, has now all the freshness of a work written within these last six months."—*Morning Paper.*

"There are few readers in the slightest degree acquainted with the principles of the British Constitution who are not well acquainted with M. De Lolme's popular treatise on the government and Laws of England—a work deservedly regarded as only second in interest to the admirable Commentaries of Sir William Blackstone. But as many most important changes have taken place in the Constitution of England since 1784, when De Lolme published the last edition of his work—particularly as regards the principles of our penal and criminal codes, and the regulations of the elective franchise—Mr. Western has undertaken the arduous and hitherto unattempted task of striking out from the text of De Lolme the portions of his treatise which have become obsolete, and interweaving in the body of the work the history of all the principal recent changes which have been effected in the Laws and the Constitution of Parliament, in order to render it a safe and trustworthy guide to readers of the present day. Mr. Western's execution of this design is at once great, laborious, and laudable, and well deserves to become popular."—*The Sun.*

Published by H. BUTTERWORTH, 7, Fleet-street, and JOHN RICHARDS & Co. 194, Fleet-street.

Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 9th March, 1839.

Price 6*d.* Stamped Edition, 7*d.*

The Legal Guide.

No. 20.]

SATURDAY, MARCH 16, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from page 274.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

HAVING given not only our own opinion, but the opinions of some of the leading conveyancers upon the question—What Title a Purchaser must now require?—we think it necessary to shew in what manner the courts are disposed to give effect to the new Statute of Limitations. The following case, (a) argued upon a writ of error in the Exchequer Chamber, Trinity Term, 7 W. 4. applies to sec. 2, 3, and 15, by which the doctrine of *non-adverse possession* was held to be done away with, by ss. 2 & 3, except in the cases provided for by sec. 15, and that an ejection must be brought within twenty years after the original right of entry of the plaintiff, (or of the party under whom he claims) accrued, whatever be the nature of the defendant's possession.

An action of ejection was commenced in Hilary Term, 1834, to recover possession of copyhold premises, in the parish of Loders, in the county of Dorset, (being the same premises claimed in the cause of Doe d. Knight v. Nepean, (b) and was tried before Patterson, J. at the Dorsetshire spring

(a) *Nepean v. Doe dem. Knight, 2 Mason & W. 834.*

(b) *6 Barn. & Ald. 88. S. C. nomine Doe dem. Slade v. Nepean, 2 Nev. & M. 219.*

VOL. I.

assizes, 1835, when the following evidence was given on the part of the plaintiff:

2nd, Jan. 1788.—At a court held this day for the manor of Loders, Matthew Knight took of the lord certain copyhold tenements, called the Roofless Living and Home Living, (being part of the premises in question in this case), to hold to him, the said Matthew Knight and Edward Knight (his brother), and Elizabeth Mary Davies, for their lives, and for the life of the longest liver of them successively.

16th Oct. 1794.—At a court held this day, the said Matthew Knight, took of the lord a certain copyhold tenement called Maby's Hay, (being other part of the premises in question) to hold to him the said Matthew Knight and Rice Davies Knight, his son, for their lives, and the life of the longest liver of them, successively, in reversion, immediately after the determination of the estate of Henry Budden therein.

20th March, 1797.—At a court held this day, George Bagster and Nathaniel Taylor, as assignees of the said Matthew Knight, a bankrupt, were admitted tenants to the said tenements called Roofless Living, Home Living, and Maby's Hay, except out of the latter as to one close called Sheep Acres, to which they were admitted tenants in reversion of the said Henry Budden.

At the same court, George Knight took of the lord the reversion of the said tenements, called Roofless Living and Home Living, to hold to Paul Slade Knight (the lessor of the plaintiff) and Thomas Clothier

Knight, sons of the said George Knight, for their lives, and the life of the longest liver of them successively, after the determination of the estate and interest which the said George Knight claimed to have for the life of the said Matthew Knight, his brother.

And at the same court, there was entered a letter of attorney, dated 13th March, 1797, whereby the said George Bagster and Nathaniel Taylor appointed Richard Travers their attorney, to take admittance of the said tenements called Roofless Living, Home Living, and Maby's Hay, together with the said close called Sheep Acres, and to surrender the same to the use of the said George Knight, his executors, administrators, and assigns, for the life of the said Matthew Knight.

In August 1806, Thomas Clothier Knight died. In December in the same year, or early in 1807, Matthew Knight went to America; and in the month of May, 1807, a letter was received from him, but he was never heard of afterwards.

Matthew Knight was in possession of the premises in question for the three years preceding his bankruptcy, which happened in 1797; and after that event George Knight entered into possession of the same premises as the purchaser of Matthew Knight's interest, and continued in such possession till his death, but he was never actually admitted tenant to the lord.

On the 1st August, 1807, George Knight executed an indenture of mortgage to the said Richard Travers, of all the said premises, for the term of seventy years, if the said Matthew Knight should so long live, for securing the payment of two several sums of 838*l.* and 375*l.* Soon after the date of this mortgage, all the premises were sold to Sir Evan Nepean, the father of the defendant in this action, (the plaintiff in error,) but the purchaser was never admitted tenant to the lord; and if any formal conveyance was executed, it had been lost.

On the 12th December, 1807, George Knight died.

On the sixth April, 1808, Sir Evan Nepean granted a lease of the premises to

the said Richard Travers for the term of fourteen years from this date, and Travers underlet the premises to George Way, who occupied them from the death of the said George Knight in 1807, to the death of Travers in 1813. Shortly after Travers' death, the premises were surrendered by his executors to Sir Evan Nepean, who continued in possession thereof by himself or his tenants, from thence until his death in 1822; and from that time to the present the defendant Sir Molyneux Nepean has been in the possession thereof.

Upon these facts, *two questions* were raised at the trial—

First, Whether it was incumbent on the lessor of the plaintiff to prove that the said Matthew Knight was actually alive *within twenty years next before the commencement of the action.*

Secondly, Whether it appeared upon the evidence that there had been an adverse possession of the premises against the lessor of the plaintiff, for twenty years before the action brought. The learned judge stated his opinion to the jury as to the first point, that it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years, and that he had not proved it; and as to the second point, that if Sir Evan Nepean took as purchaser of the interest of George Knight, then his possession had not been adverse for twenty years, because it could not be adverse so long as it was uncertain whether Matthew Knight was alive or dead, which it was up to May 1814. The jury found that Matthew Knight was not proved to have been actually alive *within twenty years next before the commencement of the action*, but that it did not appear by the evidence that there had been an adverse possession of twenty years as against the lessor of the plaintiff: and the verdict was thereupon entered for the plaintiff.

The lessor of the plaintiff excepted to the opinion of the learned judge on the first point, and the defendant to his opinion on the second point; and cross bills of exceptions were tendered and sealed accordingly, and writs of error sued out therein. (a)

(a) S.C. 7 Mee. & W. 894.

LORD DENMAN, C. J. delivered the opinion of the court, and said, *Two questions* arose: *First*, whether the lessor of the plaintiff was bound to give some evidence as to the precise time of Matthew Knight's death, in order to shew that he had brought this action within twenty years of his death, or whether the presumption of his being alive continued to the last moment of the seven years since he was last heard of, when the law presumes that he was dead, and which was within twenty years next before the commencement of the action? *Secondly*, whether, on the supposition that the defendant came in as a purchaser of George Knight's interest, there had been twenty years' adverse possession as against the lessor of the plaintiff.

The learned judge told the jury it was incumbent on the lessor of the plaintiff, to prove that Matthew Knight was actually alive within twenty years before the commencement of the action, and that he had not proved that fact by merely shewing that seven years since he was last heard of—expired within twenty years next before the commencement of the action: on which the counsel for the lessor of the plaintiff tendered a bill of exceptions. The learned judge also told the jury, that if they were of opinion that the defendant took as purchaser of the interest of George Knight, his possession had not been adverse for twenty years, because it could not be adverse as long as it was uncertain whether Matthew Knight was alive or not, which it was up to May, 1814. Upon this the counsel for the defendant tendered a bill of exceptions. The jury found that it was not proved that Matthew Knight was alive within twenty years, but that it did not appear that there was an adverse possession of twenty years; and, under the learned judge's direction, they found their verdict for the lessor of the plaintiff.

It seems the statute of the 3 & 4 W. 4. c. 27, was not adverted to at the trial, but only on the case being argued before the court. We are all clearly of opinion that the second and third sections of that act (which came into operation on the 1st of January, 1834, seventeen days before this

action was commenced) have done away with the doctrine of non-adverse possession, and, except in cases falling within the fifteenth section of the act, the question is, whether twenty years have elapsed *since the right accrued*,—whatever be the nature of the possession. The right of entry in this case accrued on the death of Matthew Knight. Then, as the first and second questions were identical, the learned judge was wrong in putting any distinct and separate question to the jury on the nature of the possession, unless the case be within the fifteenth section.

Now, that section applies only where the possession was not adverse, according to the former state of the law at the time of the passing of the act,—that is, the 24th July, 1833. If that point had been raised at the trial, it is plain the jury would have been satisfied that the possession was adverse on the 24th July, 1833; for, we know by the report of Doe dem. Knight v. Nepean, that an action had been brought and tried between the same parties some time before that date. Whether, therefore, the learned judge took a right view of the defendant's possession or not, under the former state of the law, is immaterial; the 3 & 4 W. 4. c. 27, applies to the case, and the direction in respect of which the defendant's bill of exceptions was tendered, was therefore wrong.

Still, it is necessary to determine the first and principal point in the case, because, if the learned judge's direction was also wrong, as to that the lessor of the plaintiff would be entitled to retain the verdict, although he obtained it on another ground; the court is, therefore, called on to review the decision of the Court of King's Bench in Doe v. Nepean. The doctrine there laid down is, that where a person goes abroad and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during these seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of

seven years since such person was last heard of.

After fully considering the argument at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I. relating to bigamy, more particularly to the statute 19 Car. 2. c. 6., relating to this very matter, the words of which distinctly point at the presumption of the *fact* of death, but not at the *time*: it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rex. v. Inhabitants of Harbone*. It is true, the law presumes that a person shewn to be alive at a given time, remains alive until the contrary be shewn, for which reason the onus of shewing the death of Matthew Knight lay, in this case, on the lessor of the plaintiff. He has shewn the death, by proving the absence of Matthew Knight, and his not having been heard of for seven years, whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the onus is also cast on the lessor of the plaintiff of shewing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was

living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion, that the death took place some considerable time *before* the expiration of the seven years.

It is true, the doctrine will often practically limit the time for bringing the action of ejectment in such cases; and circumstances may be supposed, as of a lease for seven years commencing on the death of A, or of a promissory note payable two months after A's death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making enquiry respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances. No such rule is enacted by the statute, nor is any one authority adduced in which any such rule has been laid down.

It is not necessary to make any election between the beginning of seven years and the end of them, and the period to which their death should be referred, as seems at one time to have been assumed. We adopt the doctrine of the Court of Queen's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.

For these reasons, we are of opinion that the learned judge's direction to the jury, in respect of which the lessor of the plaintiff tendered a bill of exceptions, was correct, and that the verdict ought to have been found for the defendant; but as we cannot order it to be so entered, the result is, that the verdict found for the lessor of the plaintiff must be set aside, and a *venire de novo* awarded.

Venire de novo awarded.

(*To be continued.*)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XVII.

What is the Law of Inheritance in England? And what changes were made by the statute 3 & 4 W. 4. c. 106?

The rules which governed the transmission of freehold estates of inheritance at common law, on the decease of the person last seized, in the absence of any express disposition by him, have been very materially altered by the above statute, and in order to point out these alterations, I will first see what those rules were.

1st, That inheritances should lineally descend to the issue of the person who last died actually seized, but should never lineally ascend. The parent, therefore, could never take immediately by descent from the child, but the land would rather have escheated, (*Cooper v. Cooper*, 2 P. Wms. 666.) This rule, drawn from feudal principles, had long been considered unjust, and therefore the lineal ancestor may now be heir to his issue in preference to collateral persons claiming through him. (a)

2nd, That the male issue should be admitted before the female. (b)

3rd, That where there are two or more males in equal degree, the eldest only should inherit; but the females altogether.

4th, That the lineal descendants *ad infinitum* of any person deceased, should represent their ancestor; that is, should stand in the same place as the person himself would have done, had he been living. No alteration has been made in this and the two former rules of descent, which remain *in statu quo*.

5th, That on failure of lineal descendants, or issue of the person last seized, the inheritance should descend to his collateral relations, being of the blood of the first purchaser. This rule, as we have seen before, (c) is now changed, as the ancestor comes in wherever the descendants of such ancestor would have inherited by the old law. As for instance, if the purchaser of an estate died without issue, and intestate, leaving a father, that father would take before the brothers and sisters, or their descend-

ants, and if there were neither father nor brother, or sister, or their descendants, a surviving grandfather would take before uncles or aunts.

6th, That the collateral heir of the person last seized must be his next collateral kinsman of the whole blood. This, however, need not now be the case, as the distinction between the whole and half blood is in a great measure abolished, the half-blood being now allowed to inherit on the part of a male ancestor after the whole blood of the same degree; and on the part of a female ancestor after her. (d)

7th, That in collateral inheritances the male stock should be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, should be admitted before those from the blood of the female, however near) unless where the lands had in fact descended from a female. And it is now declared that on the failure of the male ancestors, the mother of the more remote male ancestor shall be preferred to the mother of the less remote male ancestor. (e)

I will now proceed to note more particularly the changes made by the statute in the order presented to us by the several enactments. In the first place, the new laws of inheritance extend to land held by tenures, or customs, different from the general tenure of free and common socage, as copyholds, and customary freeholds, and lands held in ancient demesne, and borongh-english, and gavelkind lands, and also to descendable freeholds. (f) The root of descent is now distinctly laid down to be, that in all cases the person last entitled to the land shall be considered the *purchaser*, and the descent traced from him, unless it be proved that he *inherited* the same, so as to prevent the pedigree being carried further back than the circumstances of the case and the nature of the title should require. (g)

The next section (h) of the act is in direct contravention of two old-established rules of law, and renders it necessary to bear in mind the distinction between *descent* and *purchase*, the two modes of acquiring

(a) § 6.

(b) § 7.

(c) § 6.

(d) § 9.

(g) 92.

(e) §§ 7, 8.

(h) § 3.

(f) § 1.

property. The effect of this section is to declare that the heir of a testator, taking under his will, shall be considered as taking as *devisees*; and that under a limitation to a grantor, or his heirs, such person shall be considered as a *purchaser*. Before the passing of this act, no man could make his right heirs take by purchase, neither by conveyance at common law, nor by a limitation to uses, nor by devise, (Co. Litt. 22. b. Pybus v. Mitford, 1 Ventr. 372.) The difference between the acquisition of an estate by descent, and by purchase, consists principally in two points:—

1st, That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity.

2nd, An estate taken by purchase will not make the person who acquires answerable for the acts of his ancestor, as an estate by descent, (Cruise's Dig. it. 30. § 4.) By a well known rule also in law, it was established, that when the ancestor by any gift or conveyance, took an estate for life, and in the same conveyance an estate was limited either immediately or mediately, to his heirs in fee or tail, the word *heirs* was a word of limitation of the estate, and not of *purchase*, (1 Rep. 93.) And now, where an heir shall take by purchase under any limitation to the heirs of his ancestor, the land shall in that case descend as if such ancestor had been the purchaser. (i)

By a technical rule of pleading, the descent from one brother or sister to another, had been, previously to this act, considered as immediate, and in making out their title to *each other*, the common father need not have been named although living, (Watk. Desc. 111. n.) Now, however, brothers and sisters shall *not* inherit immediately from each other, but every descent from them shall be traced through the parent. (k)

With regard to persons who have been attainted, a very beneficial alteration has been made, (l) whereby a descent may now be traced through *such* persons, by the party capable of inheriting the lands; whereas by the old law, such was the consequence of an attainder, that the person so attainted

was incapable of inheriting lands, or of transmitting them to his posterity, and by the consequent corruption and extinction of all hereditary blood, also obstructing the descent of lands to his posterity, in all cases where they were obliged to derive their title through him from any remote ancestor, (11 Rep. 1. 6.; Co. Litt. 391. b.; 2 Bl. Com. 251.; Burn's J. Forfeiture.)

R. P.

PROBLEM XX.

WHAT IS WASTE?

Imperial Parliament.

HOUSE OF LORDS.

ENGLAND.

LEGAL BUSINESS.

March 11.

Law of Libel and of Evidence—Breach of Privilege—Petition of Mr. Lawson, Printer of the Times Journal.

An action for libel on the part of Mr. Polack had been met by a plea of justification on that of Mr. Lawson. To make good this plea satisfactory evidence was required to be given of the facts. The facts were contained in a body of testimony printed and published by order of the House of Commons, being sold, as is notorious, by their printer, Mr. Hansard. But the tender of these documents, thus officially published, was objected to by the plaintiff in the cause, by reason that they were not authenticated by officers of that assembly before which the evidence had been delivered—viz., a committee of the other House of Parliament, from whose records they had, with full consent of their lordships, been transferred to those of the House of Commons.

By Mr. Lawson a respectful petition was addressed to the House of Lords, explaining the difficulty in which he was placed through the operation of rules, which, partly comprehended under the law of evidence, partly under that of libel, had refused him the benefit of papers published by the House of Commons, and compelled him to

(i) § 4. (k) § 5. (l) § 10.

throw himself on their lordships' justice for an authentication of the originals by their lordships' own officer. The committee of privilege to which the petition was referred rejected the prayer of it, as being inconsistent with their privileges!

The order of the day for taking into consideration the report from the select committee on the petition of John Joseph Lawson, for the production, on a trial for libel, of certain evidence taken before a select committee of this house having been read,

Lord Lyndhurst said, as this was a question connected with the administration of justice, he had thought it to be his duty to bring the matter before their lordships; and more particularly, as, if their lordships agreed with the report, it would lead to the commission of a very great act of injustice. It appeared that in the last session of Parliament a committee of their lordships was appointed to inquire into the state of New Zealand. Witnesses were called and evidence was given, and on that evidence a report was made to their lordships. On application being made for that purpose, that report was communicated to the House of Commons. It was ordered to be printed, and, under the authority of the House of Commons, that report was printed, and circulated, and sold throughout the whole country, by Mr. Hansard, the printer to the House of Commons; and, in consequence of the nature of the subject, it had a most extensive circulation. Now, persons who conceived their interests to be deeply affected by that report, who felt that that report reflected on their character, had done that which they conceived they had a right to do; they made certain observations on that report—a report so printed, so distributed through the country, and so extensively sold. To make those observations intelligible, they did what any one would have done under similar circumstances—they cited a small portion of the evidence; and in consequence of that an action was brought against the printer who printed those observations. That printer, in consequence, justified, according to the legal phrase, that was, he undertook to prove the truth of everything which he had printed. On that plea of justification issue was joined. The Attorney-General was counsel for the defendant, and said—"It is true this report was printed and circulated throughout the country—it is true that it is a matter of perfect notoriety—it is a matter which no man disputes—but it is necessary, according to the strict rules of evidence, that the original evidence given by the witness should be produced and proved by an officer of the House of Lords." Accordingly, application was made to the Chief Justice of the Court of Queen's Bench for time to allow an opportunity for making an application to their lordships' house, to permit the appearance and examination of their officer. The application was acceded to, and the trial was

postponed. The Attorney-General said then, and he repeated now, that unless this evidence were allowed—that if their lordships refused to admit this evidence to be given, there was no defence to the action, although the existence of the evidence was notorious and indisputable. This evidence was clearly necessary to enable the petitioner to substantiate his defence; and application was humbly made to their lordships to let their officer attend at the trial. The petition was referred to a committee of their lordships, and their opinion was, that the prayer of the petition should not be granted. Now, he must say that he could not see any possible ground of justification that could be given for this refusal. After considering all the objections against the production of this evidence—after all he had heard on the subject—he was still of opinion that there was no validity in such objections—that there was no just reason for coming to such a conclusion. What was the object of their lordships' privileges? Was it not that justice might be effectually done, and not thwarted and defeated? But, then, another objection was raised, which was founded on that question of privileges. "The petitioner has violated your lordships' privileges, and, having done so, he has no right to come here for justice." What privilege of their lordships was violated? One of their standing orders set forth, "That no person shall print, or publish in print, any proceedings of their lordships' house, or anything relating to such proceedings, without the leave of the house." It was said, that the petitioner had violated their privileges by infringing that order, and on that the report of the committee was founded. It would be proper to inquire what were the privileges of the House of Commons, and by what rules they were guided and directed. Their rules were the same as their lordships'. They considered their privileges to be as important as their lordships considered theirs, and they guarded them as strictly as their lordships guarded their privileges. Yet he found that a case occurred in 1820 of a description precisely the same as the present. He found this entry on the journals—"House of Commons, 12th July, 1820. Ordered, that the shorthand writer who attended the police committee in 1817 have leave to attend at the trial of 'Lee v. certain magistrates of the county of Middlesex,' with the minutes of evidence given before the said committee in 1817." So that the House of Commons readily granted an application of this nature. The House of Commons did not consent to the prayer of all such petitions; they also maintained their privileges; but in the case to which he had alluded the other house of Parliament, feeling it necessary for the ends of justice, allowed the petition of the applicant. It had, however, been said that the present case was different from that which had come before the House of Commons; but in what did that difference consist? It had been said that the applicant to the House of Commons had not violated the privileges of that house,

and that the present applicant had by printing a portion of evidence taken before a committee of their lordships' house been guilty of a breach of privilege. The application made to their lordships was this:—their lordships were themselves a court; they were judges of the highest court of judicature in the nation; and here was a cause dependent in the court below, and which could not be fairly decided if their lordships refused the prayer of the petition. Would their lordships, therefore, sanction an unjust decision? Would they resolve that the sentence of the court below should be given on imperfect evidence? Would they consent to an act of great injustice by withholding their consent to the prayer of the petitioner? He could not believe that their lordships would be induced to sanction injustice, and therefore, but with all deference, he submitted that the prayer of the petitioner ought to be granted. (Hear, hear.)

The *Lord Chancellor* said, in questions of privilege it was not an individual which their lordships had to consider, but what they had to consider was, whether it was for the interests of the country, and whether it would tend to promote the business of the house, to prevent the publication of any portion of their proceedings. As far as the individual was concerned, he would have been glad to give him every possible facility of proving his case, but the applicant had not set forth the necessity for granting the prayer of his petition, and whether it was necessary that the evidence prayed for should be put upon the record their lordships had no knowledge. The petitioner stated the facts regarding the report made by the committee. He said—"That in the last session of Parliament your lordships appointed a select committee to inquire into the state of the islands of New Zealand. That the evidence taken before the said committee was, pursuant to your lordships' order, printed, and was communicated to the House of Commons, and was by that honourable house again printed, and has been, and still is, sold at various places in London. That an article was printed and published by your petitioner in *The Times* newspaper on the 6th day of November, 1838, on the subject of a company called the New Zealand Associationists, in which the evidence of Joel Samuel Polack and John Downing Tawell, two witnesses who were examined before the said committee, was quoted, and certain comments made thereon." The petitioner then stated that an action had been brought against him on account of the publication of a portion of the evidence taken before the New Zealand Committee, and that to that action he had pleaded a justification, and that Polack and Tawell did actually give before the committee the evidence on which the action was founded. He said further, that in commenting on the case, the evidence of those two persons was quoted, and he then stated, that he was advised that it was indispensably necessary for the ends of justice that the original examination should be given in, and that it should be produced at the trial.

Now it was said, that the evidence had been taken before a committee of that house; that it had been communicated to the House of Commons; and that it was then printed and sold at various places. But it was not stated that it was sold by the direction of the House of Commons, and that fact ought certainly to have been set forth. The only ground on which the petitioner came forward was, that he had printed evidence taken before a committee, and having done so, and an action having been brought against him in consequence, and having pleaded a justification, he prayed their lordships to enable him to prove the evidence taken before the committee. The party making the present application, and who had violated the standing orders of the house, asked their lordships to overlook his offence, and to enable him to prove the evidence which had been taken before the committee by the attendance of their officer in the court below. But as the case stood it was entirely by itself, and there was no precedent for granting such an application, and it was, therefore, for their lordships to consider whether they were to dispense with the standing order, and allow the prayer of the petitioner, who asked for protection for a violation of their privileges.

Lord Brougham had never certainly held a clearer opinion on any point of law, or on any point of privilege, than that which he held on the question before their lordships. The argument on which the application was refused was founded on this:—It was said that the party in the present case having fallen into difficulties in consequence of a breach of privilege, he could not come to that house and ask for protection. Now, in the first place, admitting it to be true in point of fact, that the action was brought in consequence of a violation of the standing orders, that in making the evidence public the party acted illegally—he would ask whether it could be held right or proper, or whether it would show common sense or consistency, to allow a decision to be given in the court below without the whole of the evidence being set forth? Their lordships were every day accessories after the fact to such breaches of privilege, and it was for their benefit that they were committed. They paid the reporters, they opened their galleries to the reporters, in order that they might the better commit the offence which they were now to visit upon the present petitioner. But there was another thing to which he must call attention. Privilege could not go into desuetude, but condonation was known to the law, and evidence might be published either by assent or consent. If they allowed every day of the year persons to do certain things, and all the debates and the reports to be published, had not the printer a right to say that he had their consent, when no objection was started in the house to such proceedings? He came now to the next part of his argument, and he would deny that the case before the house was a breach of privilege. What was the language

of the standing order? It said that no portion of their proceedings should be printed without leave, and he should now prove that the applicant had leave. The law did not say that leave should be given on petition direct to the house, and he should now show that leave had been obtained to publish the evidence taken before the New Zealand committee. The House of Commons had sent a messenger to that house requesting the evidence, and the noble and learned lord himself, or his other noble and learned friend, he did not know which, they were *Arcades ambo*, must have gone down to the bar and received the messenger. A question must then have been put by one or other of the noble lords, a vote must have been passed, and on the journals there must still exist an order granting the evidence which had been asked for by the House of Commons. He hoped the noble and learned lord would be able to show that the evidence had been granted on condition that the House of Commons should make no use of it, that it should be printed only for the members, and that it should not be sold. But here came another party and opened a libel shop, and knowing all that, and aware of the House of Commons being a partner in a libel shop, and not a sleeping partner but a most active partner, for they had made a rule that all their proceedings should be published and sold, they yet refused the prayer of the present applicant, and said that no leave for the publication had been obtained. When the House of Commons obtained the evidence, by their own rules they had a right to publish it, and they had not only authorized it to be published, but they had also directed it to be sold. Lord Coke had said of privilege, "Omnibus quesita multis ignorata paucis cognita," but he might in these days say of privilege, "Omnibus invisa, multis infracta paucis cara." (Hear, hear.) But if privilege was odious in itself, it was still more odious to draw it out as an argument in a case like the present, when they would not venture to make a motion of a substantive character asserting it. Their lordships should, moreover, recollect that the House of Commons had sanctioned the publication of their proceedings. Mr. Lawson had bought the report at the Commons' shop, the money had gone into the Commons' purse, and the Commons had thereby given him leave to make what use he pleased of what he had bought. He therefore maintained that the argument failed not only in point of fact, but in point of law, and that no breach of privilege had been committed either against the House of Lords or the House of Commons. His noble and learned friend said that the defendant might have gone to trial upon the general issue alone. But the defendant had the assistance of a counsel extremely learned and astute, a great champion of privilege, one who was not likely to plead a justification, if the general issue would have sufficed, and who had not only advised upon the case, but had settled the plea: he alluded to the Attorney-General.

But the Lord Chancellor seemed to think that it would have been sufficient for the defendant to deny that he was actuated by any malicious intention or motive. But the defendant could not have pleaded that, for it would have been struck out upon special demurrer, since the law of England said, although he could not concur in its policy, that if a man were charged with publishing a libel, the malicious intention was absolutely and entirely immaterial, and if the publication was dictated by the blackest motives, in order to gratify the most infernal spite which raged in the bosom of man or fiend, yet, if the words were true, the intention was utterly immaterial. That was the rule of the law, and consequently no man could allege on the record that he was not actuated by malicious motives. He would refer to two cases—"The King v. Creevy," and "the King v. Abingdon," in which it was agreed that a breach of privilege was committed if speeches made in either house of Parliament were published, unless leave was given by either house. In the case of "The King v. Creevy," which was tried at the Lancaster summer assizes in 1813 before Mr. Justice Le Blanc, Mr. Creevy had made a speech in Parliament reflecting upon an individual, and he had afterwards published that speech. The party assailed, considering that it was necessary to clear his character, preferred a bill of indictment against Mr. Creevy, which was afterwards removed by *certiorari* to the Court of King's Bench. There were, of course, two questions to be submitted to the jury, and one of them was, whether Mr. Creevy ever made the speech in Parliament at all, or whether he had not invented the speech and published it afterwards. Now, if their lordships refused Mr. Lawson the privilege which he sought, it would go to the jury that he had fabricated the report, and that no such evidence had been given before a committee of that house. But in the case of "The King v. Creevy," in which he was counsel, he tendered a witness, a member of the House of Commons, to commit a breach of privilege, according to the argument now used, by saying what passed in the House of Commons on the occasion when the speech was made, and no objection was raised to that course by Mr. Justice Le Blanc, or the Attorney-General for the county palatine of Lancaster, the late Mr. Justice Park. He, however, was ultimately obliged to make an application to postpone the trial for a week because of the sudden death of the sister of the member whom he had called as a witness. The court, however, called on the Attorney-General to avoid the delay by admitting that the printed speech was the same as that delivered in the House of Commons. This was all that was wanted here; but if their lordships refused this application, not one of them could publish his speech, or even go to a public meeting and say that he had heard another of their lordships say so and so, but it must go to the jury that the speech was fabricated, because then he would be guilty

of a breach of privilege. If this was to be the rule they were determined to act upon, it would be better to say at once, "Let there be no reporting; we open the house to the public; we enable every person to publish our proceedings, but let no man dare to do so." It would be better to act thus than to imitate the conduct of the Empress Catherine when she professed her anxiety to prove to her subjects that the murdered Peter had not the marks of the cords round his throat. The body was laid out in public, all were invited to inspect the corpse, but bayonets were held to the breast of any man who came near enough to see.

The house divided, when there appeared—
For the motion 31
Against it 18
Majority for the motion . —13

Law Reports.

QUEEN'S BENCH.

Hilary Term.—Special Jury.

REGINA v. THE BIRMINGHAM RAILWAY COMPANY.

Mandamus.—Joint Stock Companies—their liability to make good and sufficient new roads in the place of roads they may destroy,

This was a writ of *mandamus*, commanding the defendants to make a sufficient road in lieu of one they had destroyed in the parish of Pinner, leading between Stanmore and Uxbridge; the defendants returned that they had done so, and issue was joined. It appeared that before the railway was made there was a road leading from Stanmore to Uxbridge, which was 40 feet in width, and that this was the great road used for taking sheep and cattle from the west of England to Norfolk and Essex. The company, having power by their Act of Parliament to divert public roads for the purpose of making their railroad, stopped up this old road, and made another some distance from it, and built a bridge over their railway. This new road, however, was only 27 feet wide, and the viaduct, which was 50 feet in length, was within parapet walls, which were only 16 feet apart, and the company, in order to save the expense of embankments, had continued their parapet walls to an extent of 156 feet, the width being only 16 feet, and had in other respects made the road very inconvenient.

Lord DENMAN stated to the jury that there were three issues for them to decide—first, whether the company had made a good and sufficient roadway, as convenient as the old road, and as there could be no doubt that a 27 feet road could not be so convenient as one of 40 feet, that issue must be found for the Crown: the second issue was whether the road was as good as what the Act of Parliament required; in his Lordship's opinion the road ought not to have been narrowed in the way

represented, that issue would therefore be for the Crown: the third issue was whether the company had a right to extend the parapet walls, and his Lordship was of opinion they had not a right to do so, because, if they might extend their walls 156 feet, there would be no limit to their power, and they might continue them as far as they pleased.

Verdict for the Crown.

COURT OF EXCHEQUER. Feb. 20.

Sittings in Equity.

Before Mr. Baron ALDERSON.

BARRINGTON v. EVANS.

Priorities of Bond—covenant and judgment creditors.

This cause was heard upon further directions. The bill had been filed by the plaintiffs on behalf of themselves and all other the specialty creditors of the late Sir Watkin Lewes, for payment of their debts from his estates. The judgment creditors had claimed before the Master priority over the bond and annuity creditors. The assets had proved insufficient to pay all these creditors in full, hence the present question arose for the decision of the Court which was, which of three classes of creditors were entitled to priority—viz., the judgment creditors, the covenant creditors, or the bond creditors.

Mr. Baron ALDERSON said he thought the judgment creditors were entitled to the priority which they claimed. It seemed to him also that the annuity creditors were under the peculiar circumstances entitled to the same relief as the judgment creditors, the proper deduction being made. As to the bond creditors, the question was whether, under the framing of the bill and the course of these proceedings, the judgment creditors had not waived that priority to which otherwise they would have been entitled? He thought not. The bill in substance prayed that the assets might be divided by a due course of distribution, and that all the creditors might be admitted to receive the amount of their claims *pari passu* with the judgment creditors, under the reasonable expectation of all being paid in full. He however thought, under the actual circumstances, that the claims of the bond creditors must be postponed until the claims of the judgment creditors had been satisfied. As to the covenant creditors, they were only entitled to come in *pari passu* with the bond creditors. He therefore thought that the claims of the bond creditors and the covenant creditors must be postponed till after the judgment creditors.

Michaelmas Term, 1838.

ARCHER, GENT. ONE, &c. v. GARRARD.

Attorney's Bill and certificate to practise—whether an attorney who has taken out his certificate at any time within a year from the expiration of his last certificate, such new

certificate has relation back to the expiration of his former one, and he is entitled to make charges for business done during the time he was without a certificate.

This was an action for an attorney's bill, tried at the sittings after last Trinity Term, before Lord Abinger, and issue taken on a plea of tender. Verdict for defendant.

Mr. Erle obtained a rule to shew cause why upon payment of such sum as may have been advanced (if any) by defendant to Richard Babington, her attorney up to the 27th June last, together with the costs of such business to be taxed by the master, incurred in the defence herein, and done before the 15th of November, 1837, all further proceedings should not be stayed on the Postea.

Mr. Platt shewed cause—The Court will not make this rule absolute. The application is premature, the attorney not being of the Rolls, nor would he be until a year after the expiration of his certificate to practise for 1837. The affidavits disclose that he took out his certificate, January 2d, 1837, therefore the year would not begin to run by which he would be off the Rolls until November 15th following. In fact, he would not be disabled from practising until November 15, 1838. Paterson v. Powell, 9 Bing. 620, 2 Moore & S. 773; Bowler v. Brown, 3 Dowling, P. C. 80, 2 Adolp. & E. 116, 4 Nev. & M. 17.

PARKE, B.—There are numerous authorities to the contrary, how can an attorney recover costs without a certificate to practise?

Mr. Platt—It is held in *Bowler v. Brown*, that the certificate, taken out at any time within a year from the expiration of a former certificate, has relation back to all business done by the attorney, and he is entitled to his full costs during the time he was without his certificate, unless the neglect to take it out was wilful.

PARKE, B.—The case of *Bowler v. Brown* has been much doubted; all the authorities are the other way.

Mr. Platt—The cases disabling attorneys from recovering costs apply to where the attorney is off the Rolls, and not where he is without his certificate only.

PARKE, B.—The same principle must be applied here.

Mr. Platt—The statute evidently refers to where an attorney is off the Rolls, that he shall recover no costs.

PARKE, B.—Do the affidavits allege that the client has made any advances?

Mr. Platt—It appears money has been advanced.

LORD ABINGER—*Paterson v. Powell*, which you cite, is against you, for the proceedings of the attorney there are not only not recoverable, but void.

Mr. Erle, in support of the rule—The authorities are numerous for making this rule absolute. It is contended that an attorney must be off the Rolls before you can deprive him of his right to recover costs for business done by him during such period; that is not

so, it would be unreasonable and unfair to the respectable practitioner if it were. The Statute of 37 Geo. 3, c. 90, s. 26, and 54 Geo. 3, c. 144, s. 14, expressly states that the certificate to practise shall in all cases expire on the 15th November, without any reference to the day on which it was taken out; but if taken out before the 16th December, it will have relation back to the 15th November, and protect the attorney from penalties incurred before that time for having practised without a certificate. If however the certificate is not taken out until after the 16th December, it will have relation only to the day on which it issues. The case cited against this rule of *Bowler v. Brown* has been very much doubted, and will have no weight. *Paterson v. Powell*, also cited, is in favour of the rule. *Meekin v. Whalley*, 1 Bing. Rep. N. P. 59. 2 Dowl. P. C. 823. 4 Moore & Scott, 494.

PARKE B.—There is also a decision of Mr. Justice Coleridge, *Young v. Dowlman*, 3 Young & Jervis 24, to the same effect.

Mr. Erle—In the case of *Meekin v. Whalley* much argument had been used, and all the authorities are carefully reviewed. The Court of Common Pleas there deprived the attorney of his costs, no advances having been made by the client. The Statute contemplated the year began to run against the attorney on the 15th November, giving him the interim between that and the 16th December to renew his certificate, and if he did not renew it within that period he was off the Rolls. This seems evidently to have been the meaning of the Statute from the circumstance of a month being given for that purpose. The attorney, in this case took out his certificate, January 2, 1837, which expired November 15, in the same year: no other certificate was taken out until July 8, 1838. There had been therefore a lapse of nearly 19 months, from the date of the former certificate. The same view was taken in *Meekin v. Whalley*, which is a precisely similar case to this.

PARKE, B.—There is no doubt. The attorney could not recover these costs of his client.

Mr. Erle—There is no statement in the affidavits, that the defendant has made any advances whatever, but on the contrary, although it has been alleged the affidavit does contain such a statement.

LORD ABINGER.—This rule must be made absolute, we are bound to give effect to the Statute.

PARKE, B.—There is no doubt this rule should be absolute. It seems there is some dispute as to whether the affidavits in answer to the rule distinctly state what advances have been made by the defendant; let the Master look into them, and say what sum is therein stated to have been advanced, the costs of the enquiry to be paid by the plaintiff, as it is for his relief.

GURNEY, B. concurred.
Rule absolute.

PREROGATIVE COURT.

In the Goods of JAMES CLARK, deceased.

New Will Act, sec. 9, 15—Will signed by another person for a testator in his presence, and by his direction, and attested by the wife of the testator, who was executrix and a legatee, as also by another person. Whether the will is valid, and the wife a good witness to prove it?

The deceased James Clark, it appeared just before his decease, sent for the clergyman of the parish in which he resided at Warfield, Berks, and requested him to prepare a will, which he did, and at the testator's request, signed it on his behalf, thus, "Signed on behalf of the testator, and by his directions, by me, C. T. F., Vicar of Warfield, Berks," and the testator acknowledged the signature in the presence of his wife and mother, who attested the will. The wife was appointed executrix, and was also a legatee under the will.

The question was, whether the requisites of the 9th section of the act has been complied with. It was admitted that under the 15 sec. the wife's legacy was void.

Sir H. JENNER said, the statute does not say in distinct terms, that the testator *must sign* the instrument; but that it may be signed by another person in his presence, and by his direction. This is the signature of a will by another person, by the direction of the testator, and acknowledged by him in the presence of two witnesses present at the same time, who subscribed the will in the presence of the testator. I am inclined to think that this is a sufficient compliance with the requisites of the 9th sec. of the statute. The wife's interest under the will is void, though contrary to the express intention of the deceased.

Probate decreed.

INSOLVENT COURT.—March 7.

CASE OF FREDERICK SHACKLEFORD.

Abolition of Imprisonment for Debt Bill.

SEC. 118.

This insolvent, three years since, had filed his petition, and had remained in prison ever since, for want of funds to proceed upon it. Recently the Drapers' Company had advanced 5*l.*, and the commissioners of this court had made an order for 5*l.* to be paid to the attorney in the case, out of the unclaimed dividends in court, under the 118th section of the recent act of Parliament. It appeared that no funds had yet accumulated from the unclaimed dividends under the act, and Commissioner Law said the order should be carried into effect as soon as there should be funds; at present he could not assist the attorney.

The insolvent was ordered to be discharged.

SEC. 36.

CASE OF THOMAS WYNDHAM JONES.

Operation of the Statute upon a vesting order under this section, where the debtor subsequently pays his detaining creditor as to holding the prisoner in custody for his other creditors.

This case involved a point of law upon section 36 of the statute.

Thomas Wyndham Jones was confined in Chester castle, and his detaining creditor had applied for and obtained a vesting order, after which Mr. Jones had paid the debt and costs of his detaining creditor, and applied to the Court to annul the vesting order.

Mr. Smith, another creditor, (but not a detaining creditor) afterwards applied to the Court to continue the vesting order for the benefit of the other creditors, and that he might be appointed assignee.

Mr. Woodroffe, for Mr. T. W. Jones, contended that it would be an act of oppression to suffer the vesting order to remain in force after the payment of the debt of the party by whom it had been obtained.

Mr. Cooke, for Mr. Smith, said, the vesting order was for the benefit of all the creditors, and that an assignee ought to be appointed to give effect to the power vested in the Court.

Mr. Commissioner Law said, it would be a fraudulent operation of the Act of Parliament, if a vesting order were to be dismissed on the payment of the debt of the detaining creditor. He would give Mr. Jones an opportunity of showing cause; but, he was not disposed to relinquish the power vested in the Court.

Rule nisi was granted for the assigneeship.

CENTRAL CRIMINAL COURT.

March 8.

Counsel for prosecution—Question of employing counsel for the prosecution in all cases where counsel was retained for the defence of prisoners, and where the evidence was contradictory.

This question was mooted between the Bench ad the Bar.

Lord Chief Justice TINDAL said that in all cases where the evidence was contradictory, counsel should always be employed for the prosecution.

Mr. C. Phillips said, he felt the full force of the remark, and before the Prisoners' Counsel Bill was passed, he suggested to the committee of the House of Commons, that justice would in many instances be defeated by it. The Corporation of London had the power of employing counsel for the prosecution, but in consequence of the niggardly rule which they acted upon, no gentleman at the bar would think it worth his while to hold a brief under such circumstances. He had done all he could to oppose the passing of the bill in question, foreseeing the evils to which it would give rise.

Mr. Justice VAUGHAN.—And we did all we could to oppose it also.

Lord Chief Justice TINDAL said, that the question of employing counsel for the prosecution was one of great consequence, and if the learned counsel had anything to suggest upon the subject, the Court would be glad to hear him in private.

The corporation of London allow only one guinea with a brief for a prosecution, and two guineas should the case occupy a whole day.

ASSIZES.

NORTHERN CIRCUIT. March 5.

Before Mr. Baron PARKE, and a Special Jury.

DIXON v. SADLER.

Insurance.—Whether it is negligence generally in the Captain of a ship throwing out ballast while at sea?

This action was brought against the defendant, an underwriter at Lloyd's, to recover the amount of an insurance on the schooner John Cooke, the property of the plaintiff.

The defendant pleaded first the general issue; secondly, that the ship was not lost by the perils of the seas; thirdly, that she was lost through the wilful, wrongful, negligent, and improper conduct of the master and mariners, in wilfully, wrongfully, negligently, and improperly throwing overboard her ballast, whereby she became unseaworthy. The fourth plea was similar to the third, avowing, however, the improper conduct to have been on the part of the plaintiff himself.

The schooner, a new vessel, was in May, 1837, on her voyage from Rotterdam to Sunderland. She left Rotterdam on the 15th of May, and was off Seaham about ten o'clock on the 19th. She had taken a pilot on board about eight o'clock; the weather then being very fine. The wind freshened, however, as the morning advanced. The tide being then too low to enable the vessel to reach the port of Sunderland, the captain employed his men until the tide should rise in throwing the ballast overboard, the vessel then lying under a double reefed mainsail and a reefed topsail. They threw over about fifteen tons, being one half of what the vessel had brought from Rotterdam. They then proceeded to wear the vessel, and for this purpose hoisted the fore-top mast staysail, but while in the act of wearing she was taken by a sudden squall and thrown on her beam ends. Her anchor was let go, for the purpose, if possible, of bringing her head to the wind, but it did not hold. The crew then took refuge in the pilot's coble, and thence got on board a steamer, which came out on seeing the accident. They remained in the neighbourhood of the John Cooke for some time endeavouring to tow her into port, but all their endeavours were ineffectual, and she finally sunk. She afterwards

drifted ashore at Ryhope, and became a total wreck. She was abandoned to the underwriters. Her materials realized about 119L.

Evidence was given to shew that it was the almost universal practice of vessels going into the port of Sunderland to throw overboard a part of their ballast at sea when the weather was such as to permit it; and, in point of fact, at the time of the accident, seven or eight vessels in the immediate neighbourhood of the John Cooke were engaged in a similar operation, but the captain stated that had he anticipated such a squall as actually took place he would not have thrown the ballast overboard; and the pilot deposed that had the ballast been on board the loss would not have taken place.

His Lordship left it to the jury to say, whether they thought it negligence generally to throw over the ballast while at sea. The jury decided this in the affirmative. They also found that the owner was aware of such being the captain's practice, but had not given him any directions to do so on this particular occasion. A verdict passed, therefore, for the defendant, except on the last plea, averring negligent conduct on the part of the "plaintiff himself," his lordship being of opinion that that plea rendered it necessary to prove, either that the plaintiff was present and directed the act, or had given express orders respecting it to the captain with a view to that voyage.

HOME CIRCUIT.

SPRING ASSIZES.

Chelmsford, March 6.

KING, WIDOW v. EDWICK & ANOTHER.

Statute of Limitations—Feme Covert becoming discovert and claiming land, pleading her disability during Coverture, the husband making no claim during his life—Liability of the persons in adverse possession during the ouster of the feme for 25 years to mesne profits.

Evidence was given by Mr. Henry Ashley, attorney for the plaintiff, and Mr. George Brown his clerk, of the judgments obtained upon the ejectments, and that due search had been made for the will of John Wood without success.

The action was brought to recover the sum of 400L being the amount of the profits of an estate of which the two defendants, Mrs. Ann Edwick and Mr. William Edwick, her son, had received the profits for a period of twenty-five years and ten months. The plaintiff, Mrs. Mary King, was the illegitimate daughter of a man named Woods, who was seized of certain copyhold land and cottages at Thorpe-le-Soken, in Essex; and being so seized made a will by which he devised that property to the plaintiff. In his lifetime

Woods had a housekeeper residing in his family named Mary Smith, and the plaintiff was the offspring of that person. In order to make his property available, Woods surrendered it to the use of his will, and shortly after making his will in November, 1781, he died. At the time of his decease he resided at Thorpe-le-Soken, and Mary Smith, the mother of plaintiff, remained there for two years after that event. She then removed to Harwich, and having lived there a short time married a person named Lappidge. When the mother went to Harwich, plaintiff was only a year or two old, and she continued to reside with her parent there until her own marriage with Enoch King, which took place before she had arrived at the age of 21 years. That marriage occurred in 1799. By the will of Mr. Woods, he appointed an executor of the name of Philip Hempson, who was allowed to receive the rents by the husband King. In 1801, Hempson accounted for the profits he had received before and since the marriage, and continued to receive the rents for a short time afterwards, when Enoch King was desirous of receiving them. In 1812, the two defendants came forward and laid claim to the property. The jury would see that from 1781 to 1801, the rents had been received for Woods, and the executor under his will, and then to 1812, by Enoch King himself. Then the Edwicks came forward, and threatening the tenants, continued to get the rents and profits until they were turned out. It was for the amount of those profits then from 1812, that he (Mr. Platt) claimed a verdict. Enoch King was the rightful owner of those rents during his life, but if he had never demanded them, his wife had the right of claiming them. He died in 1835, and upon his death, his wife could act for herself. After her husband's decease she made claim to that which was hers by the devise of her father; but found that the defendants were determined to keep the property. It was necessary, therefore, to bring an action of ejectment to turn them out; and four ejectments were accordingly procured in January, 1837; they were tried at the Spring Assizes last year, when the title was gone into and examined, and the Jury, under the direction of the learned judge, found a verdict for this lady, Mrs. King, reinstating her in possession of the property, and the whole four cottages. Judgment was procured, in consequence of that verdict, on the 6th of April, 1838. On the 1st of January, 1837, the title was in Mary King, and if that were the case, so long as they were in possession of the property, they would be responsible to the owner for the profits upon it. From the 1st of January, 1837, then, to April, 1838, when judgment was recovered, gave a period of fifteen months, about which there could be no dispute; for this they said 15*l.* were sufficient; and they pleaded that the Statute of Limitations had settled the matter so far as the profits received prior to Nov. 1832, were concerned. But they made a little mistake about this plea, because they had

taken the 1st of November, 1832, as the commencement of the six years. This would not answer, however; for, looking at the Record, they would see that the action was brought on the 7th of June, 1838, so that the six years must be counted back from that time, and not from the 1st of November—thus there would be five months not covered. In reply to this plea, inasmuch as the plaintiff was a *feme covert*, her rights could not be asserted by herself, and as her rights attached to her within six years, and her husband died in 1837, the Statute of Limitations was beside the case. In the outset of his address, he (Mr. Platt) had stated under what Mrs. King had derived her right to the property, viz. the will of her father. In the district of Thorpe-le-Soken, there was a peculiar, in which wills were proved and deposited, of parties not having property out of that district. There was also a Registry at Chelmsford as well. A search had been made for the will in the Prerogative Courts in London, in the Registry at Chelmsford, and in the peculiar of Thorpe-le-Soken; also the papers of the Manor Court were searched, in order to discover the original will. Woods, on his death, had no other property than that which he had devised to his daughter; and it was supposed that the executor having gone to the Manor Court for the purpose of presenting the will and claiming the admission of Mary Smith, might have left the will at the Court. From the Court rolls it appeared that the executor, Mr. Hempson, appeared in Court Baron and claimed, with that will, that Mary Smith should be admitted tenant of the property. She was admitted accordingly. Nobody opposed her; and this, at the former trial, was thought to be quite sufficient proof of the will. Search for the will had also been made among the executor's papers, but without success.—The following evidence was then adduced:

Abraham Mayne, 70 years of age—I lived in one of the four cottages at Thorpe nineteen years. I have left about four years. I paid 4*l.* a-year rent. I took two pear trees and paid 1*l.* a-year for them for some years. I paid my rent to Mrs. Edwick, sometimes to Henry Edwick. They lived in Suffolk.

C. J. Parker, Esq., the Registrar appointed for the Commissary Court of the Bishop of London, for parts of Essex and Herts, and of the Archdeaconries of Chelmsford and Essex, examined. Thorpe-le-Soken is exempt; but I do not know that it is a peculiar. I have no jurisdiction. If a person brought me a will devising property which was in Thorpe-le-Soken only, I should not accept it; but send it to the Prerogative Court of Canterbury. If there were a court of that Commissary, that would be the proper place to send it.

*Verdict, by consent, against Mrs. Edwick—Damages 12*l.**

LIST OF SHERIFFS, UNDER-SHERIFFS, AND DEPUTIES FOR WALES, 1839.
(Concluded from p. 302.)

NORTH WALES.

<i>Counties.</i>	<i>Sheriffs.</i>	<i>Undersheriffs and Deputies.</i> <i>Office hours, the same as Seal Office.</i>
Anglesea	J. Greenfield, of Rhyddgaer, Esq.	Mr. William Jones, of Llangefui— <i>Deputies</i> , Messrs. Weeks and Gilbertson, 12, Cook's Court, Linc. Inn.
Carnarvonshire	J. Williams, of Hendaegadno, Esq.	— David Williams, Pwllheli— <i>Deputy</i> , Mr. Hyde, 33, Ely Place.
Denbighshire	Sir John Williams, Bodlewyddan, Bart.	— C. W. Wyat, of Saint Asaph— <i>Deputies</i> , Messrs. Bloxam and Co., 2, Lincoln's Inn Fields.
Flintshire	John Offley Crewe Read, of Hawarden, Esq.	— Charles Walter Wyatt, of Saint Asaph— <i>Deputies</i> , Messrs. Bloxam and Co., 2, Lincoln's Inn Fields.
Merionethshire	The Honourable Edward Mostyn Lloyd Mostyn, of Plashen	— D. Breese, Llanlyllan— <i>Deputy</i> , Mr. R. V. Williams, 38, Hatton Garden.
Montgomeryshire	David Hamer, of Glanrafon, Esq.	Messrs. Longueville and Williams, Oswestry, Salop; J. Owens, of Newton, Acting U. S.— <i>Deputy</i> , Mr. William Deane, 16, Essex Street.

SOUTH WALES.

Breconshire	John Lloyd, of Duias, Esq.	-	Mr. Henry Maybery, Brecon— <i>Deputy</i> , Mr. Ullithorne, 26, Red Lion Square.
Cardiganshire	The Honourable George Lawrence Vaughan, of Cwmnwydion	-	— Horatio Hughes, of Aberystwith— <i>Deputies</i> , Messrs. Hawkins and Co., New Boswell Court.
Carmarthenshire	John Edward Saunders, of Glanrhydw, Esq.	-	— John Budden Jeffries, Carmarthen — <i>Agents</i> , Messrs. Clark and Medcalfe, 20, Lincoln's Inn Fields.
Carmarthen (County of the Borough of)	G. Philipps, of Carmarthen, Esq.	-	— Lewis Morris, of Carmarthen — <i>Agents</i> , Messrs. Chilton and Acland, 7, Chancery Lane.
Glamorganshire	Charles Henry Smith, of Gwernllwynwith, Esq.	-	— Charles Basil Mansfield, of Swansea — <i>Deputies</i> , Messrs. Hornidge, Carter and Voules, 16, Bloomsbury Square.
Pembrokeshire	Gilbert William Warren Davis, of Mullock, Esq.	-	— James Summers, Haverfordwest— <i>Deputies</i> , Messrs. Jones, Trinder and Tudway, 1, John Street, Bedford Row.—Hours same as Cambridge-shire.
Radnorshire	Henry Lingen, of Penlausley, Esq.	-	<i>Deputies</i> , Messrs. White and Whit-

Warrants are granted in Town except for Canterbury; the Cinque Ports; Southampton, and Carmarthen.

REVIEW OF NEW BOOKS.

THE PRACTICAL MAN, or *Pocket Companion*
for Solicitors, Valuers, and Surveyors
of Property; containing a large
Table, Calculating the Value of
of Professions, &c. Several
queries, and other useful
information, may be had
of the Author, at his
Shop, in
the Strand, near
the Royal Exchange.

thematical portion extended so as to give a COMPLETE SYSTEM OF PROPERTY VALUATIONS, embracing Freeholds, Copyholds, Advowsons, Successive Presentations, Rent-charges, and Common Leaseholds, Annual Fines, Beneficial Values, Copyhold Enfranchisements, Tithe Commutation, Rent-charge, present and absolute, re-deferred, determinable, or on the number of joint lives orships, and including many

values never before made public. London: Published by Richards and Co., Law Booksellers and Publishers, 194, Fleet Street.

This is a useful little practical volume for general purposes, and for all persons in business; the title of the book is quite long enough to shew the nature of its contents. The author tells us that this edition aims at something higher than the first edition, the object of which he tells us was concentration, or the giving within a small compass a body of information, which, though attainable on reference to the library, was likely to be wanted when reference could not be made. The present edition, he says, aims at—the embodying a system of rules and tables enabling any person acquainted with common arithmetic, to ascertain the value of all the more complicated interests in property capable of mathematical solution. The third part of this edition, he says, is altogether of a different class from the property valuations in the first edition, being the result of an attempt to embody within forty rules and twenty-four tables, a complete system of property valuations, applicable to all the more complicated interests in property, and yet so simplified that any man of common information may use them.

TO CORRESPONDENTS.

"A. J. H."—Cannot do as he wishes; he will obtain every information upon the subject by applying at the office of the treasurer of any Inn of Court; his postscript is answered fully in p. 175, of this work.

"B. H. T."—We request that in all future communications the postage be paid.

"A Subscriber."—We do not profess to answer cases and pay for the communication.

"J. E. R. Camden Town."—We think such conduct very disgraceful, but we should be overstepping the line, we have drawn, by taking notice of it.

"H. D. M," see the errata.

"C.J., Huddersfield."—His communication has been received, and shall have attention. He will find the same Problem answered in this number by another correspondent. We are glad to see that very

many have been encouraged to the same end by our exertions. We wish to see Attorneys what they ought to be—LAWYERS.

"Tyro."—We would cheerfully oblige you; we however conceive that it would be most presumptuous in us to lay down a formula for the profession. Have we not said sufficient in p. 151., as a guide in the absence of any judicial rule.

We are very sorry at being compelled to announce to all correspondents, that we have resolved to pay no attention to UNPAID COMMUNICATIONS. We claim merit for some respect and courtesy.

TO SUBSCRIBERS.

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This Paper will be forwarded, postage free, to any part of the United Kingdom, to Annual Subscribers. Subscriptions, 1*l.* 10*s.* for the year, to be paid in advance.

ERRATA.

Page 300, List of Sheriffs, Cornwall—in the column for Undersherriffs and Deputies, an intended foot note is placed.

Page 293, in the 10th line from the bottom, 2nd column, for "indeed the word heirs" read "in a Deed the word heirs."

*Just published, price 2*s.**

THE LEGAL GUIDE.

PART 4, containing Nos. 14 to 17, both inclusive, with Table of Contents to the whole. This Part contains Original Essays on the Laws relating to Real Property, and a Letter to the Lord Chancellor, upon the doctrine of the Court of Equity in relation to property settled to the separate use of Unmarried Women, with the view of proving that the doctrine held for the last century is as old as the days of Elizabeth, and that the doctrine referred to by his Lordship, in hearing the appeal case, Tullet v. Armstrong, is an innovation made by the House of Lords, which the Judges at the time were in direct opposition to.

Part 5 will be Published on the 1st of April.

JOHN RICHARDS & CO., 194, Fleet Street.

Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 16th March, 1839.

Price 6*d.* Stamped Edition, 7*d.*

The Legal Guide.

No. 21.]

SATURDAY, MARCH 23, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from page 308.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

WE will continue to shew, in what manner the Courts are disposed to give effect to this New Statute of Limitations. It will be seen, that the statute has been held to be *retrospective*, and that it attributes to *past possession*, of the quality, it contemplates the character and consequences of *adverse possession*. The following case determined, that where the possession was not *adverse* at the time of the passing of the statute, a claimant is not barred by ss. 2 & 7, but is allowed five years from the passing of the statute by s. 15, notwithstanding the twenty years have expired.

This case (*a*) occurred in the court of King's Bench, in Michaelmas Term 1836, on a motion for a new trial of a cause that was tried at the Cambridge assizes, 1836, before Tindal, C. J. The following were the facts proved at the trial.

The lands in dispute were partly copyhold and partly freehold; the lessors of the plaintiff were devisees in trust of all the premises, under the will of William Thompson; and the defendant was the eldest son of James Thompson, deceased, who was

the eldest son of William Thompson. The will was proved; and it appeared that the copyhold land was part of the manor of Ely Barton, which is a manor belonging to the See of Ely; that the lessors of the plaintiff had, after the death of William Thompson, sold it to Susannah Thompson, who had been admitted on the 22nd of April, 1835; and that she had afterwards made a surrender of it to the lessors of the plaintiff, to be void on her payment of 4*l.* and interest upon a day named. The lessors of the plaintiff were admitted in pursuance of this surrender. This admission was produced, and purported to be made on the 19th July, 1836, at the special court baron of the Right Reverend Joseph, Lord Bishop of Ely, Lord of the Manor of Ely Barton, in the county of Cambridge. It appeared, further, that James Thompson, the son and heir of the devisor, William Thompson, and father of the defendant, had occupied all the premises sought to be recovered for more than twenty years before his, James's death, which took place in February, 1831.

William Thompson died in September, 1833. Upon James's death, his widow continued in possession of the lands for some time, when the defendant took possession, which he has ever since held. It was admitted that William Thompson was absolute owner of all the premises, unless the occupation above mentioned barred him. *The jury found expressly that James Thompson held and occupied the lands for more than twenty years before, and at the time of his death, but that the possession was*

(a) Doe dem. Burgess and Harrison v. Thompson, 5 Adolph. & Eliz. 532.

not adverse to William Thompson ; and *the plaintiff had a verdict* for all the premises.

A motion was made for a rule to shew cause, why a *nonsuit* should not be entered, or a *new trial* had, on the ground that in respect to the copyhold property, there was no title in the lessors of the plaintiff at the time of the trial, (which point was not taken at the trial;) and with respect to the whole property, it was contended that *the possession not having been adverse*, James Thompson in his lifetime, and the defendant since, were tenants at will; so that the title of William Thompson had accrued more than twenty years before the action; (statute s. 7.) and that the plaintiff was, therefore, barred by sect. 2; and that if it should be contended on the other side, that sect. 15. gave the right of recovering for five years from the passing of the act; then, first, the "acknowledgment" mentioned in that section would be a complete determination of a tenancy at will; and, secondly, a tenancy at will could not be an "adverse" possession. Therefore, that section did not control the 7th, but provided only that mere lapse of time should not bar a recovery, till five years after the passing of the act, when the possession has not been adverse: it left the legal rights of the parties in other respects as they were before. But that the defendant, even on this supposition, was not a trespasser, but still *tenant at will*; as the devise by the owner of the fee, being an act done off the land without notice to the tenant, was not a determination of the tenancy; Co. Litt. 55 b. Com. Dig. Estates, (H. 6.); and that the action, therefore, was brought too soon, there having been no notice or demand of possession. The motion was made on the ground that the verdict was against the weight of evidence. *Cur. adv. vult.*

Lord Denman, C. J. in delivering the judgment of the court said, it was also contended that, under stat. 3 & 4 W. 4. c. 27. ss. 2 & 7, the possession of twenty years, by James, barred the devisees. But the jury have found that the possession was not adverse to William the testator; and, as the action is brought within five years after the passing of the statute, the proviso of the

fifteenth section saves this right—and the rule was refused.

This case subsequently, in Easter Term, 1837, came before the court in another shape. James Thompson, the defendant in the last action, brought an ejectment against the widow Susannah Thompson, which was tried before Parke, B., at the Cambridge-shire Summer Assises, 1835, and the declaration then stated—That in 1807, William Thompson being tenant in fee of the premises in question, put his eldest son James in possession of them; which possession James kept till 1831, when he died. His widow, the present defendant, had continued in the occupation ever since. William Thompson died in September, 1833, having devised all his real property to trustees. The lessor of the plaintiff was the eldest son of James Thompson, and claimed as his heir at law.

It did not appear that William Thompson or the devisees had made any entry before December 31st, 1833.

The Jury found that James Thompson, the father of the lessor of the plaintiff, was tenant at will to William Thompson in 1807, and that no rent was paid to, or profits received by William for twenty years from that time. A verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff, and in the ensuing Michaelmas Term, a motion was made accordingly, (a) and a rule nisi was granted.

Upon shewing cause against the rule, it was contended that the last mentioned case had already decided that sec. 7. of the statute did not bar the action in such a case as this, because by sec. 15. where the acknowledgement mentioned in sec. 14. should not have been given before the passing of the act, and the possession at the time of the passing of the act should not have been adverse to the right of the party claiming title, then, although the twenty years before limited should have expired, such party might bring an action to recover the land at any time within five years next after the passing of the act.

(a) Doe dem. James Thompson v. Susannah Thompson, 6 Adolph. & Ellis, 721.

In support of the rule it was argued that sec. 7. operated upon the by-gone transactions; and its effect is, that from the expiration of twenty years after the end of the first year of James's tenancy the right of William was as much barred as if there had been a possession adverse to him for twenty years. If sec. 7. did not operate retrospectively, it was asked what need would there be of sec. 15., which exempts certain cases from that retrospective operation? (*Coleridge, J.* observed, it has the effect of extending the time for bringing actions where less than five years of the twenty were unexpired when the act passed.) It was answered that at all events, the section operated only in favour of the real owner, or the party claiming under him. But for sec. 15. the title of the lessor of the plaintiff would have been indefeasible by sec. 7. even as against them; and that it was so, notwithstanding sec. 15. as against every one else. At this part of the argument, the judges made the following observations:—

Patteson, J. James's holding was determined by his death in 1831, there is nothing to connect his possession with any title of the lessor of the plaintiff.

Littledale, J. The twenty years' possession after 1807 has nothing to do with the present claim. You might as well go back a hundred years.

Patteson, J. I do not mean to say that the twenty years must have expired since the passing of the act. Sec. 15. applies to persons who have been in possession so long, that if their possession had been adverse they would have acquired a title, but who have held under such circumstances that the doctrine of non-adverse possession would have prevented such a title from accruing. In those cases the right of action now subsists by sec. 15. for five years next after the passing of the act. I think that to make that section applicable there should have been a continuance in possession of the person who was in for the twenty years.

Coleridge, J. You admit that the devisees of William, the grandfather, might have turned out the lessor of the plaintiff if he had been in possession, but you say that

Susannah, the defendant, cannot set up that right in an action brought by him?

This was replied to in the affirmative, and that the lessor of the plaintiff contended the devisees themselves would have been concluded by sec. 2. and 7. but for sec. 15.

Coleridge, J. How does the defendants' case differ from that of a party setting up an outstanding term?

To this it was answered, that the lessor of the plaintiff had an estate under ss. 2. and 7. defeasible only by sec. 15., if the real owner interfered. That in the case put, the termor had an actually subsisting interest in the term. That the words of ss. 2. and 7. extended to the case of a party out of possession, where the real owner had done nothing to recover it.

Patteson, J. It would be strange to give such an effect to the clauses as that a tenant at will, who has given up possession, should afterwards, by the passing of this act, be deemed to have acquired a right to turn out his landlord. I think that no case is contemplated in which the tenant at will was not actually in possession when the act came into operation.

Lord Denman, C. J. The monstrous consequences which would result from the construction insisted upon, shew that it was not contemplated. According to that construction, whenever a party had held as *tenant at will for a year*, and had then continued in possession twenty years without paying rent, he might at any subsequent time after giving up possession claim title to the premises and turn out his landlord. It cannot have been so intended. The rule must be discharged.

Littledale, J. The act in the clauses referred to must contemplate cases where the possession has continued. Otherwise a party might go back to an unlimited period of time for the possession on which his claim was to be founded.

Patteson, J. The case would have been quite different if the tenant at will had continued in possession. But here, after the possession has been long determined, it is contended that a fee simple arises by the passing of the act. That cannot be.

Coleridge, J., concurred, and the rule was discharged. (a)

The result of this determination is, that no title can be acquired under the by-gone possession of a tenant at will.

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XVIII.

What is an Estate in Parcenary?

WHERE lands descends to two or more persons, they are said to hold in coparcenary, or (for brevity) parcenary.

This estate arises either by the common law, or by custom.

By the common law, where a person is seized of an estate of inheritance, and dies leaving only *female issue*, the land descends to them jointly, and is thus expressed by Bracton, B. 2. c. 30.—“Parceners by law are, the issue female which (there being no male heirs) come in equally to the lands of their ancestors.” And by the same law, if there be no issue, then the next heirs, where they be females, such as the sisters, aunts, cousins, &c., take in the same manner.

Parceners by custom are, where the male children take by gavelkind and other customary descents, where the lands descend in equal moieties, and in either of these cases, the parceners make but one heir, and have but one estate among them; 2 Bl. Com. 187.

An estate in coparcenary is somewhat similar to that of joint-tenancy; parceners having the same unities of interest, title, and possession; and as they make but one heir, they have but one entire freehold in the land, with respect to the præcipe of strangers. Co. Litt. 163. b. 169. b. 2 Cru. Dig. 391. But in some instances they differ very materially from joint-tenants, for parceners always take by descent, and never by purchase, as is the case in joint-tenancy; so that no estate can be held in coparcenary, but such as are of a descendible nature.

Although coparceners have an unity, they have not an entirety of interest, and have in judgment of law, as between themselves, distinct freeholds; consequently there is no “*jus accrescendi*,” or right of survivorship between them, for each part descends severally to their respective heirs; though the unity of possession still continues. But whenever the possession is once severed, they are no longer parceners, but tenants in severalty. Or if one parcener alienes her share, though no partition be made, the lands are no longer held in coparcenary, but in common; Litt. s. 309.

The possession of one coparcener was, until very recently the possession of the other; but by the 12th section of the 3 & 4 W. 4. c. 27., it is enacted, “that the possession of one of several coparceners, joint-tenants, or tenants in common, shall not be deemed the possession of the others.” The entry of one, when not adverse, was considered the entry of all: Doe v. Pearson, 6 East. 173. And it is laid down by Lord Coke, that “When one coparcener doth specially enter, claiming the whole land, and taking the whole profits, she gains the one moiety (viz.) of her sister, by abatement, and yet her dying seised doth not take away the entry of her sister. Whereas, when one coparcener enters generally, and taketh the profits, this shall be accounted in law the entry of them both, and no divesting of the moiety of her sister.” Co. Litt. 243. b. But in the note to this passage, and which is taken from Lord Nottingham’s manuscripts, it is said—“The contrary is held; that one coparcener cannot be disseised without actual ouster: and claim shall not alter the possessions.” Smale v. Dales, Hob. 120.

Where one coparcener enters claiming the whole, and makes a feoffment in fee, and takes back the estate to her and her heirs, has issue, and dies seised; the right of entry was taken away by this descent, because the privity of the coparcenary was destroyed by the feoffment. Co. Litt. 243. b. This doctrine was also admitted in the case of Davenport v. Tyrrell, 1 Bl. R. 675. But by the 3 & 4 W. 4. c. 7. s. 39., it is enacted, “That no descent cast, discontinuance, or

(a) See Doe dem. Corbyn v. Bramston, ante, p. 257.

warranty, which may happen, or be made after the 31st day of December, 1833, shall toll or defeat any right of *entry*, or action for the recovery of land.

This estate may be destroyed by devise or alienation, and it then becomes a tenancy in common. Litt. s. 309; 2 Bl. Com. 189; or by partition, 2 Cru. Dig. 466; which might have been compelled by writ of partition, before such writ was abolished by the 3 & 4 Wm. 4. c. 27. s. 36; or by bill in Chancery, which was the most usual, and is now the only way. A tenant by courtesy might have had a writ of partition pursuant to the 32 Hen. 8. c. 32.

There are several methods of making partition, (I) as described by Littleton, four of which are by consent, and the other by compulsion; the first is where the tenants agree to divide the lands into equal parts in severalty, and that each shall take a particular part. The second, where they agree to choose some friend to make partition for them, and then they choose according to the seniority of age, or in such manner as is agreed upon; but if the eldest dies leaving issue, such issue does not choose first, but the choice falls upon the next, and so on; because the privilege of seniority does not descend, but is merely personal; except in the case of an advowson being in coparcenary, and the paroonees cannot agree in the presentation, then the eldest and her issue, nay her husband and her assigns, shall present alone before the younger. Co. Litt. 166; 3 Rep. 22; and the reason given is, that in the former case the privilege of seniority arose from her own act, namely, the agreement to make partition. But in the latter it arises by the act of the law, and is annexed not only to her person, but to her estate also.

The third manner of making partition is where the eldest divides, and then she chooses last, for the rule of law is "*cujus est divisio alterius est electio.*"

The fourth method is, where the coparceners agree to cast lots.

That by compulsion was, where one or

more sued out a writ of partition against the others: but this writ being now abolished, as I have before shown, the only method now left of enforcing a partition is by bill in equity.

In those cases where some of the premises are not capable of partition, as for instance, the Mansion House, Common of Estovers, Common of Piscary, or any other common without stint, the eldest may take them, and make the others a reasonable compensation in other parts of the inheritance; or if this cannot be, then they must have the profits of such things by turns, in the same manner as they take the advowson. (II) Co. Litt. 164, 165.

A partition does not have the effect of revoking a will. See *Luther v. Kirby*, 8 Vin. Abr. 148; *Knollys v. Alcock*, 7 Ves. 566; 2 Prest. Abs. 72.

Under the General Inclosure Act, 41 Geo. 3. c. 109. the commissioners may, on the request of tenants in coparcenary, allot the same in severalty.

Coparceners of offices may execute the offices by deputy. *Buckingham's Case*, Dyer 285 b. 1 Inst. 165 a.; *Lady Willoughby's Case*, 2 Bro. P. C. 146.

This estate is subject to courtesy and dower; but dower must be assigned in common, for the widow cannot have it in a different manner from her husband, 2 Cru. Dig. 394.

And, lastly, estates in coparcenary are destroyed by the whole at last descending to one of the coparceners, which brings it to an estate in severalty.

HENRICUS.

Middle Temple, March 16th, 1839.

PROBLEM XXI.

WHAT DO CORPOREAL HEREDITAMENTS CONSIST OF?

(II) Which is thus—the eldest sister takes the first turn, the second the next, and so on with the remainder. *Plow. 333. 1 Bac. Ab. 693.—Ed.*

(I) Coparceners cannot exchange with each other till partition.—*Ed.*

Imperial Parliament.**LEGAL BUSINESS.****HOUSE OF COMMONS.****ENGLAND.****March 19.****County Courts Bill.**

Mr. Hawes moved that no bill for the recovery of small debts be committed until after Easter. He observed, that there were a great many bills connected with this subject before the house, and that it was most desirable to see a principle of uniformity established. If the County Courts Bill should pass that house, he presumed that none of these bills would be proceeded with. The hon. member concluded by moving "That the order to commit any bill for the recovery of small debts be discharged, and that no such bill be committed until the 8th day of April next."

Lord J. Russell could not speak as to the probability of any general bill passing this session; but he must say that the parties who were pressing forward these separate bills could hardly say they had not had fair notice of the intentions of the Government upon the subject, since the principle of the bill intended to be proposed by Government had been stated last year. The only question was, whether it was expedient or not for Parliament to allow a number of separate bills to be proceeded with while a general measure was under consideration. Some words had fallen from an hon. member opposite which seemed to imply that the matter was one entirely for the consideration of the parties themselves, and that the separate measures ought to pass if those parties were willing to incur the expence. But, inasmuch as the different bills were very varied in their provisions, and in many respects were very objectionable, and had, in fact, been objected to by the Attorney-General, the question was not really of so narrow a kind as the hon. member imagined. According to one of those bills the court was to have the power of imprisoning for 20 days, while according to another, affecting a place at a very small distance from that affected by the first, a power of imprisoning for 60 days was given under precisely the same circumstances. If Parliament were to pass a number of bills so at variance with one another, it would be taking a very unusual course. He should therefore support the motion of the hon. member for Lambeth.

Carried without a division.

March 20.

Double and Treble Costs—Plea of General Issue—Limitation of Actions. (a)

This bill was read a second time, and ordered to be committed, Wednesday, April 17.

(a) See ante, p. 278.

ROLLS COURT—March 12.

BITTELL, *Formā Pauperis*, v. TURNLEY AND OTHERS.

Voluntary Settlement—Necessity for proof that it was properly executed and not obtained by fraud.

In this case the bill filed by the plaintiff stated, that in 1774, the plaintiff's father, David Bittell, married Mary Jackson, by whom he had one son, the plaintiff, and two daughters, Sarah, the wife of Evans, the defendant, and another daughter, who married a Mr. Harley. Mr. Jackson, David Bittell's father-in-law, many years ago conveyed three freehold houses at Westerham, in Kent, to his daughter, Mary Bittell, in fee, and there she and her husband lived until January, 1835, when they were taken by the defendants, Mr. and Mrs. Evans, to reside with them, with whom they remained until they died. The bill charged that Evans and his wife possessed themselves of his title-deeds to the Westerham houses, received the rents, took advantage of the age of Mr. and Mrs. Bittell, who were 90 and 85, and with the assistance of Turnley, caused them to execute the deeds sought to be cancelled—viz., a lease and release of the 6th and 7th of January, 1835, by which they conveyed the houses to Turnley and his heirs upon trust, after the decease of David and Mary Bittell, to sell them, and out of the purchase-money to pay the plaintiff 10*l.*, and to stand possessed of the residue in trust for the defendant Evans and his wife. David Bittell died in September, 1835, and his wife died in January, 1836, leaving the plaintiff their only son and heir. The premises formed the whole property of Mr. and Mrs. Bittell, and had ever since the death of Mrs. Bittell, been in the possession of Mr. and Mrs. Evans.

The defendants were Mr. Joseph Turnley, a solicitor, James Thomas Evans, and Sarah his wife, the daughter of David and Mary Bittell, and Messrs. Palmer and Harvey, who were trustees.

The bill prayed a declaration of the Court, that the lease and release of the 6th and 7th, January, 1835, had been fraudulently obtained, and be delivered up to be cancelled.

Lord LANGDALE said, those who obtained from individuals of the age of Mr. and Mrs. Bittell a voluntary deed, exposed themselves to the necessity of making out that the deed was properly executed. One of the grounds stated for relief was, that the parties who executed it were not of sound mind, or at least that their understandings were so impaired by age, that they were to a great degree exposed to undue influence, and liable to be persuaded into executing deeds without knowing their contents. If the parties were

of unsound mind, the deeds were void, and the plaintiff, as heir to his mother, would have a right to recover at law, and his relief was not in this Court. His relief here was only by showing some equitable fraud which could not be made known by a court of law. With respect to the competency of mind and the nature of the transaction, these things appeared:—Mary Bittell complained to a person of the name of Alexander, that the conduct of her son (the plaintiff) towards her was very bad, and that he and her grandson abused her, on which Alexander advised her to go to Turnley. She accordingly went by herself to Turnley, and expressed her dissatisfaction with the conduct of her son and grandson. Mr. and Mrs. Evans went afterwards to Turnley, who refused to receive from them instructions respecting the disposition of the property, but said he must see the Bittells themselves. They went accordingly to him, and instructions for the deed were from time to time given. Those first given were not ultimately adopted. One of the propositions was to convey the houses after the decease of Mr. and Mrs. Bittell to Evans, subject to the payment of 50*l.* to the plaintiff. This sum was afterwards reduced to 10*l.*, and the deed was prepared, and Mrs. Bittell, being a married woman, appeared and acknowledged the deed before the commissioners, who gave their certificate in the usual form. Credit must be given to that certificate. After this Mr. and Mrs. Bittell resided with their son-in-law and daughter, but there was nothing extraordinary in that. Soon afterwards, Bittell died. There was not a surmise of any improper conduct whilst they lived with the Evanses at Kensington. After Bittell's death, Mrs. Bittell would have been absolute owner of the property had it not been for the deed which she and her husband executed. Mr. Turnley had removed to Ipswich, and his remote residence made it inconvenient for him to remain trustee. Mrs. Bittell directed new trustees to be appointed, and showed in her communication with the solicitor who prepared that deed a perfect understanding; she perfectly knew what was done, and approved of it. She afterwards died, and then the dispute arose. There was evidence irresistibly preponderating that Mrs. Bittell was a careful shrewd person, not subject to be improperly influenced. The evidence was different with regard to her husband, who was five years older, but it was not so strong as to show that he was not of understanding. There was no evidence of any undue influence—or any direct fraud. The chief evidence was that which appeared in the instrument itself, which ought to have had a clause of revocation, but he did not think, on that account, it should be set aside. The plaintiff was not entitled to relief. The plaintiff had been offered the 10*l.* provided for him by the deed, but had refused to accept it.

The plaintiff's counsel disclaimed taking the 10*l.*

Lord LANGDALE.—The plaintiff is not precluded from bringing an action at law, but this bill must be dismissed.

March 15.

ENGLAND AND WIFE v. DOWNES AND OTHERS.

Practice—Husband and Wife—Whether a wife beneficially claiming, under a settlement upon her, made before her marriage, should not file a bill by her next friend, and her husband be made a defendant.

In this case it appeared that Mason, a brewer at Bristol, died, leaving his widow and three children (one of whom was Mrs. England) surviving. Mrs. Mason, the widow, afterwards married Broad, but before the marriage she conveyed the property which she derived from her first husband to Downes and Alexander, in trust for her own separate use for life, with remainder to the separate use of her children by her first husband, Mason. Mrs. Broad, the mother, afterwards died, and Mr. and Mrs. England, on behalf of Mrs. England, who claimed under the settlement, filed the present bill against the trustees of the settlement, and also against Broad, for an account of the settled property, and for a transfer of Mrs. England's share. The defendants, by their answer, contested the validity of the settlement. Mr. Tinney took a preliminary objection for the defendants, the trustees, that the suit was improperly instituted, for that the party beneficially claiming, Mrs. England the wife, should not have joined with her husband, but should have filed the bill alone by her next friend, and that her husband should have been made one of the defendants; and for this he relied upon some recent decisions, and he said, that in a late case there had been an appeal to the Lord Chancellor, in which the same point arose, which was not yet determined.

Lord Langdale said, he would not dismiss the bill. The wife of the complainant ought to be at liberty to amend by making the husband defendant, and filing the bill herself by her next friend, her husband giving security for the costs of the suit (a).

A wife being entitled to her *sole* use, her husband joining with her as co-plaintiff, is in the nature of a *prochein ami*; but where the claim is by the husband, the wife should sue with another person as *prochein ami*, making her husband a defendant. *Laird v. Tobin*, 1 Molloy, 543. See *Griffith v. Hood*, 2 Ves. 542. In all suits by *femes covert* it is necessary that the husband should be a *substantive* party, as the wife's claim to separate estate is against the *jus mariti*. By

(a) See *Head v. Head*, 3 Atk. 547.

joining the wife as co-plaintiff, the husband admits the statement in the bill, that it is the separate property of his wife, and this will answer the purpose of making him a defendant. *Smith v. Myers*, 3 Mad. 474. See id. 174.—Ed.

QUEENS' BENCH.

Sittings at Nisi Prius after Hilary Term, 1839.

SPECIAL JURY.

BARSHAM v. BULLOCK.

Sheriff's Law.

This was an action against the Sheriff of Essex to recover three penalties of 50*l.* each, under the statute of 32 George II., intituled "An Act for the Relief of Debtors, as respects the Imprisonment of their Persons."

Sir F. Pollock stated, that the plaintiff was taken in execution, at the suit of a creditor, by a sheriff's officer, and conducted in the first instance to the house of the latter, and, as the officer was proceeding with the plaintiff to Chelmsford Gaol, he begged to be taken to a public house at Chelmsford instead of to the gaol, in order that he might make some arrangement with his creditor. Accordingly, the sheriff's officer conducted the plaintiff to the Saracen's Head, at Chelmsford, where an arrangement was effected with the creditor, and he was liberated. There were three counts in the declaration, grounded upon the enactments of the statute referred to, upon each of which the plaintiff now sought to recover the penalty of 50*l.*: first, that he was taken to prison within twenty-four hours from the time of his arrest; secondly, that he was taken to the house of the sheriff's officer without his consent; and, thirdly, that he was taken to a victualling house against his will, all of which are prohibited by the act, under penalties to be recovered from the sheriff.

The *Attorney General* submitted that the plaintiff must be nonsuited, inasmuch as the warrant from the defendant to his officer had not been produced.

Lord DENMAN, however, thought the case should go to the jury.

The *Attorney General*, for the defendant, contended that the plaintiff had not sustained any one of the counts in the declaration by evidence. He had not, in fact, been taken to prison at all, and he had not shown that he was taken to the house of the sheriff's officer without his consent; whilst, as respected the third count, it had been distinctly shown in evidence that he was taken to the public house at Chelmsford by his own express desire, in order to make an arrangement with his creditor, which he had effected, and he had consequently obtained his liberation.

Lord DENMAN thought there must be a verdict for the defendant on each of the two first counts, and for the plaintiff on the third count, as he must be considered as having

been under duress when he was taken to the Saracen's Head public house at Chelmsford.

The jury found accordingly for the defendant on each of the first two counts, and for the plaintiff on the third count.

POLACK v. LAWSON.

SPECIAL JURY.

Libel.

This action against the publisher of the *Times* newspaper was brought to recover compensation in damages for a libel alleged to have been committed in that paper, in an article imputing to the plaintiff that he had forsaken himself in certain evidence given by him before a committee of the House of Lords. The defendant put in a plea of justification.

Upon the application of the *Attorney General*, and finally by consent of the parties, the trial of the action was postponed, it being stated to the court that a motion was pending in the House of Lords, (a) for leave that the officer of their lordships' house should attend the trial and give evidence as to the minutes of evidence given in the committee, referred to in the defendant's plea of justification.

THOMPSON AND OTHERS, EXECUTORS OF WESTLAKE v. USBORNE.

COMMERCIAL CASE—BROKERS of the CITY OF LONDON—Custom as to theright of principals rescinding sales made by Brokers, where they do not approve of the parties—Practice of the City in regard to the fair dealing of Brokers as established by law.

This action was brought upon a contract, dated the 11th of November, 1835, made between Nevins, a broker employed by Westlake, and the defendant, for the purchase by Nevins of some oats, to be delivered by the defendant within six months. The defendant, however, shortly after the signing of the contract, refused to deliver the oats, as he objected to Westlake, whose name had not been mentioned to the defendant until after the contract was signed.

The declaration stated that the defendant had entered into the contract to sell oats, the payments to be, at the option of the seller, either in cash or approved bills. The defendant pleaded, first, *non assumpit*, that it was the custom of the city of London that when sales were made by brokers, their principals had a right to put an end to the contract, if they did not approve of the parties, and that the defendant did rescind the contract, and that the defendant was induced to enter into this contract by the fraud, covin, and representation of Westlake and others in collusion with him.

Lord DENMAN gave it as his opinion, that the evidence made it quite clear that the broker and Westlake were conspiring together to make the defendant, whether he would or not, through the medium of a broker, the seller to that man whom he had resolved not to trust

(a) See ante, p. 310.

again. If these two persons had conspired together, that was a fraud. He was of opinion that a broker of the city of London was bound to act impartially, according to the state of the market, both for the buyer and seller. He was not acting the genuine part of a broker if he allowed himself to join with that buyer to induce the seller to sell at a price he knew not to be just and fair. He apprehended that was the law upon the subject, and he trusted it would be the clearly established practice of the city of London : indeed it must be, so long as that city was anxious to retain that character for integrity which it had so long held. A broker took an oath to act fairly between the parties, but if he were to enter into a private understanding with either of them, it appeared to him that man was no longer a broker, but was making himself an instrument in the hands of one of the parties to the injury of the other. It appeared to him there was clear proof of fraud made out as between these parties, and if the jury were of that opinion they would find for the defendant.

Verdict for the defendant.

COURT OF REVIEW.—March 16.

OLIVER THOMAS JOSEPH STOCKEN'S BANKRUPTCY.

Petition of James Julius Stocken to stay the bankrupt's certificate—Practice—Order of 12th August, 1809 (a), regulating the signature and attestation of petitions—What is a sufficient attestation—Not necessary to allege in the petition that the certificate had been regularly allowed.

DOE DEM. SPILSBURY v. BURDETT, OVER- RULED BY COURT OF ERROR.

This petition prayed that a brewery and other property, situate at Walham-green, might be sold, or a moiety thereof, and the proceeds applied in paying the costs of this application, and in payment of a sum of 4,000*l.* due to the petitioner, the surplus to be paid into the Court of Chancery, or proof allowed in the event of a deficiency ; and that the certificate should be stayed until the Master should have made his report on the state of the accounts. The fiat in bankruptcy issued on the 21st of November, 1838.

Sir F. Pollock raised a preliminary objection to this petition, that he said he believed was fatal, and would therefore dispose of the whole case. The Order of August 12, 1809, regulated the signature and attestation of petitions. The word "witness" was prefixed to the signature of the solicitor, but this was informal, and insufficient to attest the validity of the petitioner's subscription.

Mr. Swanston opposed the objection, and said, the Court of King's Bench had decided in the case of "Doe dem. Spilsbury v. Burdett" that the word "witness" prefixed to the signature constituted a valid attestation.

Sir F. Pollock said this decision took place about two years since, and might, until recently, have been quoted in authority. *The Court of Error, however, sitting in the Exchequer Chamber, on appeal from the King's Bench, had about a fortnight ago reversed that decision.* The case might possibly be on its way to the House of Lords, but the decision quoted was solemnly upset, and it must at least at present be taken as the law of the land, that *an attestation must contain a reference to the matter attested*, such having been the opinion of the majority of the judges. That such a form was required in the practice of the Court of Review, he found alleged in Mr. Montagu's work on the *Law and Practice in Bankruptcy*.

The COURT held that the form of attestation was a rule for the convenience of the Court and subject to its discretion. The solicitor in question was present, and if it had been thought requisite, there would have been no injustice in allowing him to perfect the form.—*Objection overruled.*

Sir F. Pollock had a further objection, that the petition merely asked that the certificate might be stayed, without containing any allegation that any such document had been issued by the proper authority under allowance by the commissioner.

The COURT said, that if the certificate had not been, at the time when the petition was presented, lying in the office, it might have been a premature application, and fatal objection.—*Overruled.*

Sir J. Cross said the allowance of a certificate was a matter within the discretion of the Court, and if the present had been the first application of the sort, he should have been inclined to suspend the issue. But this discretion had been long subject to rules, and, without going into cases, it would be sufficient to say that the exercise of that discretion was restrained by the decisions on previous occasions. The certificate must be allowed.

Sir G. Rose said unless misconduct could be attached to a bankrupt during the period of his bankruptcy, the Court could not interfere. That part of the petition relating to the stay of the certificate must therefore be dismissed, and with costs. As to the other points, the petitioner was entitled to have his claim for proof admitted, in such amount as the commissioner on inquiry should think fit ; the assignees to be restrained from distributing the property until the claim should be adjusted ; the remaining costs to be costs in the cause.

(a) Lord Eldon's Order, 12th August, 1809.—"All petitions in bankruptcy, presented for hearing, shall, before they are presented, be respectively signed by the petitioners—except in cases of partnership or absence from the kingdom ; in the former of which cases, the signature of the partners is to be deemed sufficient ; and, in the latter case, the petition is to be signed by the person presenting the same, on behalf of the person so abroad."

"And it is further ordered, that the signa-

ture of each person, signing as a petitioner, shall be attested by the solicitor actually presenting the petition, or by some person who shall state himself, in his attestation, to be the attorney, solicitor, or agent of the party signing in the matter of the petition."

This Order will not be dispensed with unless under very special circumstances, verified by affidavit (1 Rose, 97). It was formerly held that this Order is sufficiently complied with by the signature of the petitioner being "authenticated" not "attested" by his solicitor, who had *not* witnessed the signature, but put his name to it from a knowledge he had of the petitioner's handwriting; the object of the Order being to secure the responsibility of a solicitor to the propriety of the application. See Exp. Titley, 2 Rose, 83; but that doctrine was overruled in Exp. Berry, (Buck. 393).

An objection to the attestation of a petition is not sustainable after an order has been already made upon it. Where such an objection is taken to the attestation of a petition for *supersedeas*, it may be amended *instanter*: but *not* if the petition is to stay a certificate. Where an attestation was in the following form, "Signed by the petitioners A. B. and C. D., in the presence of T. S., acting as solicitor for A. T., solicitor for the petitioners in this matter," and it appeared that A. T. was not a solicitor of the Court of Chancery: *semble*, nevertheless, that the attestation was good, the petitioners having appeared by counsel. See Exp. Tanner, 2 Dea. & Ch. 563. So it has been held that an agent in town may sign a petition for his principal in the country, the agent undertaking to be answerable for costs. See re Boldero, 1 Rose, 231; Exp. Stone, Buck. 255; but a petition to stay a bankrupt's certificate, attested by the solicitor's agent, was dismissed with costs. Exp. Hurst, Glyn. & J. 76. And a petition, witnessed by the agent of the attorney, who presented the petition, was held to be *not* a sufficient compliance with the Order. Exp. Weston, 1 Mad. 75; see 16 Ves. J. 320. So a petition, witnessed by the country attorney, as "solicitor for the petitioner," which was presented by the London agent, was held to be informal. *Quære tamen*, Exp. Rose, 1 Dea. & Ch. 554.

It is no objection that the solicitor "attesting" the petition is, at the time, *in prison*, as being within 12 Geo. 2. c. 13. s. 9. See Exp. Thompson, 1 Glyn. & J. 308.

The following attestation was held to be a sufficient compliance with the General Order. "I attest this to be the signature of the said A. C.—W. A. his solicitor in the matter of this petition." Exp. Caldecott, re White, Mont. & M'Ar. 433. And, unless the person "attesting" the signature, be the solicitor *actually presenting* the petition, he should state himself in the attestation to be the attorney, solicitor, or agent of the party signing in the matter of the petition. See Exp. Clapham, Mont. & M. 51.

If a petitioner reside in Scotland, his signature is sufficient, and the petition need not be

signed by an agent in England. Exp. Paul, re Monteith, Mont. 252. Petition of a person in Ireland must be signed by the petitioner. Exp. Cumming, Mont. 266.

The "attestation" must be to the name of the petitioner and not to the petition. See Exp. Cracklow, re Peel, Mont. 353.

A solicitor presenting a petition in *his own* behalf, the attestation required by the Order is *unnecessary*. Exp. Kingdom, 1 Mad. 446. But it must appear on the petition that he is a solicitor, and if it be to stay a certificate, it cannot be signed in court. Exp. Barrow, re Poile, Mont. 92.—EDITOR.

PREROGATIVE COURT.

WOOD & OTHERS v. GOODLAKE & OTHERS.

In the matter of the Will of James Wood Banker, late of Gloucester, deceased.

(Continued from p. 298.)

This was the statement which the executors undertook to prove; and it was impossible, if these facts were established, and no interrogatories had been addressed to the witnesses, that the papers could have been refused probate. But it did so happen that before the cause arrived at its termination, and the requisition for the examination of witnesses had been completed, a paper was produced which not only stopped the cause between the executors and Mrs. Goodlake, but gave a different character to the whole case. On the 8th of June, Mr. Helps received, by the threepenny post, a packet, containing the paper of July, 1835, which he immediately communicated to the executors. It was accompanied by a pencil writing to this effect:—"The enclosed is a paper saved out of many burnt by parties I could hang. They pretend it is not J. Wood's hand; many will swear to it. They want to swindle me. Let the rest know." The production of this paper gave a different character to the whole proceeding. Certain of the legatees propounded this paper, and a decree was taken out calling on all the next of kin to see proceedings; but no appearance was given for any but Mrs. Goodlake, who was already before the Court. The executors reproposed the papers as together containing the will, and re-asserted their allegation. The signature was proved, but Mr. Phillpotts, who made an affidavit in the first instance, was not now produced as a witness, as he was a party named in the codicil; but his answers were called for. The legatee brought in an allegation pleading circumstances to rebut the presumption of law against the codicil, and also showing misconduct and malpractices on the part of the executors, and alleging, amongst other things, that they had been guilty of a spoliation of papers, that the case set up by the executors was not true, and that the two papers were not annexed together at the time of their execution by the deceased, or sealed up by him, or by his direction, or

with his knowledge, in the envelope. The allegations were of a most serious kind, and, if true, were calculated to awaken the jealousy and suspicion of the Court, for they went to a direct falsification of the case set up by the executors. The imputations appeared to the Court so highly improbable and incredible, that it was with the greatest astonishment he (the learned judge) learned from the answers of the executors that a great part—a material part—of these allegations was founded in fact; for it appeared that the papers were not originally annexed together when executed by the deceased, and that they were not annexed till the morning of the 20th of April, 1836, when the deceased, though not actually dead, was admitted to have been utterly incapable of attending to business. It was also admitted that the papers of the 2d of December, described as "instructions," had been in the custody of Mr. Chadborn, the drawer of the paper, and that it had been taken from his house immediately on his arrival at Gloucester from London, enclosed in the envelope with the other papers, which had been in the possession of the deceased, and endorsed by Mr. Chadborn as "the will of James Wood, Esq., 2d and 3d of December, 1834," whereas it had been sworn that these papers had come from the repositories of the deceased in the plight and condition in which they were annexed together, Mr. Chadborn admitting in his answer that he, in the presence of Mr. Phillpotts, wafered the papers together on the morning of the 20th of April, enclosed them in the envelope and endorsed the same, sealing it with a seal bearing the testator's initials; and that the papers were then deposited in the bureau. All this, he states, was done under the advice and at the suggestion of Mr. Phillpotts, who, till the discovery of the codicil, acted as the legal adviser of the executors.

The admission of these startling facts implicated not only the executors themselves, but Mr. Phillpotts in an attempt to deceive the Court, in order to obtain probate of these papers on a false representation of facts; for though the affidavit of Mr. Phillpotts did not expressly swear that the papers were in the same plight and condition as when executed by the deceased, it was clear that such was the impression meant to be made on the mind of the Court. But for the mere accident of the production of the codicil, this attempt must have been crowned with success, for nothing but the appearance of that paper could have prevented it. If the witnesses on the *conditit* and Mr. Phillpotts had been examined, no suspicion could have been raised in the mind of the Court as to the *bona fides* of the transaction; and, under these circumstances, the Court felt very strongly the manner in which it had been treated by an attempt to set up a totally false case, and to surprise it into the granting of probate of these papers as together containing the deceased's will. But the case was much stronger against the instructions, which were followed by a will executed on

the next day; for nothing was more clear than that, according to all the decisions and principles of this Court, a paper of instructions was superseded by the execution of a will; that it was not the practice of the Court to pronounce for instructions as part of a will, though under certain circumstances the Court would permit omissions to be supplied from instructions; but it always required in such cases, in order to supply a deficiency in the will, not merely parol, but the evidence of the documents themselves; but he was not aware of any case in which instructions, dated a day before a regularly executed will, had been pronounced for as together containing the will of the deceased. If it had been alleged that by error or mistake the names of the executors had been omitted in the second paper, if the Court had had full and satisfactory evidence of the fact, it might have permitted the omission to be supplied; but it must have the most satisfactory evidence that such was the real intention of the deceased; and who could give that information? No one but Mr. Chadborn, who had been the drawer of the paper, giving himself a benefit of 200,000*l.* or 300,000*l.* But this was not the case set up, which was that it was no omission, but the intention of the deceased to incorporate these two papers together. It was therefore quite impossible for the Court to pronounce for the validity of the paper called "instructions." It had been asked in the argument what possible object could have been answered by attaching these two papers together, since at that time there could be no dispute as to the validity of the will. Why, that was the very reason why the annexation was made, to prevent opposition, and it would have been quite fruitless to have opposed these papers unless it could be shown that the affidavit as to the state of the papers was false. The evidence on the *conditit* would have proved the *factum* of the will; there was no doubt of the deceased's capacity, and if the papers came from the repositories of the deceased in their present state, probate must have been decreed. It had been said that Mr. Phillpott's affidavit might have been an inadvertent act, and that no care or caution had been used in drawing it. He (the learned judge) was of a different opinion; it was a most important affidavit, and was calculated to carry into effect the avowed intention of the parties, and to obtain a probate in common form, and he could not think that it originated in a want of caution, if Mr. Phillpotts was cognizant of the whole of what had passed. But he thought Mr. Phillpotts could not have been cognizant of all that had been done, and Mr. Chadborn, who had been a solicitor for 25 years, would hardly have had recourse to Mr. Phillpotts for advice as to what he should do with these two papers in the situation in which they were prior to the morning of the 20th. He therefore did not feel himself in a condition to declare that the charge against Mr. Phillpotts had been proved, of having made this affidavit with a full knowledge of all that had actually taken place in regard to

these papers. The utmost extent to which he believed Mr. Phillpotts to be implicated in the transaction was, that in their journey from London on the night of the 19th, Mr. Chadborn might have said to him that he had a paper in his possession which was a part of the deceased's will, and Mr. Phillpotts might have thrown out that it ought to be annexed to the other part. But as far as Mr. Chadborn was concerned, he knew all the facts; he had the paper of the 2d of December in his possession, and he knew that the paper of the 3d was in the possession of the deceased; he knew (for his conduct showed it) the necessity there was for these two papers being annexed together in such a manner as to show they were parts of the same will; he knew the state of the deceased on his arrival, and he admits that he annexed the papers together and enclosed them in the envelope, which he endorsed without the authority or knowledge of the deceased. How were Mr. Osborn and Mr. Surman implicated? Mr. Osborn knew that the papers were not annexed at the time of execution, and that they were not enclosed by the deceased in the envelope; and Mr. Surman was also aware of these facts. With regard to the fourth executor, he did not appear to be cognizant of all that took place. He stated, that he was present at the time when the other executor states that he annexed the papers, but that he was otherwise engaged and did not observe it. It might very probably be that this gentleman was ignorant of what took place; but though morally acquitted of the guilt of this fraud, he must be legally responsible for the acts of the other executors, and all were bound by the consequences of their conduct. Then what effect ought this conduct to produce on the mind of the Court? It ought to place the Court on its guard at least in receiving explanations from parties who had conducted themselves in such a manner. Mr. Chadborn and the other executors had sworn that he had no improper motive in annexing these papers; but the Court cannot but think it was done to facilitate the obtaining probates of these papers, and to get possession of the property on a false representation of facts which it had no means of detecting, and so far from its being a case in which the Court ought to presume anything in favour of the executors, it ought on the contrary to presume everything against them. Notwithstanding the conduct of the executors, however, it would be still competent to them to prove, as they had pleaded, that the deceased at the time of execution published these papers as together containing his will. The second paper was supposed to refer to the first, but it did not necessarily follow that the instructions mentioned therein were the instructions of the preceding day, more especially as the disposition was in some respect different. But supposing the former paper to be referred to in the second paper, the execution of this paper was a supersession of the former.

The learned Judge then went through the evidence of the subscribed witnesses to

the paper of the 3d of December. As no interrogatories had been addressed to these witnesses by Mrs. Goodlake, he observed, although their evidence in chief was somewhat equivocal as to the existence of another paper, yet, coupled with the affidavit of Mr. Phillpotts, it would have induced the Court to admit the papers to probate. But when the legatees under the codicil were before the Court, they administered interrogatories to the witnesses (though not without some opposition on the part of the executors, whether from an apprehension that the witnesses would not stand the test of cross-examination, or that some glimmering of light would be thrown on the conduct of the executors), and when interrogated, all the witnesses distinctly deposed that they saw no other paper than that of the 3d of December, and that the deceased did not publish both papers as his will. If any witnesses could negative a case, these witnesses, on their cross-examination, had negatived the important allegation of the executors, that these two papers were published and declared by the deceased as altogether containing his will. It had been argued that the two papers must have been before the deceased, for that the latter by itself conveyed no interest to any person; but that was no presumption that that paper was there. Mr. Chadborn, when the paper of the 3d was executed, was summoned from a dinner-party in a hurry, and was not likely to have brought the other paper in his pocket. But on the face of the paper itself there was no corroboration of this suggestion, for the words were all in the singular number—"I declare this to be my will," not this paper and the paper of instructions, "in witness whereof, I have to this my last will set my hand." So that, from the terms of the paper itself, there is a presumption that he did not intend the other paper to be embodied. Upon the failure of direct evidence, another species of proof was had recourse to—that the disposition was extremely probable. Three of these gentlemen were in no degree related to the deceased; the other was the son of Mrs. Goodlake, and therefore a second cousin once removed. Alderman Wood appeared to have been an intimate friend of the deceased, who had a great regard for him. He had been introduced to the deceased by his sister, about 1820, and after 1824, they had become very intimate; it was therefore extremely probable that he would have given a very considerable proportion of his property to him. With respect to Mr. Chadborn, nothing was more probable than that he would have been appointed as executor. He had been his confidential solicitor for many years, and had managed his whole estate, and there were declarations ascribed to the deceased that Mr. Chadborn had given him his services gratuitously, and that he would put him in a corner of his will. The deceased's opinion of Mr. Chadborn's disinterestedness did not appear to rest on very solid grounds, for, though he did not make out a bill of

charges, he kept a regular entry in his books of his attendance and services, and had since his death sent in, as a set off to claims against him, a bill for services rendered to the deceased to the amount of between 2,000*l.* and 3,000*l.* With respect to the other executors, there was no improbability, rather the contrary, in their being benefited by the deceased's will. But these were mere grounds of probability—they went no further—they did not lead to the act of disposition. The learned judge then considered the declarations attributed to the deceased, which he considered loose and vague, or improbable, or inapplicable, or as intended to parry impertinent questions, or to quiet the apprehensions of those who kept money in his bank, lest on his death there should be no administrator of his effects. He was of opinion that the executors had failed in establishing the paper of the 2d of December as part of the testamentary disposition of the deceased, and he pronounced against it. This being the case, no person before the Court had an interest in propounding the paper of the 3d of December, for the sole interest of the supposed executors depended on the paper of the 2d, and that being pronounced against, their interest was disposed of, and both Mrs. Goodlake, and Mr. Hitchings, opposed the will. There only remained the paper of July, 1835, which had come to light in so mysterious a manner. There was nothing in the amount of the sums bequeathed by this paper, or in the persons named as legatees, which was improbable, considering the immense property possessed by the deceased; nor was there anything on the face of the paper to excite suspicion with reference to its contents. It had been produced in a mysterious manner, and that circumstance and the non-appearance of the writer or transmitter of the paper, notwithstanding large rewards had been offered, threw a difficult burden on the legatees. The letter which accompanied the paper suggested a charge against some persons or other of an atrocious character—namely, an attempt to burn this paper along with others. Who the persons were the Court had no means of exactly ascertaining; but, from the plea, the charge seemed to point to the executors, or some person connected with them. There was, therefore, nothing to support this paper but the evidence of handwriting, and it was admitted that the Court could not, on the evidence of handwriting alone, pronounce for the validity of the paper: there must be something to connect it with the deceased. The rule was binding on the Court; for though the legatees laboured under these disadvantages, and though they alleged that this paper had been rescued from destruction, there was no proof of this, and the Court could not act on conjecture only. The circumstances stated in the allegation were of some importance, and this had induced the Court to allow some latitude of plea to the legatees. They alleged that the executors had free access to the repositories of the de-

ceased, and had ample opportunity of destroying or suppressing papers, and it had been admitted by them that one paper had been destroyed by Mr. Chadborn, acting upon the advice of Mr. Phillpotts, which it would appear was of a testamentary nature, and would have been sufficient to constitute Mr. Chadborn executor, according to the tenour of that paper. As all the persons capable of giving information on these points were in the deceased's house, the allegation was necessarily a kind of fishing allegation. But even supposing that there was ground for believing that the executors, having access to the repositories of the deceased, had abstracted or destroyed a codicil, of which there was no proof, still there would be no evidence that they abstracted this particular codicil; and mere probability was not sufficient to rebut the presumption of law against a paper not coming out of the repositories of the deceased. The evidence of the handwriting on the instrument was, as usual, extremely contradictory, but it preponderated strongly in favour of its genuineness; so much so, that coupled with the probability of the disposition, he should not hesitate to pronounce in favour of the paper, if he could do so on evidence of handwriting alone abstracted from all other considerations. The learned judge then commented upon the suspicions attaching to Mr. Chadborn on his visit to the house of the deceased early in the morning of the 20th of April, in respect to the time of his visit, on which his statement had been contradicted by several witnesses. What passed on that occasion it was not possible for the Court to conjecture; but where a party acted as Mr. Chadborn had done, it did create a suspicion that he was there for some purpose which would not bear to be disclosed. There was another circumstance which threw a degree of suspicion on the executors; the servants, Ann Lewis, and [Ann Nicholls, were alleged to have had reason to believe that the deceased had executed other testamentary papers, of a later date than the 2d and 3d of December, and know who the person was who sent the paper to Mr. Helps, and that papers had been burnt in the deceased's house; but the legatees were not able to get access to these witnesses, who were in the custody of the executors. Now, when such imputations were thrown out against the executors, why did they not produce these servants? What could they apprehend from their cross-examination? Their conduct in this respect tended to support the suspicion against them. Looking at all the circumstances of the case, though the evidence, in affirmation of the genuineness of the codicil, as far as handwriting went, was extremely strong, it was impossible for the Court to pronounce for the paper on that ground alone, and he consequently pronounced against it as well as against the validity of the paper of the 2d of December, 1834. On the question of costs, the general practice was, that where a party set up a paper like this, and failed to establish

it, they were liable to costs. This had been done in cases where, as in the present, there was no suspicion that the party propounding the paper had been privy to any fraud. But there were peculiar circumstances in the present case which induced the Court not to adhere to this course—namely, that, but for the production of this paper, the executors would have wrongfully obtained probate of the two papers of the 2d and 3d of December, 1834. And who were entitled to press for costs? Not the executors, for they had not established their case. Mrs. Goodlake might press for costs, as she had opposed the codicil as well as the will: but when the Court looked at her conduct, as the nominal opposer of the will, it could not consider that she was entitled to her costs. But there was a further question as to costs. The executors had propounded the papers in an improper manner, and having failed in establishing them, the Court would be bound to condemn them in the costs; but the difficulty was to say whose costs they should be condemned in. The legatees had failed; Mrs. Goodlake had come forward in reality to support the case they set up. But the Court, for the sake of public justice, in order to prevent such experiments for the future, and to mark the Court's disapprobation of the manner in which the executors had brought their case forward, by a suppression, if not a misrepresentation of facts, should condemn them in the costs incurred by Mr. Hitching in the opposition he had given to the papers.

(*To be continued.*)

COURT OF BANKRUPTCY.

Fiat against DAVID CLARK.

Practice—Bankrupt—Trustee—As to the right of proof against a bankrupt's estate by his co-trustees for trust-monies applied by the bankrupt to his own use, without an order from the Court above.

In this case the bankrupt had been one of five trustees under a settlement made upon the marriage of Mr. and Mrs. Faulkner. The bankrupt had received part of the trust-fund through his agents, Messrs. Ferguson and Co., of Calcutta, and which he allowed to remain with Ferguson and Co. as a cash balance. Two of the trustees died. After Clark became bankrupt, by virtue of a power in the settlement, Mr. Faulkner appointed new trustees, reserving all rights against the bankrupt, but releasing the two other trustees. The new trustees now claimed to prove against the bankrupt's estate. The objection was as to the jurisdiction of the Court to receive the proof. It was contended that it could not be gone into without an order from the Court above.

Mr. Commissioner HOLROYD was of that opinion. The new trustees having been appointed since the bankruptcy, could not make the requisite affidavit that the bankrupt was indebted to them at the time of the bankruptcy. Now, at the time of the bankruptcy the parties

to have been admitted to prove would be the two solvent trustees against the bankrupt, their co-trustee. But, in practice, one trustee could not prove without his co-trustee joining him in the proof; and in this case, the bankrupt being the co-trustee, he could not stand in the situation of both debtor and creditor; and on that ground it had been considered necessary to obtain an order to admit one trustee to prove against a bankrupt co-trustee. The order was not declaratory of any antecedent right of proof, but it originated the title of the party to be admitted a creditor, and in such cases the party to be admitted to be a creditor could not vote in the choice of assignees, or sign the certificate. See *Ex parte Phillips*, 2 Deacon, 334, and *Ex parte Shaw*, 1 Gl. and J., 124. In this case it would certainly be right that the new trustees should be allowed to tender a proof either in their own names or in the names of the two solvent trustees at the time of the bankruptcy, but he (the learned Commissioner) thought, for the reason above cited, the practice required an order from the Court of Review to permit the trustees to go in and tender such proof. In *Ex parte Inkersole*, 2 Glynn and J., 230, where new trustees were appointed subsequent to the bankruptcy in the place of the bankrupt, sole trustee, under section 79 of the 6th George 4, c. 16, the order was that the bankrupt trustee should prove against his own estate, but that the dividend should be paid to the new trustees.

INSOLVENT DEBTORS' COURT. Mar. 14.

*CASE OF—
Abolition of Imprisonment for Debt Bill.—
Sec. 94 (a).*

Whether a prisoner arrested under a Judge's order in the Country, and trading and residing elsewhere, can be removed from his place of imprisonment in the Country to London.

In this case the Insolvent had been arrested away from his place of trading and residence under a Judge's order, upon an affidavit that he was about to abscond from his creditors, and leave the country. He was taken to the prison of the place where he was arrested.

Mr. Nicholls applied to the Court for the removal of the Insolvent to the prison of the place where he had traded and resided, at the expence of his creditors, that he might be heard among them, and not that the creditors might be put to the expence of following him into the country where he was confined, and there opposing him.

Mr. Commissioner Law said, that he could not assist the applicant, and observed that when he prepared the Statute, 7 Geo. 4, he wished the Court to possess such a power; but he was defeated.

*The Court could only remove an Insolvent from a London Prison to a Country Prison.
Application refused accordingly.*

(a) Section 94 empowers the Court to re-

move prisoners (at the request of creditors, and at their expence) from the gaols of London, Middlesex, and Surrey, where their usual residence before arrest was, elsewhere to be heard in the county or place to which they are removed.

Suppose, however, the debtor's usual place of residence to be in London, and he thinks proper to go to the most remote part of the kingdom, and be there taken in execution, the Court has no power to send him to be heard in London among his creditors, who must therefore be at the expence of following him, if they wish to oppose his discharge. *Thus the Court may send an insolvent for hearing from London into the country, but it cannot send him from the country to London,* and the dishonest debtor is placed in a much better situation than the honest one.

This observation also applies to sec. 95, which deprives a prisoner of the benefit of this act upon *his own petition*, who shall have removed himself from any gaol distant more than twenty miles from London by *habeas corpus*. Suppose, however, that a creditor petitions, there is nothing in the act to prevent the debtor being heard in London, away from his creditors, however distant. So that a debtor may remove himself by *habeas corpus*, from York to London, and refuse to petition, while at the same time he gets a creditor to petition, and he is heard in London away from his York creditors, unless they think fit to be at the expence of removing him back to York (no inconsiderable burden) under the 94th section.—*Western's Commentaries.*—ED.

ESSEX LENT ASSIZES—1838.

KING, WIDOW v. EDWICK & OTHERS. (a)
Ejectment—Adverse possession—Disability by Coverture.

This was an action of ejectment, brought to recover possession of some copyhold property, at Thorpe.

Mr. Gurney opened the pleadings.

Mr. Platt stated the case. This was an action brought to recover possession of certain copyhold property, situate at Thorpe, and he should in the first place produce the title from the Court rolls from 1740, to the present day. In 1740, the Lord of the Manor of Thorpe granted a portion of the waste to John Woods, the length of which was about 26 rods, and on the same day Woods surrendered it to the uses of his will. In 1777, Woods surrendered three rods of the 26 to a person named Edwick; and in 1781, he made his will. He had at this time associated himself with his housekeeper, of the name of Smith, and the result was a daughter. Being desirous of providing for this daughter, he made his will, by which he devised this property to her when she attained the age of 21,

and he appointed Philip Hempson his executor. Towards the latter part of the same month he died. Three years after Hempson, as the attorney for the daughter, applied to the Court for her admission, and to make him her guardian during her minority; and at a Court held in July, 1784, Mary Smith was admitted, and Hempson appointed guardian. At this time Mary Smith was a child, and went with her mother to reside at Harwich. The same year her mother married, and the daughter remained with her ten years, when she married Enoch King, at Colchester. When the marriage took place, Hempson was called on to render his accounts, which he did, and was continued as receiver of the rents till 1801 or 1802, when he was succeeded by William King, the brother of the husband. The brother continued to receive the rents till 1811, when some of Edwick's family, who in 1777, had obtained three rods of the ground, interfered to prevent the tenants paying rent to him, and the husband, Enoch King, being an easy man, and thinking the property was not of sufficient importance for him to trouble himself about it, from 1811 to 1835, no rents were received by him. In 1835, the husband died. Now in ordinary cases this adverse possession would be an answer to the action, and no doubt if Mary Smith had not married, and had let them enjoy it for 20 years, she could not have brought an ejectment; but inasmuch as she was covert, and during all that time under coverture, she was supposed not to have assented to the disposition. He should have no difficulty in showing she was the same person to whom the property was devised, but he believed he should not be able to lay the will before them as it could not be found, but he should lay before them the best evidence that could be obtained—the recitation of it in the admissions on the Court-rolls.

George Brown, clerk to the plaintiff's attorney, proved that he had searched the Court Roll of the manor of Thorpe, and he produced a copy of the admission of John Woods in 1740, and the surrender to the uses of his will. Witness also produced a register of the burial of John Woods, in 1781. In 1784, Mary Smith, described as a natural daughter of John Woods, was admitted under his will, with the exception of that part surrendered to William Edwick. The admission of Edwick was put in, from which it appeared that the quantity to which he was admitted was three rods in length of the part towards Tendring. The certificate of marriage of Mary Smith, with Enoch King, at St. Trinity, Colchester, on the 15th of July, 1799, and the register of Mary Smith's baptism in 1779, at Thorpe-le-Soken, were produced; also the certificate of burial of Enoch King, at Shoreditch, on the 27th November, 1835. Witness said the manor of Thorpe was in a peculiar, but though he had searched he could not find the will. It was also proved that search had been made in the Prerogative Court, and at Chelmsford, but the will could not be found.

William Hempson, the son of Philip, said

(a) See the report of the action for mesne profits in consequence of this ejectment, ante, p. 317.

his father had been dead 27 years; he knew Mary Smith, for whom his father was executor; he received the rents of the cottages for Mary Smith, after the death of Woods. The book produced witness knew to be in his father's hand-writing.

Cross-examined. I do not know that Woods left any other relations besides Mary Smith behind him.

Wm. King. I had a brother named Enoch King, who married Mary Smith, and I received the rents of the cottages at Thorpe, for him; I first received them when my brother went to London, and I also went to take the apples from the orchard every year. I continued to receive the rents about a dozen years.

Cross-examined. I left off taking the rents because Edwick would not let the tenants pay me,—he seized their things, and sold their goods because they did not pay him. I think the last time I received the rents was about 40 years ago.

Re-examined. John Edwick claimed a right to the houses; before he claimed them he offered me 50 guineas for the copy of the writings; I said I dare not part with them. Edwick when he made the offer, said he wanted to build a mill.

Cross-examined. After Edwick said I should not take any more rent, my brother did not trouble his head much about it. He was a master stone-pavior, and very well off at that time.

The books of Hempson were put in, from which it appeared that he received the rents up to 1799.

Mr. Platt said the certificate of marriages showed that it was not 40 years since the witness received the rents, as the marriage took place in 1799, and he received them twelve years after that.

Mr. Knox submitted to his lordship that the plaintiff had not laid a foundation for the admission of the secondary evidence with respect to the will. There was no evidence to show that the will had been in existence at all: and if Woods left a will the probability was that it was in the possession of some surviving members of his family. His Lordship knew that wills for real property were not proved, and therefore the places searched were not the places at which to find it. Mary Smith was a natural child: Woods might leave legitimate children, and in their possession the will would be.

His Lordship said he thought there was ground for admitting this secondary evidence.

Mr. Knox said, perhaps his Lordship would allow him to move to enter a nonsuit if the Court should think it ought not to be admitted.

Mr. Platt said, he could move what he pleased.

His Lordship said, he would make a note that this objection was taken.

Mr. Knox said he should not address anything to the jury on the case.

His Lordship said, he thought if the evi-

dence of the will had been properly admitted the plaintiffs had made out their case.

A verdict was accordingly taken for the plaintiffs.—Damages 1s.

TO CORRESPONDENTS.

The Editor thanks Mr. Henry Ashley, the attorney for the plaintiff, in the case of King, Widow, v. Edwick and others, for the reports we have inserted.

The Editor also thanks Mr. Archer and Messrs. Saunders and Pearson for the report of the case Archer v. Gerrard, inserted by him last week.

"H. D. M."—Your communication dated *Tuesday* was not delivered at our publisher's till late on *Thursday*; next week it shall have attention.

"Aliquis."—Your case is not of sufficient importance for our columns, and the subject matter is besides *personal*. See our Notice to Correspondents, p. 112.

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ERRATUM.

Page 233, first column, sixth line from the top, for "does affect," read "does not affect."

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JOHN RICHARDS & Co., 194, Fleet Street.

Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 23rd March, 1839.

Price 6*d.* *Stamped Edition, 7*d.**

The Legal Guide.

No. 22.]

SATURDAY, MARCH 30, 1839.

LAWS OF REAL PROPERTY.

ESSAY I.

(Continued from page 324.)

ON THE TITLE A PURCHASER MAY REQUIRE.

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

THE last case we noticed as showing in what manner the courts are disposed to give effect to this new Statute of Limitations, related to titles acquired by *tenants at will*.

A very recent case caused some difficulty as to the *species* of possession (*a*), which, not having the character of *adverse* possession up to the time of passing the statute, would, by its operation, become adverse after it passed.

This case was argued upon a rule to enter a nonsuit in Trinity Term, 1836, before the Court of Queen's Bench, (*b*) and the following were the facts proved at the trial which took place at the Cardigan Spring Assizes, 1835.

William Davies, the lessor of the plaintiff, was heir at law to one John Williams, and by indenture of release, dated 2d May, 1765, the premises were mortgaged by the then owner unto, and to the use of, John Williams, in fee, in consideration of 200*l.* advanced by John Williams, and subject to

a proviso for redemption upon payment of 200*l.* and interest, on the 1st of May, 1786. The plaintiff proved that in May, 1814, the defendant George Williams, who was then in possession of the rents and profits, had offered to give a bond to William Davies for the money secured on the estate, which had not been accepted. The defendants proved that the money had been paid and the estate reconveyed. The learned judge directed the jury to find for the plaintiff, unless they were satisfied that the money had been repaid and a reconveyance had taken place. The jury found for the plaintiff, and his lordship gave the defendants leave to move to enter a nonsuit on the ground that the plaintiff was barred, under stat. 3 & 4 Wm. 4. c. 27. ss. 2, 3., neither he nor his ancestor having been proved to have been in possession or receipt of the profits within twenty years, and no acknowledgment of the title in writing having been shown, according to section 14, and the mortgagee's right having accrued at latest on the default of payment (March, 1786,) which was more than twenty years from the commencement of the action. A rule was obtained accordingly; and it was contended in shewing cause against the rule that the question was, whether there was any *adverse possession* against the lessors of the plaintiff at the time of passing the act (24th July, 1833,) for, if there was not, they had, by the 15th section, a right of re-entry for five years from that time; and this ejectment was brought within the five

(a) See Notice to Correspondents.

(b) *Doe dem. Jones and Davies v. Williams and Herbert, 5 Adolph. and Ellis, 291.*

years,—that the question of adverse possession must be determined by the law as it stood before the act passed. In *Hall v. Doe dem. Sureties*(b) it was held that the fact of the principal being unpaid by the mortgagor to the mortgagee on the day appointed for payment of the principal, prevented the possession of the mortgagor from being adverse to that of the mortgagee, though no interest was found to have been paid, and though twenty years had elapsed since the day appointed for payment,—that here the offer to give the bond shewed that the principal was unsatisfied even at a date within twenty years of the time of the passing of the act; there was therefore no adverse possession at that time. The mortgagor at the time of the act passing was bailiff to the mortgagee. *For the rule* it was contended, that the mortgagor's title accrued in May, 1765, or at any rate in March, 1786; and no possession, or receipt of the profits, or written acknowledgment, had ever taken place. The possession at the time of passing the act, was therefore adverse. Even if the parole acknowledgment in 1814 could be set up, there was an adverse possession in July, 1833, though not one of twenty years, and that was sufficient to render the 15th section inapplicable; for that section spoke not of a possession sufficient to bar an entry, but of a possession adverse at the time of the act passing. The effect of the 40th section would be also evaded, if this action were not barred; for by the ejectment the money might be recovered indirectly. That this section must have contemplated the action of ejectment on mortgage, for that was the only way in which money could be recovered on the mortgage itself, that giving no right of action for the money, though the deed generally contains, besides the mortgage, a distinct covenant to pay. In *James v. Salter*,(c) a devisee of an annuity charged by the devise upon land who had never received any of the annuity, twenty years having elapsed from the devisor's death was held not to be barred; but it was clear, from the judgment of Tindal,

C. J., that if the third section had not excepted the case of a will, the statute would have been held a bar. That case was therefore an authority in the defendant's favour.

Lord Denman, C. J. said, It is contended that the plaintiff is barred by the second and third sections of the act. The 14th section provides that if a written acknowledgment be given the right shall be deemed to have first accrued from the time at which it is given. Here no written acknowledgment was proved. But then the plaintiff is said to be protected by the 15th section. Under this clause the necessity of a written acknowledgment does not arise if there be no adverse possession at the time of the act passing, and the action be brought in five years from that time. But then it is said on behalf of the defendants that there was an adverse possession at the time of the act, twenty years having elapsed without payment of interest. It seems to me that that is not so. The possession of the mortgagor is consistent with the right of the mortgagee, and therefore the possession is not adverse at any assignable period, unless the jury, from renunciation by the mortgagor, or some other circumstances, are induced to find the fact of adverse possession. That argument therefore fails, and then there was no necessity to prove a written acknowledgment, and the statute does not bar the plaintiff.

Littledale, J. said, I think the act does not prevent the plaintiff from recovering. The question as to the fact of an adverse possession, such as would bring a party within the 15th section, must be determined, as it would have been if the act had never passed. The conversation in May, 1814, was an acknowledgment amounting to a strict recognition of the right of the mortgagee. The possession of the mortgagor therefore could not be adverse. If at the time of the act passing twenty years had not elapsed from a payment of interest, or the making of an acknowledgment, there could not be an adverse possession at that time. That being so, the plaintiff had five years to bring the ejectment.

The 40th section is not applicable, for this

(b) 5 Bars. and Ald. 687.

(c) 2 New. Ca. 505.

action is to recover the land, whereas the 40th section relates to actions brought to recover the money, and those actions in the case of mortgages are either upon the covenant usually inserted in the mortgage deed, or on the bond which commonly accompanies it.

Patterson, J. said, From the beginning of 15th section it plainly appears that something or other was after the act passed to be considered an adverse possession, which was not so before the act passed. For in that section it seems to be considered that the possession which, up to the passing of the act, was not adverse as the law then stood, would by the operation of the act become so on the very day after the act passed; and that by relation, otherwise the provision as to the five years was not needed to protect the right of the party against whom such adverse possession might be set up. What is adverse possession at the time of the act passing in the sense of that section, depends therefore upon the law as it stood up to that time. One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. In *Partridge v. Bere*, (a) such mortgagor is held to be tenant to the mortgagee; sometimes he is said to be the bailiff of the mortgagee; and in a late case (b) Lord Tenterden said that his situation was of a peculiar character. But it is clear that his possession is at all events not adverse to the title of the mortgagee, and therefore I think that the 15th section applies to the present case. How far under the 3rd section it is necessary for the mortgagee to bring his action within twenty years from the day of default I cannot say: I do not see any way at all. (c) If the 3rd section was intended to comprehend the case of a mortgagee, it is very ill

penned; and the 40th section, if meant to apply to actions of ejectment, is still worse penned.

Williams, J. concurred.

Rule discharged.

The difficulty which this case caused may perhaps be removed by reverting to ss. 7, 8, 9, 12, 13, and 28; and it should be recollect that under sec. 7. a mortgagor in possession and *cestui que trust* are excepted from its operation.

As to the character in which a mortgagee in possession may be considered, there is much confusion in the cases; some call him tenant at will, others tenant at sufferance, and others again call him simply a receiver; this confusion is only a part and parcel of "the glorious uncertainty of the law," which we are continually dwelling upon. To make these observations of more extensive utility, we will direct the attention of our readers to the cases which have caused this confusion, and leave him to consider them in connexion with the new statute of limitations. *Birch v. Wright*, 1 Term. Rep. 378; *Christopher v. Sparke*, 2 Jac. & W. 234. see id. 183, 553; *Powsley v. Blackman*, Cro. Jac. 659; *Smarle v. Williams*, 1 Salk. 245; *Wilkinson v. Hall*, 3 Bing. N. C. 508; *Doe v. Maisey*, 8 Barn. & C. 767; *Keesh v. Hall*, 1 Doug. 22; *Doe v. Giles*, 5 Bing. 421; *Thunder v. Belcher*, 3 East. 449. 10 Vin. Ab. 418. pl. 19; *Moss v. Gallimore*, 1 Doug. 283.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XIX.

Actions of Trespass to Land—Of What kind are they—and who may bring them.

THE *action of trespass to land* is a personal suit, brought for the purpose of recovering damages for wrongs committed, arising by reason of any injury, great or small, done to real property of one party by another entering his ground (I), (the words of the writ of trespass commanding the defendant to shew cause *quare clausum querentis frigat*,) (II) in any case except by the owner's leave, or in some very particular cases hereafter mentioned, Bl. Com. iii. 209. The

(a) 5 B. & Ald. 604. and see note at the end of the case.

(b) The reporter adds, perhaps *Doe dem. Roby v. Marney*, 8 B. & C. 767; S. C. 5; *Adolph. & Ell.* 297.

(c) Stat. 7 W. 4. & 1 V. c. 28. regulates the time at which entry may be made or action brought by a mortgagee of land within the definition of stat. 3 & 4 W. 4. c. 27. s. 1. giving twenty years from the last payment of any part of the principal or interest, though the right of entry may have first accrued more than twenty years back.

different kinds of this action are principally comprised by *trespass general*, otherwise called *vi et armis*, and *trespass special*, or *upon the case*; the one *direct*, where the act is immediately injurious to the person, or property of another, the *original act being wrong*; the other *consequential*, where the injury proceeds from an act which was *lawful* at first. As for instance, it is lawful for a man to erect a water-spout for his own use, to carry off the rain, in a yard to which he has a common right with the tenants of two other houses; but if after making it, the water overflow his neighbour's land, to the inconvenience of such neighbour, an action *on the case* lies against him, because the injury did not arise, or the right of action accrue, till the water actually descended. "A man," Blackstone says, "in order to maintain an action of trespass, must have a property (either absolute or temporary) in the soil; also actual possession by entry," Bl. Com. iii. 210.; for before entry and actual possession even the heir cannot maintain an action of trespass, though he hath the freehold in law, 2 Roll. Abr. 553. Bl. Com. iii. 210; though we find that an exclusive interest in the crop, vesture, or pasture, *without* an interest in the soil, is sufficient to sustain this action, 3 Burr. 1836. Moor, 456. But possession, actual or constructive, must be proved, 1 East. 224.

Trespass will not lie for entering a pew, or seat, because the plaintiff has no exclusive interest, the possession of the church being in the parson. But an action of trespass *vi et armis* will lie against the owner of cattle, for allowing them to stray upon another's land, thereby doing damage, (and much more so if he drives them on,) (III) as a man is answerable not only for his own trespass, but that of his cattle also; and supposing them driven on by any one else, by entering to drive them off the owner of the cattle might have an action of trespass brought against him by the owner of the ground so trespassed on. This action may be brought for several trespasses, but they must not be of several natures, which may not be tried in one action. Formerly *trespassers continued*, or of a perma-

nent nature were laid, with a *continuando diversis diebus et vicibus*, but the form of declaring with a continuando has grown obsolete, and the plaintiff may now prove any number of trespasses by setting forth in his declaration, that the defendant between such a day and such a day, trespassed, (for example cut several trees), (IV). There are cases in which trespass is justifiable, as in the case of one entering an inn or tavern without leave of the owner, or a reversioner entering to see if any waste is committed, &c. But if the party entering the tavern, should remain all night against the wish of the owner, or the reversioner should break or injure the house, they shall be deemed trespassers *ab initio*, the law then presuming that they entered for such unlawful purpose. But with regard to a landlord entering to distrain for rent, (V) the 2 Geo. 2. c. 19. enacts that no subsequent irregularity of the landlord shall make the first entry a trespass. A man may also justify, in an action of trespass, on account of the freehold and right of entry being in himself, which always brings the title of the estate in question. And with a few exceptions where the jury shall award less than 40s. damages, (unless the title of the lands come chiefly in question) there shall be no more costs than damages.

H. D. M.

(I) Or it may be described more briefly, as being an entry on another person's land without lawful authority, and doing an injury.—ED.

(II) So called because the writ requires the defendant to shew cause "wherefore he broke and entered the plaintiff's close;" every one's land being set apart from his neighbour's, by some limits or boundaries, and in the absence of the latter, in contemplation of the law.—ED.

(III) But the owner of *lands* is not liable for damage by animals *ferae naturae*, as *rabbets* escaping from his land, Boulston's case, 5 Rep. 104. b.; Cooper v. Marshall, 1 Burr. 259. And see Mason v. Keeling, 1 Ld. Raym. 608. Latch. 13. Beckwith v. Shoredike, 4 Burr. 2093.—ED.

(IV) See as to cutting down trees ex-

cepted in a lease. *Rolls v. Rock*, 2 Sel. N. P. 1316.—ED.

(V) See as to irregularities in distraining for rent. *Wallace v. King*, 1 Hen. Blackst. 13. *Lady Branscombe v. Bridges*, 2 D. & R. 256. S. C. 1 Barn. & Al. 145.—ED.

(VI) An action of trespass on the case lies for continuing on premises after the time allowed by law. See *Winterbourne v. Morgan*, 11 East. 395; and *Sheriff v. James*, 8 J. B. Moore, 334. S. C. 1 Bing. 341. Also for wrongfully removing a tomb stone. See *Spooner v. Brewster*, 3 Bing. 136.—ED.

PROBLEM XXII.

WHAT DO INCORPOREAL HEREDITAMENTS CONSIST OF?

Imperial Parliament.

HOUSE OF LORDS.

March 27.

The House adjourned to Thursday April 11.

HOUSE OF COMMONS.

The House adjourned to Monday, April 8.

Law Reports.

COURT OF CHANCERY. March 8.

BICKFORD v. SKEWES.

Appeal from an Order of the Vice Chancellor. Patent Right.—Whether after injunction obtained against a party for infringement of a Patent, and he lies by for Ten Months before he applied to dissolve it, a motion for the purpose, after that lapse, will be entertained.

This appeal was against an Order of the Vice-Chancellor for continuing an injunction that had been obtained by the plaintiff restraining the defendants from infringing the Patent of the plaintiff which he had enjoyed for several years undisturbed. The injunction was granted in November 1837, and the defendant did not attempt to dissolve it till December 1838, when he made a motion for the purpose before the Vice Chancellor, and his Honour directed the injunction to stand, and that an action at law should be brought to try the validity of the Patent.

The LORD CHANCELLOR said, if the defendant had come to the Court more promptly to dissolve the injunction, it might not have been unreasonable to compel the patentee to try at the present assizes. But Mr. Skewes had suffered an interval of ten months to elapse, from February to December 1838, and then appeared to become suddenly active. If improper delay took place, there were sufficient means to urge on the cause, but he did not think it reasonable to grant the present application. The plaintiff had been in possession of his patent for six years, and in continuing the injunction the Court would look at the balance of the inconvenience.

March 28.

In re MEDHURST A LUNATIC.

Whether an advance from the funds of a Lunatic may be made to the Heir for the purpose of defending him against a Criminal Prosecution.

The Solicitor-General applied to the Court on behalf of the *Grandson* of the Lunatic now in Newgate for a most serious offence which has been recently the subject of a Coroner's Inquest. He was desirous of availing himself of the services of the Attorney-General in his defence, and prayed the Court to direct the payment to him of the sum of 400*l.* for the necessary expenses of his trial. The lunatic, possessed landed property to the value of nearly 3,000*l.* a-year, which, upon his death, would pass to the applicant, Mr. Medhurst, as tenant in tail. The allowance made to him at present was 200*l.* a-year, which would not supply adequate means for his defence. The lunatic was more than 80 years of age, and there was also a fund of 10,000*l.* under the lunacy, out of which he prayed the advance to be made. The solicitor also was willing to undertake to account for the due application of the sum.

Mr. Wigram for the next of kin, said he was instructed to facilitate the application.

The Lord CHANCELLOR said, upon the undertaking of the solicitor to account, an order might be made for the advance of 400*l.*

ORDER.

March, 1839.

TITHE COMMUTATION ACT.

It is hereby declared and directed by the Lord High Chancellor, with the concurrence of the Master of the Rolls and the Vice-Chancellor, that in all cases where a receiver of a landed estate is appointed, with a direction that such receiver shall manage, as well as set and let, with the approbation

of the Master, and such receiver shall, under the provision of the Act for the Commutation of Tithes in England and Wales (6 & 7 W. 4. c. 71. s. 12.) be deemed for the purposes of the said act, an owner of such tithes and land as therein mentioned, jointly with any other person, the Master shall, without special order, receive any proposal regarding the execution of the said act as to such tithes and lands, and shall make his report thereon, which report shall be submitted to the Court for confirmation, in the same manner as is now done with respect to reports made under the 64th of the General Orders, dated the 3d April, 1828, and until such report be confirmed, it shall not give any authority to the receiver.

(Signed)

COTTERHAM,
LANGDALE, M. R.
LAUNCELOT SHADWELL, V. C.

VICE CHANCELLOR'S COURT. Mar. 16.

CORPORATION OF BATH v. PINCH.

Rights in the Soil.—Injunction restraining a party from sinking or boring a well upon his premises, through the lower soil of which a mineral spring ran that was enjoyed by another upon other premises—whether maintainable.

This was a motion to dissolve an injunction obtained *ex parte*, whereby the defendant, who was a brewer in Kingswood-street, Bath, was restrained from sinking or boring a well which he employed in the purposes of the brewery to a greater depth than 60 feet from the surface of the ground, and from diverting or obstructing the hot mineral streams which supplied the baths belonging to the corporation. The dispute commenced in 1835, by an attempt of the defendant to bore through the hot mineral stream which runs below the spring of cold water that supplied his well, in order to obtain a greater supply of cold water, which was supposed to flow at the depth of about 170 feet from the surface. This operation being found to diminish the supply of the mineral water to the public baths, as well as to lower the temperature, an action was brought by the corporation in 1836, and a verdict for the plaintiffs taken by consent at the summer assizes, in terms dictated by Baron Alderson—that the plaintiffs should, at their own expense, undertake to do everything towards stopping up the aperture and restoring the

defendant's original supply of cold water, which a surveyor should from time to time direct. The defendant proceeded subsequently with the works, but a quarrel again occurring, the defendant refused to permit the workmen of the corporation to come upon his premises, and for this breach of the *nisi prius* order he was committed to the Fleet. He was afterwards discharged on heavy recognizances, but was stated in the affidavits on the part of the plaintiffs to have proceeded with the boring in such a manner as greatly to prejudice the mineral springs, and render an application to the Court necessary for the protection of the springs which supplied the public baths. The numerous affidavits filed on both sides from engineers and workmen, related chiefly to the mode in which the works had been carried on, those in support of the defendant's case going to show that the operations had been conducted in the manner least likely to prejudice the hot springs, and that the *bona fide* object of the defendant was merely to obtain a supply of cold water for his brewery, and those for the plaintiffs denying such intention, and contending that the boring could be only effectually carried on, and without prejudicing the mineral waters, by adopting the Artesian principle, which would be attended with a much greater expense than the business and property of the defendant could bear.

The VICE-CHANCELLOR said, the corporation were justified in applying for the injunction, and that it ought to be continued against Mr. Pinch, but that the terms of it, in confining him to a depth of no more than 60 feet from the surface, were wrong, and ought to be so modified as to permit the boring to proceed in such a way as not thereby to divert or obstruct the hot mineral waters flowing into the public baths.

March 20.

ALDRED v. THE DIRECTORS OF THE NORTH MIDLAND RAILWAY COMPANY.

Joint Stock Companies.—Their liability to make good, damages done by them to roads, where their Act gives them power to raise or sink roads. (a)

The SOLICITOR-GENERAL moved for an injunction to restrain the North Midland Railway Company from proceeding with, or continuing, a certain archway or bridge in progress of erection for carrying the railway across the turnpike-road leading from Rotherham to

(a) See *Regina v. The London and Birmingham Railway Company*, ante, 314.

Swinton, in the West Riding of Yorkshire, or any other archway that should not be of the height of 16 feet from the original surface of the turnpike-road, and also from proceeding with the works in progress until the turnpike-road had been restored to its proper level. The suit was instituted by the trustees of the turnpike-road, who had given their assent to the passing of the bill, "provided the railway should cross over the road at a sufficient elevation, and the road be not lowered to effect such elevation or otherwise prejudiced thereby," and the ground of the present complaint was, that the company were constructing the arch in such way as to evade one of the conditions on which the act was permitted to pass. The 72d section, which was in the usual form, required that the span of the arch of any bridge should have an open space of 25 feet, and a height of 16 feet, and that the descent should not exceed 1 foot in 30, and the company thought they should be within the strict letter of the act if they built a bridge whose height was only 14 feet 8 inches above the original level of the road, and lowered the road 16 inches to give the altitude of 16 feet required by the act. The spot where the railway passed over the turnpike-road was in the parish of Rawmarsh, a very low wet country, in the immediate neighbourhood of the Dun Navigation, and there was a great deal of evidence to show that at some periods of the year that portion of the country, even at the old level, was very liable to be flooded, and it never could have been the intention of the Legislature, under the general clause, to raise or sink rivers, waters, roads, &c., or to have intrusted the company with so mischievous a power as, by increasing the great public inconvenience which already existed to an almost intolerable extent, to commit a serious public injury, for which the act provided no compensation. Yet this was the necessary inference, if the terms of the act were to be strictly construed. He submitted, that at all events the company were bound to construct an equally convenient temporary road, which would give to the passengers the same degree of security in flooded seasons they before enjoyed, or else that the injunction should issue to restrain their present proceedings.

The VICE-CHANCELLOR said he was of opinion the assent the trustees gave before the passing of the bill did not in any way prevent their opposing it in Parliament to obtain the modification they insisted on as a protection to the road. The Legislature had, however, with a full knowledge of all the assents and dissents to the bill, suffered it to pass without any restriction of the ordinary powers given to railway companies, and therefore the Court could only give effect to what they had thought right to enact. He admitted the company would have been bound by any previous agreement that might have been entered into with the trustees and agents of the petitioners for the bill, but that circumstance did not exist in the present case. Though there was a particular proviso in the act which prevented

the company obstructing rivers or waters to the prejudice of mills, there was no proviso which limited their power of levelling roads, and it seemed the Legislature had entirely overlooked the necessity of imposing any terms on the company in this respect. All that could be said amounted to this, that the company might do a damage to the road, and the Court had not any power to prevent it.

Motion refused with costs.

ROLLS COURT—March 20.

WEBB v. THE DIRECTORS OF THE MANCHESTER AND LEEDS RAILWAY COMPANY.

Joint Stock Companies.—Injunction against a Company to restrain them from proceeding to assess the value of land they required, and which the proprietors did not wish to part with —Whether maintainable.

The plaintiffs were Dr. Webb and the Fellows of Clare-hall, Cambridge, who, as vicar and patrons of Kirkthorpe, Yorkshire, were the owners of a piece of ground of a little more than three roods, which the defendants wanted for their railway, and for which they had offered 160*l.* Differences arose between the parties, and the company in December last caused a precept to be issued to the sheriff of Yorkshire to summon a jury to ascertain the value of the land, upon which the plaintiffs obtained an injunction.

A motion was now made to dissolve it.

Lord LANGDALE said that the company ought not to be limited, but were entitled under their act to purchase the whole of the land from the plaintiffs.—*Injunction dissolved.*

PREROGATIVE COURT—March 15.

DURLING & ANOTHER v. LOVELAND. (a)

Weakness and incapacity of a Testator—Necessary proof required to establish a Will made by such a person, when the party benefited prepares the Will.

Sir H. JENNER gave sentence in this case. The property left by the deceased was about 1,800*l.*, which purported to be disposed of by a will, dated March 8th, 1838, about a month before his death, which gave the whole property to the executors, Mr. J. Durling and Mr. J. F. Parker, in trust to pay an annuity of 10*l.* to each of three persons—a female, named Cross, the deceased's housekeeper; Jupp, the brother of the deceased's wife, and who had acted, till disabled by infirmity, as hostler at the inn; and Mrs. Petworth, the widow of the deceased's brother; the execu-

(a) See this Case reported, ante, p. 269.

tions being appointed residuary legatees: Mr. Durling, one of the executors, was the landlord of a public-house at Bexley, and Mr. Parker, who drew the will, was partner in a respectable firm of solicitors at Lewisham, in Kent, the firm having been employed by the deceased. Before he (the learned Judge) proceeded to consider the circumstances connected with the preparation of the instrument, it would be proper to consider the principles which applied to this and other cases where the drawer of the will took a considerable benefit under it. In the course of the argument the attention of the Court had been called to a judgment recently delivered by Mr. Baron Parke in the Judicial Committee of the Privy Council, in the case of "Barry v. Butlin," (A) where it became necessary for that Court to consider the doctrine and principles of this Court with reference to such cases, and that judgment was cited from a report in the *Monthly Law Magazine*; and, though it was not to be considered a book of authority to be cited in support of any doctrine, he believed that the report of the judgment in that particular case contained its true and exact substance and effect, and, as he was not aware that it had been published in a more authentic form, he should read it from that book; for, though it might not be considered as authentic, he believed the reports were as accurate as attention could make them. The learned Judge then read an extract from the judgment referred to, in which Mr. Baron Parke laid it down as the opinion of all their Lordships who heard the cause, that the true rule of law was, that "if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight, according to the facts of each particular case, in some of no weight at all, varying according to the circumstances—for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies, but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased." Baron Parke added, that instructions and reading over, though the most satisfactory, were not the only satisfactory description of proof. He (Sir H. Jenner) was not aware that this Court acted on different principles, or that it had ever held (except when the particular circumstances of the case required it) that the party propounding a will was bound to do more than show that the deceased had a knowledge and approved of the contents; or that the doctrine of the Court ever went beyond this—that the circumstance of the drawer of the will being a party benefited under it, awoke the vigilance and jealousy of the Court to watch and see that a knowledge of the contents were brought home to the deceased. The learned Judge then proceeded to detail

the facts and circumstances of the case. Assuming the value of the three annuities of 10*l.* to be 300*l.*, the residue of the property would be 1,500*l.*; and taking the debts and expenses at 500*l.*, there would be 1,000*l.* to be divided between the two executors, which was a large proportion of the property of the deceased, given to two persons who were entire strangers in blood, to the exclusion of his relations. Mr. Durling was a friend of the deceased, but Mr. Parker, whose father had been employed by him in acts of business, had little acquaintance with him. This was, therefore, a circumstance of suspicion, which should arouse the vigilance and jealousy of the Court in the investigation of the evidence, to see whether the deceased executed the will with a perfect knowledge of its contents. The deceased appeared to have been a person of coarse manners and low conversation, and in the latter part of his life was addicted to excessive drinking, taking brandy and water the whole day, and when tipsy he was just like a madman. When sober he was rational and sensible, and some witnesses described him as shrewd, but age and indulgence in liquor appeared to have impaired his intellects, especially his memory. The learned judge went through the evidence on both sides on the subject of the deceased's capacity, the result of which was, that in March, when the will bore date, the deceased's mental faculties were impaired by the joint effects of age and indulgence in intoxication. Whenever he had been spoken to about his will, however, he had always declared his intention of providing for his poor relations, from whom he was not alienated, though he was not on terms of intimacy with them. On the 3d of March, he had declared he had made his will, and the very day the will bore date, previous to its execution, he still declared he had made his will, and "uncle Parker" (Mr. Parker senior) had got it, though no such will was forthcoming. The learned Judge then detailed the circumstances attending the preparation of the will. There was no evidence that Mr. Parker was sent for by the deceased's order, and the attesting witnesses stated that the will was not read over to the deceased in their presence, and that if they had known that he had excluded his poor relations, contrary to his constant declarations, they would not have attested it, as they believed he could not have known the contents. The only observation which fell from the deceased implying a knowledge of the contents of the paper was, "They have got my money, and that's all they care for." Under such circumstances, with nothing to detract from the weight of suspicion, a bare execution was insufficient to satisfy the Court that a person in the circumstances of the deceased,—with a memory greatly impaired, executing a paper which excluded his own poor relations, for whom he had declared he would provide, in favour of two strangers in blood,—possessed a knowledge of the contents and effect of the paper. An attempt had been made to prove a subsequent

recognition, but, in his opinion, it had failed. He was of opinion that the evidence was not sufficient to sustain the act, and he therefore pronounced against the validity of the will; and, as the case had been brought forward on behalf of persons for their own benefit, he was of opinion that he ought to go further, and condemn them in the costs of the proceedings.

(A) The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute. These rules are two: the *first* is, that the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the Court, that the instrument propounded is the last will of a free and capable testator; the *second* is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased. These principles, to the extent that I have stated, are well established: the former is undisputed; the latter is laid down by *Sir John Nicholl* in substance, in *Paske v. Olatt*; *Ingram v. Wyatt*; and *Billinghurst v. Vickers*; and is stated by that very learned and experienced judge, to have been handed down to him by his predecessors; and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker v. Batt*. Their lordships are fully sensible of the wisdom of this rule, and of the importance of its practical application on all occasions. At the same time, they think it fit to observe, especially as there has been some discussion upon this point towards the close of this inquiry, that some of the expressions reported to have been used by *Sir John Nicholl*, in laying down this doctrine, appear to them to be somewhat equivocal, and capable of leading into error in the investigation and decision of questions of this nature. It is said that, where the party benefited prepares the will, "the presumption and *onus probandi* is against the instrument, and the proof must go not merely to

the act of signing, but to the knowledge of the contents of the paper; (a) and that "where the capacity is doubtful there must be proof of instructions or reading over." (b) If by these expressions, the learned judge meant merely to say, that there are cases of wills prepared by a legatee so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them extending to clear proof of actual knowledge of the contents by the supposed testator; and that the instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the proposition, so understood. In all probability, the learned judge intended no more than this. But if the words used are to be construed strictly; if it is intended to be stated, as a rule of law, that, in every case in which the party preparing the will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof, is thereupon required from the party propounding the will, we feel bound to say that we conceive the doctrine to be incorrect.

The strict meaning of the term "*onus probandi*" is this; that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him. In all cases, this *onus* is imposed on the party propounding a will; it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are presumed, and it cannot be, that the simple fact of the party who prepared the will, being himself a legatee, is, in every case and under all circumstances, to create a contrary presumption, and to call upon the Court to pronounce against the will, unless additional evidence is produced to prove knowledge of its contents by the deceased. A single instance of not unfrequent occurrence will test the truth of this proposition: a man of acknowledged competence and habits of business, worth

(a) *Parke v. Olatt*, 2 *Phil. 326*.

(b) *Billinghurst v. Vickers*, 1 *Phil. 193*.

100,000*l.* leaves the bulk of that property to the family, and a legacy of 10*l.* or 50*l.* to his confidential attorney, who prepared his will; would this fact throw the burden of proof of actual cognizance by the testator of the contents of the will on the party propounding it, so that, if such proof were not supplied, the will would be pronounced against? The answer is obvious. It would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested; varying according to the circumstances: for instance, the quantum of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies, but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that, in such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for or reading over the instrument; they form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a will without it; but it has no right, in every case, to require it. *Parks B. in Barry v. Butlin, Monthly Law Mag.* vol. iv. p. 23.

INSOLVENT DEBTORS' COURT. Mar. 8.

CASE OF MOSES SALMON.

As to allowing a Prisoner to reside within the Rules of a Prison after a remand.

This insolvent applied to the Court for an order that he might be allowed to reside in

the rules of the Queen's Bench during the period of his remand, on the ground of serious illness.

An affidavit of the surgeon was read in support of the application.

An affidavit was put in in opposition, to the effect that the insolvent had on a former occasion feigned illness.

The Court granted the application until the 6th of April, with liberty to have the term extended.

SPRING ASSIZES—OXFORD CIRCUIT.

Shrewsbury, March 20.

SMITH v. STANLEY.

Special Jury.

ATTORNEYS NEGLIGENCE—*Liability of an Attorney to damages for negligence in investing money for his Client upon insufficient security.*

This was an action against the defendant, an attorney, carrying on business at Newport, for negligence in investing a sum of money belonging to the plaintiff in an improper security.

The plaintiff having the sum of 250*l.* to lay out, he applied to the defendant to do so, which the defendant did by advancing it to a professional gentleman in Staffordshire, in May, 1836, and that the only security taken was an assignment of a policy of insurance for 500*l.* in the Law Life Insurance Company, and that the borrower was in fact insolvent, having been discharged under the Insolvent Debtors' Act in December, 1838. The policy itself was only worth about 60*l.* The plaintiff at first failed to prove that the defendant had been employed to find the security on which the money should be invested, and Mr. Justice Erskine was about to nonsuit the plaintiff, but the latter then called the borrower of the money, who stated that he employed the defendant to procure the money for him, and that defendant prepared the deeds: at the time of the loan he owed 4,800*l.*, and had assets to the amount of 1,100*l.* Defendant lent him at the time 50*l.* also. He stated that he was then living in apparent credit, and was about removing to a larger house.

The defence was, that the plaintiff really employed another attorney on his behalf, and that his clerk had recommended him to take the security: the clerk was called as a witness, but admitted that his principal had not been actually employed, and had not charged the plaintiff.

Mr. Justice ERSKINE left it to the jury to say whether the plaintiff had retained the defendant to lay out the money; if so, whether he had used proper care in negotiating the business, and knew that the borrower was a

needy and distressed man. *Verdict for the plaintiff*—Damages 187*l.* deducting the value of the policy.

As this is an important case affecting ATTORNEYS, we think it desirable to give the opinion of Mr. Justice Bayley in delivering judgment upon the case of *Howell v. Young, Gent., one, &c.* (a) The declaration in that case stated, that the plaintiff had contracted to lend a party 3000*l.* at interest, the repayment and interest to be secured by a warrant of attorney and certain mortgages, provided they should be found to be a sufficient security,—that the plaintiff retained the defendant as his attorney, to ascertain that the security was sufficient,—that the defendant accepted such retainer, and that it became his duty to use due care and diligence in getting at that fact.

Breach—That the defendant did not use that due care and diligence, but wholly neglected so to do, and on the contrary falsely represented to the plaintiff that the warrant of attorney and mortgages would be a sufficient security, whereupon the plaintiff lent his money,—that the securities were not sufficient security, by reason whereof the plaintiff lost his money.

Plea—not guilty. 2dly, Statute of Limitations. The action was tried at the Summer Spring Assizes for Gloucester, 1825, and the jury found a verdict for the defendant upon the direction of the judge—(Burrough,)—that the Statute of Limitations was a bar to the action, but that if the jury should be of opinion that the plaintiff had been induced by the fraud of the defendant to advance the money, they were to find for the plaintiff.

A rule for a new trial was had upon two grounds; first, that upon the question of fraud the verdict was against the weight of evidence; and 2ndly, that the Statute of Limitations ran, not from the time when the insufficient security was taken, but when the special damage alleged in the declaration, viz. the loss of interest accrued.

Bayley, J. said, this is a case of no dif-

ficulty whatever. The only question is, what is the cause of action disclosed in this declaration? It appears to me that the misconduct of the defendant is the gist of the action. If the allegation of special damage had been wholly omitted, the plaintiff would have been entitled to a verdict for nominal damages. The plaintiff in this action is entitled to recover a compensation in damages for the injury resulting to him from the misconduct of the defendant. The special damage resulted from that misconduct; but it constituted part only of the injury sustained by the plaintiff, and it is not of itself a cause of action. The declaration is framed so as to shew that the misconduct of the defendant is the cause of action. It states that the plaintiff had contracted to lend 3000*l.* at interest, to be secured by a warrant of attorney and mortgages of specific property there described, provided the warrant of attorney and mortgages should turn out to be a valid and sufficient security for the same; that the plaintiff retained the defendant (he being an attorney) to ascertain whether they would be a sufficient security; and that it became the duty of the defendant to use due care and diligence to ascertain whether they would be so or not. It then states, that the defendant did not use due care and diligence in that respect, but omitted so to do; and, on the contrary, represented to the plaintiff that the warrant of attorney and mortgages would be a sufficient security, whereupon the plaintiff advanced the money; and that the warrant of attorney and mortgages were not a sufficient security, but were invalid and insufficient securities. Now, if the declaration had stopped there, a sufficient cause of action is stated. There is an acceptance of the retainer by the defendant, a duty resulting therefrom, and a breach of that duty. But the declaration goes on to state: “By reason whereof the plaintiff has wholly lost the interest due on the sum of 3000*l.* and is likely wholly to lose the said principal sum of 3000*l.*” Now does the introduction of that allegation vary the case? In an action for words which are actionable in themselves, a special damage is frequently alleged in the declaration,

(a) 5 Barn. & Cress. 263.

although it is not the ground of the action, and the plaintiff may recover without proving the special damage. In such case the allegation of special damage is a mere explanation of the manner in which the conduct of the defendant has become injurious to the plaintiff. So in this case, the purpose for which the allegation is introduced, is precisely similar. Where, indeed, words are not actionable of themselves, but become so by reason of the consequential damage, then it must be alleged and proved; because it constitutes the cause of action.

In an action of *assumpsit* the Statute of Limitations begins to run *not* from the time when the damage results from the breach of the promise, *but* the time when the breach of promise takes place. The case of *Short v. M'Carthy*,^(a) which is very analogous to the present, is an authority in point. There the declaration in *assumpsit* stated as a breach of the promise, that the defendant did not diligently and sufficiently make a search at the Bank of England to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney to do so. The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff till within the six years. The Statute of Limitations having been pleaded, it was held, that upon this form of declaration the plaintiff was not entitled to recover, on the ground that the cause of action accrued at the time of the breach of duty or promise by the defendant, and not at the time of its discovery by the plaintiff; and that the statute began to run from the time when the defendant ought to have made the search, which it was his duty to do. It appears to me that there is not any substantial distinction between an action of *assumpsit*, founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly upon a breach of duty. Whatever be the form of action, the breach of duty is substantially the cause

(a) 3 B. & A. 626.

of action. That being so, the cause of action accrued at the time when the defendant in this case took the bad and insufficient security, that was more than six years before the commencement of the action, which is consequently barred by the Statute of Limitations. The rule for a new trial must therefore be discharged.

Holroyd, J. was also of opinion that the Statute of Limitations was a complete bar to the action.

Littledale, J. concurred.

Bayley, J. also referred to *Brown v. Howard*, 2 B. & B. 73.

A count in *assumpsit* against an attorney for negligence, stating, "that in consideration that the plaintiff would retain the defendant in investing money in the purchase of an annuity, the defendant undertook to perform his duty in the premises; that the plaintiff did retain the defendant for the purpose aforesaid, yet the defendant did not perform his duty in the premises, but invested the money in security of no value, by reason of which premises the plaintiff lost the money;" it was held on motion of arrest of judgment, that the count was bad, because it did not state that any reward was to be paid to the defendant, or that he was employed in any particular character, so as to make him responsible for taking bad security, although not guilty of negligence or dishonesty. *Dartnall v. Howard*, 4 Barn. & Cress. 345; 6 Dow. & Ry. 438.

EDITOR.

NORFOLK CIRCUIT.

BEDFORD, TUESDAY, March 19.

Before the Lord Chief Justice TINDAL, and a Special Jury.

MUGGLETON v. EDWARDS.

Nuisance—Ancient blacksmith's shop—Whether the smoke arising from the forge of a blacksmith's shop, is the subject of an action for a

nuisance, when it annoys another who has come to it, without interfering with the fair exercise of his trade, or rendering his house uncomfortable?

This was an action to recover damages for a nuisance.

It appeared in evidence that in the year 1836, the Marquis of Bute sold by auction a space of ground in the parish of Luton, on which there then stood a few cottages and an ancient blacksmith's shop of the defendant's. These buildings were all pulled down, and the defendant built his new shop near the old one; he also became the purchaser of one of the lots, for the purpose of building a dwelling-house. A Mr. Burr, a brewer of Luton, purchased three other lots, on two of which he erected houses, one of which he let to the plaintiff, the other to a Mr. Harrison. Behind his house, and within a few feet of the defendant's shop and forge, the plaintiff built warehouses, and formed a yard for the drying and bleaching of straw plat, which article he manufactured to some extent. Harrison's kitchen chimney, a baker's chimney, and many others, but particularly the large brewery chimney of the plaintiff's landlord, Burr, are in the immediate vicinity of the plaintiff's premises, and send out continual and uncomfortable quantities of smoke. But above all, the plaintiff complained of the defendant's forge-chimney, from which the witnesses swore they could see not only large volumes of smoke, but great quantities of sparks and soot issue. These sooty particles, "blacks," fall on to the plat of the plaintiff as it hangs out to dry, covering it to such a degree that it is frequently necessary to wash it a second time before it is in a fit state for the market. Besides this, the plaintiff and his neighbours are often obliged to keep their house windows closed, in order to keep out the "blacks," which cover counterpanes and furniture when they are left exposed to it. It was also shown that loud and sleep-disturbing noises proceed from the hammer and anvil used by the defendant, to the annoyance of the neighbourhood, though to no great extent.

Mr. Andrews, for the defendant, contended that the plaintiff had no right to build premises and establish a trade requiring a peculiarly pure and clear air, in the heart of a busy and thriving town like Luton, and then to complain of the exercise of a useful and lawful trade by a neighbour, which was carried on long before the plaintiff built his own premises. The reasonable exercise of a man's legal rights is not the subject of an action for a nuisance, even although it may annoy another; as, where a brewer, butcher, or the like, carries on his trade in a lawful manner and in a proper place. Here the defendant had established his trade before the plaintiff had built his premises, and the latter had, therefore, no right to complain. He should moreover shew, that by far the greatest quantity of smoke came, not from the defendant's shop, in which only a single workman was

employed, but from the chimneys of the breweries of Mr. Burr and others, in the immediate neighbourhood.

Evidence was given in support of this statement, and the leading manufacturers of straw plat in Luton, stated that it would be impossible to carry on the business for which their town is so celebrated if they were extreme in complaining of every little injury they received from the blacks and smoke from their neighbours' chimneys.

The Lord Chief Justice left it to the jury to say whether the evidence satisfied them that the smoke and dirt from the defendant's chimney rendered the occupation of the plaintiff's house, in a sensible and substantial degree, uncomfortable, or interfered in the like degree with his carrying on of the trade upon his premises. If they thought it did, the defendant could not justify himself in this action; if they thought that the house was not rendered substantially uncomfortable or lessened its value, and that the mode in which the defendant carried on his business did not interfere with the fair exercise of the plaintiff's trade, their verdict would be for the defendant.

Verdict for the defendant.

SPECIAL JURY.

TIPLADY v. HUNT AND CHASE.

ATTORNEYS—*Liability of, in conducting their business to an action for damages, where they had charged a party with felony for taking purchase money from an attorney's table, to the whole of which he was not entitled, and refusing to distribute it among the parties who were entitled.*

This was an action for maliciously charging the plaintiff with felony before a magistrate, and afterwards indicting him at the quarter sessions for that offence.

The plaintiff is a plumber at Luton, in which town the defendants carry on, but not in partnership, the profession of attorneys. The following appeared to be the somewhat singular facts of this case. The plaintiff, in 1837, purchased a small property in Luton for the price of 250*l.* of a Mr. Barrett, of which he paid 150*l.*, leaving the deeds in the hands of Mr. Chase, as Barrett's solicitor, as a security for the other 100*l.* Besides this charge, the estate was encumbered with a mortgage to one Miss Barnett, for the like sum of 100*l.* In June, 1838, the plaintiff agreed to sell the property to one Warren for 230*l.*; the defendant Hunt was concerned for Warren in the transaction. It was arranged that the mortgage to Miss Barnett should be discharged out of the moneys to be paid by Warren to the plaintiff, and upon the faith of her being paid when the purchase should be completed. Mr. Chase procured her to execute the deed, conveying the property to Warren, in which deed she released the estate and all parties

from the mortgage money. On the 15th of June, the plaintiff, the defendants, Warren the purchaser, and some other parties met in order to complete the business. The deeds were produced, and Warren placed 230*l.*, the purchase-money, in the hands of Hunt. The servant of Mr. Chase was sent to procure change for one of the notes, for 100*l.*, and during his absence an account was produced containing a statement of the claims of the various parties. By this it appeared there was due to Miss Barnett 105*l.*, for principal and interest on her mortgage; 62*l.* to Barrett on his, and a small sum to Chase as their solicitor—in all amounting to 174*l.* This account the plaintiff went through, item by item, and, finding it correct, he agreed that Hunt should deduct the amount from the 230*l.*

On the return of the messenger with the change for the 100*l.* note, the 230*l.* was placed by Mr. Hunt upon the table at which they sat; but it had not lain there more than a minute when the plaintiff "made a long arm," took up the money and put it into his pocket, at the same time saying it was long since he had had so much money about him, and he "should like just to say he had such a sum." Presently, upon the deeds being laid before him for execution, he was required to return the money to Mr. Hunt for distribution as above mentioned, but this he wholly refused to do, though much urged by the parties. Mr. Hunt, thinking at the time that the whole matter was only a joke on the part of the plaintiff, allowed him to sign the deeds, and this having been done he renewed his request on the plaintiff to give up the money, but in vain. Entreaty was useless, and after several threats to send for the constable, that officer was fetched in good earnest. The plaintiff, being told that he had arrived, threw down a 100*l.* note upon the table, saying at the same time, "There's Miss Barnett's money," but refusing to relinquish either Barrett's or Chase's share. The constable was then called in, and having, with the assistance of two other men, wrenched another 100*l.* from the plaintiff, Mr. Hunt took 74*l.*, and offered the plaintiff the balance of 26*l.*, which the latter refused to take. He was then taken before a magistrate, who, after taking the depositions, remanded him, but allowed the constable to convey him to his own house. The officer and his prisoner sat conversing for some hours, but towards the morning the constable, unused to be so occupied during the hours of darkness, fell into a profound sleep, from which he waked not until he felt something "brushing past him." Upon waking he had just time to see his charge escaping without his hat; he pursued him, but in vain. It appeared, however, that the plaintiff got away only for the purpose of consulting his attorney, by whose advice he surrendered himself at the first meeting of the magistrates for Bedfordshire, by whom he was held to bail to appear at the sessions. He appeared accordingly, when he was tried upon an indictment

for stealing the money so often mentioned. Mr. Chadwick Jones appeared specially to defend him, and after the charge of the learned chairman, Mr. Pym, the jury at once, and without hesitation, acquitted him. Hence the present action. His attorney's bill for the defence was upwards of 100*l.* By way of proving that he had sustained "special damages," by the charge of felony having been made by the defendants, the plaintiff called two shoemakers, from Luton, who stated that in consequence of that charge they refused to make shoes for his wife and children "on credit."

The LORD CHIEF JUSTICE said he was clearly of opinion that no felony had been committed by the plaintiff. He had been guilty of an audacious trespass, for which the defendants might have had a civil remedy, but could not proceed by indictment. Still, although there was no reasonable cause for preferring the charge, the jury must be satisfied that the defendants acted from malicious motives, and not under a fair and *bona fide* belief that the plaintiff had committed a felony, before they could find a verdict for the plaintiff. Of express malice on the part of the defendants no proof had been even attempted to be given; and it would be for the jury to say whether, under the extraordinary circumstances before them they could see any ground for inferring that the defendants had been actuated by malice in any part of the proceeding.

Verdict for the defendants.

SITTINGS.

COURT OF CHANCERY.

Adjourned to Tuesday, April 9.

VICE CHANCELLOR'S COURT.

Adjourned to Tuesday, April 9.

ROLL'S COURT.

Adjourned to Tuesday, April 9.

REGISTER OF JUDGMENT, &c., under 1st and 2nd Victoria, Cap. 110, Sec. 19.

851

Filed the 18 , By	day of A Dated _____	JUDGMENT, DECREE, ORDER, OR RULE. of the Court of _____ day of _____ 18 _____
TITLE OF THE CAUSE OR MATTER IN WHICH THE SAME HAS BEEN OBTAINED. v.		
(Signature and Address of Attorney.)		
NAME, &c. OF THE PERSON, WHOSE ESTATE IS INTENDED TO BE AFFECTED.		
SURNAME.	CHRISTIAN NAME OR NAMES.	USUAL OR LAST KNOWN PLACE OF ABODE. TITLE, TRADE, OR PROFESSION.
ACCOUNT OF THE DEBT, DAMAGES, COSTS, OR MONEYS THEREBY RECOVERED OR ORDERED TO BE PAID.		
Account of _____		£
Account of _____		s.
		d.

TO CORRESPONDENTS.

"R. P." We admit that through an error of the press, the first seven lines of our leading article last week are unintelligible. (See the Errata below.) A comma was intended by us to be placed after the word "contemplates," for want of which our meaning is quite perverted. *With the comma* the sentence, with attention, may be readily understood. We are much pleased in seeing that our readers do pay attention to matter so highly important to practical men. The sentence alluded to is in reference only to the *species* of past possession only, *which the act contemplates*; for though, as we have said, (a) the act is retrospective, yet it must be so far qualified in its construction as to exclude from its operation cases in which the state of circumstances within its purview, had existed for the full period requisite to complete the bar, but had ceased to exist before the passing of the act, and in which, therefore, the title had reassumed its rightful aspect. See also Hayes's Conveyancing. In the case of Doe dem. Thompson v. Thompson, 6 Adolp. & Ellis, 721; ante, p. 321.—it was contended that *a fee simple arose by the passing of the act*—that was impossible.

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(a) Ante, p. 321.

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ERRATA.

Page 321, in the seventh line of the first column, place a comma after the word "contemplates."

Page 324, omit "to be continued."

On the 1st April, Price 2s.,

PART V.

THE LEGAL GUIDE.

Nos. 18, 19, 20, and 21.

CONTAINING an Original Essay upon the New Statute of Limitations relating to Real Property, illustrated by the Opinions of Conveyancers, and shewing in what manner the Courts are disposed to give effect to that Statute.—Also an Original Essay upon the present State of the Law governing the Liabilities of Legal and Equitable Mortgages, occasioned by *Flight v. Bentley*, being overruled.—The Practice of Solicitors "attesting Petitions" in Bankruptcy.—The Practice of instituting Suits by *Femes Covert*.—New Forms of Writs under 1 & 2 Vict. c. 110. s. 20.—Judgment of Sir H. Jenner in the Will case of James Wood, of Gloucester, Banker.—Important Decision upon Attorneys' Certificates.—New Sections of the Insolvent Act coming into Operation.—Law relating to the Brokers of London.—Reports of Practical Cases at the Assizes.—List of Sheriffs.—Legal Business in Parliament, and Index to the Part.

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Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 30th March, 1839.

Price 6d. Stamped Edition, 7d.

The Legal Guide.

No. 23.]

SATURDAY, APRIL 6, 1839.

MORTGAGORS AND MORTGAGEES.

AN ESSAY Upon the Character in which a MORTGAGOR in Possession may be considered.

WE concluded our last part of the Essay upon the Laws of Real Property, with some observations upon the character in which a *mortgagor in possession* may be considered, and we are inclined to think that the usefulness of "The Guide" will be more extended by our entering fully into the subject, and explaining to our readers the *confused* state of the law, as to the character in which a mortgagor in possession is to be considered.

It is observed by two modern writers (*a*) upon the subject, that "the point (*the confusion*) may not be of any material consequence, further than as it is important in all cases that a construction should be adopted consistent with the general principles of law; and as the privity which may exist between the mortgagee and a mortgagor in possession, in consequence of a tenancy being considered as subsisting between them, may materially affect the operation of a conveyance from the former to the latter." We cannot, however, bring ourselves to such a conclusion;—if the law be unsettled, or confused upon any point, the resulting consequences *may be* of the highest importance. Indeed one of the same writers on another

occasion also observes, "There is some obscurity in the books, in what light the mortgagor, during the period of actual possession, or receipt of the rents of the land, stands in respect of the mortgagee. The result of the cases, however, appear, that he *may be* considered as tenant for a term, or at will, or by sufferance, or a trespasser, according to circumstances. (*b*)

Surely if the law be so obscure, the point must be of much greater importance than these gentlemen have shewn in the quotation we first made.

In *Keech v. Hall*, (*c*) an ejectionment was brought by a mortgagee, against a lessee, under a lease in writing for seven years, made *after the date of the mortgage*, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectionment was brought. Lord MANSFIELD, in delivering the judgment of the court, said there was no notice to quit; so that, though the written lease should be bad, if the lessee is to be considered as tenant from *year to year*, the plaintiff must fail in this action. The question, therefore, for the court to decide is, whether by the assignment understood between mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the

(*a*) Coots and Morley's note to Watkins on Conveyancing, 13; 8th Edition.

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(*b*) Coots on Mortgages, 389.

(*c*) Ante, 329.

mortgagee has given an implied authority to the mortgagor to let from year to year, at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrong-doer. No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the Home Circuit (*Belcher v. Collins*); but *there the mortgagee was privy to the lease*, and afterwards by a knavish trick wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a court of equity goes upon a mistake. It emphatically belongs to a court of law in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration a court of equity must follow, not lead the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud, or consent against the mortgagee, to prevent him from considering the lessee as a wrong-doer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; (a) but here the question turns upon the agreement between the mortgagor and mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises *at will* in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because *all is liable* to the debt; on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go to a great extent; to leases where a fine is taken on a renewal for

lives. The tenant stands exactly in the situation of the mortgagor.

The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage: for it is in the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure, when he takes a lease, should enquire after and examine the title-deeds. In practice indeed (especially in the case of great estates), that is not often done, because the tenant relies on the honour of his landlord; but, whenever one of two innocent persons must be a loser, the rule is *qui prior est tempore, potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff in a case like this, can recover, he will also be entitled to the mesne profits from the tenant, in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop, which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which with regard to tenants at will, the text of *Littleton* is clear. We are all clearly of opinion that the plaintiff is entitled to judgment.

The decision in this case established the doctrine that a mortgagee may recover in ejectment, without giving notice to quit, against a tenant, who claims under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee, and has been since repeatedly confirmed.

The doctrine, however, was not new. In Croke's reports we find the same, (a)

(a) See Cowp. 473.

(a) Cro. Id. 660. Cro. Car. 303,

and that it followed, from the *mortgagor*, being considered, in the nature of a **TENANT AT WILL**: and yet Lord MANSFIELD (*b*) said, that a mortgagor is **NOT** properly a *tenant at will* to the mortgagee, because he is not to pay him rent; so Mr. JUSTICE BULLER in the elaborate judgment he delivered in *Birch v. Wright*, which we shall notice hereafter, (*c*) said a mortgagor is **NOT** considered as a *tenant at will* in those proceedings which are in daily use between a mortgagee and mortgagor.

We will turn our attention to the *circumstances* that may give a mortgagor in possession or receipt of rent, some *defined* character as to the relation in which he stands with the mortgagee.

To get at these *circumstances*, we will first direct our inquiry to what is deemed a sufficient recognition by the mortgagee, that the mortgagor or his tenant is in such lawful possession as shall bar an ejectment by the mortgagee.

In *Doe dem. Whitaker v. Hales*, (*d*) we find that one Austin mortgaged to the lessor of the plaintiff, and afterwards let the premises to the defendant. The mortgagee directed his attorney (who was also attorney for the mortgagor) to apply to Austin for the interest; the attorney applied in April, 1830, to the defendant (who was the occupier of the land) for rent, to pay the interest, and threatened a distress in case of non-payment. The defendant did pay the attorney several times, who had an account with Austin, and who paid the interest, but he never had any authority from the lessor of the plaintiff to receive rent *for him*, but he received the rent for Austin and distrained by his authority. The lessor of the plaintiff brought an ejectment, which was tried before *Bosanquet, J.* at the Salop assizes, 1830. The demise was laid on the 25th Dec. 1829, and it was determined that the application made by an agent of the lessor of the plaintiff to the defendant in April, 1830, was an acknowledgment that the defendant was **NOT** a trespasser at that time, and therefore could not have been such on the day of the

demise (25th Dec., 1829,) and the plaintiff was nonsuited. On showing cause against a rule that had been obtained to set aside the nonsuit, Tindal, C. J., in delivering the judgment of the court, said, the question is, whether Hales was a trespasser on the 25th Dec., 1829, and after stating the facts, observes, "This, therefore, was a demand made by the assent of the mortgagee, and with full knowledge of all the circumstances of the parties, namely, that the defendant was tenant to the mortgagor, and not to the lessor of the plaintiff, and if a party employs an agent who has full knowledge of the circumstances, it must be presumed that the principal has the same knowledge. So that the lessor of the plaintiff, having recognised and availed himself of the possession of the defendant, so late as April, 1830, cannot treat him as a trespasser in 1829. If the case had gone to the jury, as it might have gone, had the counsel for the lessor of the plaintiff insisted on it, they must have come to the conclusion that here was a recognition of the lawfulness of the defendant's possession. *Bosanquet, J.* also observed, "The question which has now been raised on the part of the lessor of the plaintiff, might, no doubt, have been left to the jury; but I interposed, and said, that without deciding whether the defendant had been adopted as tenant to the lessor of the plaintiff, yet that he could not be considered as a trespasser from December, when his possession had been recognised in April following. The witness said, 'I told Hales if he did not pay the rent, I should take the steps the law allowed: I believe I threatened to distrain if the rent were not paid.' There was no privity between the lessor of the plaintiff and the defendant, and on what ground could he call on him for money, except as being legally in the possession of the premises?" *Alderson, J.* said, "If the demise had been laid subsequently to April, 1830, the question which it was proposed to leave to the jury at the trial might have been very material. But the question here is, not whether the defendant was tenant to the lessor of the plaintiff, but whether he had been recognised by him as being in the legal occupation of the land; and if he had been

(*b*) *Moss v. Gallimore*, 1 Doug. 283.

(*c*) 1 Term. Rep. 382.

(*d*) 7 Bingh. 322.

so recognised, the lessor of the plaintiff could not treat him as a trespasser. Suppose the mortgagor had gone to the defendant in company with the mortgagee, had demanded the rent, and had immediately paid it over to the mortgagee as interest. If the mortgagee knew that at that time the defendant was in possession of the land, and signified no dissent, is it lawful or just that he should afterwards treat the defendant as trespasser *ab antecedente?*" and it was decided that the defendant was entitled to his judgment of nonsuit, whether the attorney's evidence shewed him to be a tenant to the lessor of the plaintiff, or only legally in possession of the premises since December, and the *rule was discharged.*

This case has its *peculiar circumstances*, and from it we collect that a mortgagee having recognised and availed himself of the possession of the mortgagee, or his tenant *up to a certain period of time*, cannot treat either of them as transgressors *before* that period, and this is all the case determines; however we shall shew in our next that by a subsequent case it was determined that the *mere fact* of the mortgagee having received interest down to the time, *later than* the day laid, as the demise is not a recognition that the mortgagor, or his tenant, was in *lawful possession until* that time, and consequently was no defence to an ejectment by the mortgagee.

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XX.

What is Waste?

WASTE, which is expressed at common law very significantly by the word *vastum*, is defined by Blackstone (I) to be a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the injury of the inheritance.

This waste is of two kinds; viz. *voluntary* and *permissive*; the former is a crime of *commission*, by an actual demolition of the lands, woods, and houses; and the latter is a matter of *omission only*, arising from mere

(1) 2 Comm. 281. See Co. Litt. 53. 3 Atk. 95.
754.—Ed.

negligence and want of sufficient care in reparations, fences, and the like. Whatever then does a lasting damage to the freehold or inheritance, such as removing wainscot, floors, or other things once fixed to the freehold of a house, is waste; and to enable a reversioner to bring an action in the nature of waste, it must be proved that the injury is of a *permanent kind*. 1 Nev. and M. 13. It has been held, however, that a tenant for years may take down necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. He may also carry away ornamental marble chimney-pieces, wainscot fixed only by screws, and the like. But erections for the purpose of farming or agriculture do not come under the exceptions with regard to trade, and cannot be taken down again. Elwes v. Maw, 3 East. 52; nor will the words "without impeachment of waste" permit a tenant for life to unlead a house and pull down the tiles. Vane v. Barnard, 1 T. R. 56 n. And where a tenant for years has a right to remove erections and fixtures during his lease, and omits doing so, he is a trespasser afterwards for going upon the land, but not a trespasser *de bonis asportatis*. 2 East. 88.

Waste may also be committed in ponds, dove houses, warrens, and the like, by so reducing the number of creatures therein as to cause an insufficiency for the reversioner. Co. Litt. 53. Timber being part of the inheritance, is also subject to waste, and it has been held that if, during the estate of a mere tenant for life, any timber is severed either by accident or wrong, it belongs to the first person who has a vested estate of inheritance. But where there are immediate contingent estates of inheritance, and the timber is cut down by a combination between the tenant for life and the person who has the next vested estate of inheritance; or if the tenant for life has himself such estate and sells timber; in these cases the Chancellor will order it to be preserved for him who has the first contingent estate of inheritance under the settlement. 3 Cox's P. Wms. 267; 3 Wood. 400.

The conversion of land from one species

to another, as from meadow to arable, is waste. *Simmons v. Norton*, 5 M. & P. 645; 7 Bing. 640; and the same rule is observed with regard to converting one species of edifice into another, even though it is improved in its value. To open land in search of mines is also waste, for that is a detriment to the inheritance; but if the mines have been open before, the tenant may still continue digging them for his own use, having become part of the mere annual profit of the land.

Such then are the three general heads of waste, viz. in houses, in timber, and in land; although as is mentioned before, whatever else tends in any way to the destruction or depreciating the value of the inheritance is considered by the law as waste.

R. P.

PROBLEM XXIII.

WHAT IS THE LAW GOVERNING THE DISTRIBUTION OF THE PERSONAL ESTATE AND EFFECTS OF A PERSON DYING INTESTATE?

Law Reports.

VICE CHANCELLOR'S COURT. Mar. 28.

NEWMAN v. JOSEPH.

TRADESMEN'S NAMES as applied to distinguish a particular business or article—their exclusive right to MARKS.

Injunction—Whether one tradesman may place upon his shew board the name of another, in conspicuous characters, so as to deceive the public and defraud a person having the right to the name.

Mr. K. Bruce moved upon notice for an injunction on behalf of the executors of the late Mr. Newman, the colour manufacturer of Soho-square, and his sons, who now carried on the business, to restrain the defendant from exhibiting on the front of his house certain show-boards or placards inscribed in such characters as were calculated to delude the public with a belief that the business of the late Mr. Newman was carried on at the defendant's shop, or from making use of any other boards that would lead to an impression that the defendant's house was, in fact, the house of Mr. Newman, or that he had succeeded to the business formerly carried on by

him. The plaintiffs and the defendant both resided in Soho-square, the shop of the latter being situate on the north side of the square, and Mr. Newman's trade being carried on at a private house on the east side. Soon after the death of Mr. Newman the defendant placed a show-board on the side of his shop-door with this inscription,—“The late Mr. Newman, No. 24, was for fifty years furnished with pencils from Joseph's manufactory,” and the complaint was, that the name of Mr. Newman, and the number of the house, were written in such large and conspicuous characters, and that such slender and insignificant letters were employed in the rest of the inscription as to lead at once to an impression the house was, in fact, No. 24, and the business of Mr. Newman was conducted there. This was only one part of the fraudulent intention to mislead the public, and prejudice the business of the plaintiff. Two boards were made use of,—one hung at the side of the defendant's shop in the daytime, and concealed his name, which was inscribed in small letters under a bell, and the other, which was a transparency, was exhibited inside the shop-window at night; and what manifested a more flagrant intention to deceive the public was, that a pasteboard was ingeniously placed behind the lower part of the transparency, and the light was only admitted through that portion on which Mr. Newman's name appeared, so that though there were in point of fact sufficient words on the transparency to represent the business was Joseph's, if they could be seen, yet they were in effect rendered invisible, and a simple statement was given out to the public that it was Mr. Newman's establishment.

The affidavit of Mr. Bagster, of Paternoster-row, stated that he went to Soho-square with his son, intending to execute an export order at the establishment of Mr. Newman, that he was induced from the show-board which was placed on the defendant's house to enter the shop, and being informed by the defendant that he had conducted Mr. Newman's business in his lifetime, he gave the order under an impression it was the establishment of Mr. Newman carried on by the defendant, and that Joseph took the goods to Mr. Bagster's house the next day, and received in payment a check for 50*l.*, drawn in the name of “Newman or bearer.” There was also an affidavit which stated a similar instance of the boards having deceived a lady who kept a school, and who gave a large order at the defendant's shop. In this case the deception was so successful throughout, that it was only discovered by the accident of the draught for payment having been delivered at Mr. Newman's house, whence it was supposed the goods had been supplied. Facsimiles of the show-boards were also exhibited in court, which it was contended evinced a sufficient intention to mislead the public and benefit the defendant at a proportionate injury to the plaintiffs' establishment. To rebut the case he set up, that it was only the *bona fide* exercise of a right he possessed

of informing the world he formerly supplied Mr. Newman's establishment with pencils, and after the repeated remonstrances ineffectually made to him, and the injury specially proved to justify the court in granting the injunction.

Mr. Jacob opposed the motion, and argued that the number of months the plaintiffs had suffered the grievance of which they now complained to continue without any application to the court was fatal to the present application for an injunction, and clearly proved they had hitherto suffered and would suffer no injury from what the defendant had done. It was shown by an affidavit on behalf of the defendant, that his only object in exhibiting the board in the manner it was written, was to inform the public that the pencils for which Mr. Newman had obtained so much celebrity were not, in fact, manufactured by him, but by Mr. Joseph, and that he only sought to enjoy the benefit of the reputation his own pencils had acquired. This he had a right to do; and as to all that had been said about the characters in which the boards were written, it was impossible that any person who was not defective in vision could fail to see that the intention was to make known to the public that Mr. Joseph, who had supplied the establishment of the late Mr. Newman with pencils, carried on the same trade there, and sold the same article. There could be no deception in this, and it was a right the court had no power to restrain by injunction. The very slenderness of the letters distinguished Mr. Joseph's name, and made it conspicuous from the rest of the writing. If the court did grant the injunction, it would be either affirming the principle that after a man had once left the employment of another he was not at liberty to state the fact at all on his boards, and thereby prevent him from setting up for himself, deriving a benefit from the reputation he had acquired by long service and excellent management, and enabling every house that felt its trade declining from the loss of a valuable assistant to resort to the court for an injunction, or else it must take upon itself to define the exact size and description which the characters in the various parts of a show-board adapted to the use of a person in such a situation should be written.

The VICE-CHANCELLOR said it was impossible for any one to look at the two boards which had been exhibited in court without at once perceiving a manifest intention on the part of the defendant to mislead the public with a notion that the trade of the late Mr. Newman was carried on at his house, nor could any one enter Soho-square from Oxford-street, in search of Mr. Newman's shop, without being under an impression, from a glance at the show-board, that it was at the house of the defendant. But what, in his opinion, was the best criterion in such cases was the fact shown in the affidavits, that three persons had actually entered the shop and made purchases under such an idea. As to the affidavit on the part of the defendant,

which stated that the intention was merely to claim the benefit of a reputation derived from articles he had for many years manufactured for Mr. Newman, his Honour, for one, must take the liberty to say he did not believe it. Upon the ingenious argument used by the defendant's counsel, that the court must either deprive a party of the benefit of the reputation he had acquired at the house of another person, or else prescribe the exact size of the letters, he would only observe, that it was not necessary to lay down any rule, but to deal with every case according to its own particular circumstances, and the evidence of fraudulent intention or otherwise which those circumstances showed. Being clearly of opinion in the present case the boards were written in a manner and with a manifest intention to deceive the public, to the prejudice of the plaintiffs, he should grant the injunction, but confine it for the present to the use of two boards which had been produced in court, and leave the plaintiffs in the mean time to bring such action as they should be advised. When the result of the action was known, the court would be able to decide what further order was proper to be made.

Mr. K. Bruce hoped the court would give the plaintiffs liberty to apply, if any new board should be put up, only colourably differing from those interdicted by the injunction.

The VICE-CHANCELLOR.—Certainly.

A case (*a*) occurred in 1832, where the plaintiff began to sell in London a mixed tea, composed of many different sorts of black tea, under the name of "Howqua's Mixture," in packages weighing a *catty* each, and having Chinese characters, and the figures of a male and female Chinese on three of the sides, and a printed label containing the words "Howqua's Mixture," and some other particulars relating to tea, on the fourth side.

The defendant having sold tea under the same name, and in packages with labels resembling those used by the plaintiff, the plaintiff obtained an *ex parte* injunction to restrain him from so doing. The case made by the plaintiff was that the mixture in question was originally made by one of the Hong Merchants at Canton, named Howqua, for his own private use; that the plaintiff, when he was at Canton, had been intimate with Howqua, and had frequently drunk tea, made from the mixture at his house; that having ascertained the particular kind

(*a*) *Piddington v. Howqua*, 8 Sim. 477

of tea which gave to the mixture its peculiar flavour, he in 1832 purchased from Howqua, and brought to England, a large quantity of that tea, and also of other black teas, and made a mixture of them similar to that used by Howqua; and that he had continued to sell large quantities of it, under the name and in the packages before mentioned.

The plaintiff, in his labels and advertisements, intimated that the mixture was made by Howqua, in Canton, and was purchased from him, and imported into this country, by the plaintiff, in the packages in which it was sold; that the tea which gave it its peculiar flavour, was very rare and high priced even in China, and was grown in only one province of that country, named Kiyang Nan; and that it could not be procured in England, at any price.

The defendant replied, that the mixed tea sold by the plaintiff was neither made nor used by *Howqua*, that it was composed of scented orange pekoe, (which gave it its peculiar flavour) and of other black teas of the ordinary kinds: that orange pekoe was not considered in China to be one of the best teas; and that that sort of tea had been imported into and sold in England previously to 1832, and had been since, generally imported and sold by persons engaged in the tea trade. That no black tea, but only green tea, was produced in the province of *Kiyang-Nan*. That the plaintiff did not purchase the teas, from which the mixture was made, from Howqua, or import them from China, but that he purchased them in England, and that the packages in which the mixture was sold were made not in China but in England.

The VICE-CHANCELLOR, in delivering judgment, observed that the plaintiff having acquired, either by some communication from Howqua, or in some other manner, the method of compounding a mixed tea, which had been so agreeable to the public as to induce them to purchase it, began, some years ago, to sell it under the name of "Howqua's Mixture:" and the defendant, finding that the plaintiff's mixture was in considerable demand, had begun to sell a mixture of his own, which differed from the plaintiff's under the same

designation. That, *prima facie*, the defendant was not at liberty to do that. There had been, however, such a degree of misrepresentation held out to the public, about the mode of procuring and making up the plaintiff's mixture, that a court of equity ought not to interfere to protect the plaintiff, until he had established his title at law. As between the plaintiff and the defendant, the course pursued by the defendant had not been a proper one; but it was a clear rule, laid down by the Courts of Equity, not to extend their protection to a person whose case was not founded in truth. And, as the plaintiff, in this case, has thought fit to mix up that which might be true, with that which was false, in introducing his tea to the public, that unless he established his title at law, the court could not interfere in his behalf. The injunction was, therefore, dissolved, and the plaintiff had liberty to bring such action as he might be advised. Both parties had liberty to apply; and the consideration of costs was reserved.

In Millington *v.* Fox, (a) it was also determined by the present Lord Chancellor, that the court will grant a perpetual injunction against the use by one tradesman of the *trade marks* of another, although such marks have been so used in ignorance of there being any person's property, and under the belief that they were mere technical terms.

In that case, the LORD CHANCELLOR, in order to repress useless litigation, laid down *an important rule as to the costs* in such cases. His lordship thought that a great deal of very useless litigation had been carried on, and that a great deal of very improper expense had been incurred. That it was exactly a case in which the court was repressing useless litigation by refusing the plaintiff the costs of the cause. A perpetual injunction was granted, therefore, against the use of the marks in question, but without the costs of the cause; and in noticing the question of costs, his lordship said, this question of costs in Chancery is left to the discretion of the Court. That discretion ought to be exer-

(a) S. C. 3 Mylne & C. 338.

cised; as far as possible, according to some principle; and I am very much disposed, as a general rule, to make the costs follow the result; because, however doubtful the title may be, or however proper it may be to dispute it, it is but fair that the party who really has the right should be reimbursed, as far as giving him the costs of the suit can reimburse him. But then there is another object which the court must keep in view, namely, *to repress unnecessary litigation*, and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights.

ROLLS COURT—March 28.

WILLATS v. BUSBY AND OTHERS.

Specific performance—Voluntary settlement—Practice—Necessary parties.

Mr. Pemberton stated that this suit was instituted, praying for the specific performance of an agreement which the plaintiff, Henry Thomas Willats, of Chertsey, in the county of Surrey, banker, now deceased, had entered into with the defendant, for the purchase of a considerable estate in houses in Bethnal-green. It appeared that the defendant, Edward Sclater Busby, on the 18th of March, 1834, contracted to sell the premises in question to the plaintiff for the sum of 4,000*l.*; he was also to make out a good title. Upon this agreement the plaintiff paid the sum of 120*l.* to Mr. Busby, in part discharge of the purchase-money. On the same day another agreement was entered into, by which Mr. Willats, in consideration of the sum of 1,850*l.* agreed to secure an annuity of 100*l.* a-year to Mr. Busby, for life, and also another annuity of 50*l.* a-year to his wife, Jannet Busby, for her life, for her separate use. It was also agreed that the plaintiff should, upon the execution of the conveyance of the premises purchased, pay to David William Busby, and Edward Sclater Busby the younger, the two sons of E. S. Busby the elder, and Jannet, his wife, the sum of 1,000*l.* part of the purchase-money, and after deducting the costs of any suit which might be instituted to make out the title to the premises, or to compel the specific performance of the agreement, it was further agreed that the surplus of the remaining 1,000*l.* should be paid to D. W. Busby, and E. S. Busby the younger. After the execution of this agreement an abstract of the title of Mr. Busby was delivered to the plaintiff, from which it appeared that, by indenture of lease and release, bearing date the 11th and 12th days of February, 1812, Mr. Busby executed a voluntary settlement, by which, in consideration of the dower to which his wife was entitled, he conveyed the messuages, land, and promises in question, to James Dobie,

John Miers, and Joseph Merceron, upon trust, for the separate use of his wife for life, with a remainder to his two sons, D. W. Busby, and E. S. Busby the younger. Upon the decease of James Dobie and John Miers, Mr. John Thomas was appointed to act with Joseph Merceron in carrying the trusts of the settlement into execution. In consequence of the legal estate being vested in the trustees, the plaintiff insisted that in order to make a good title it was necessary that they, and also Mrs. Busby, should join in conveying the estate to him, which, on being applied to for that purpose, they refused to do. The plaintiff then filed the present bill against Mrs. Busby and also against the trustees of the settlement, the former of whom insisted that the deed which had been executed by her husband was made for a valuable consideration. She also insisted that the conduct of her husband was cruel—that he had, since the settlement, never been called upon to discharge any debt which she had incurred—that she believed his mind was impaired in consequence of his drunken and intemperate habits, and also that, at the time of executing the contract for sale, he did not know what he was doing, since the property was of far greater value than the sum agreed to be given for it. But in addition to these things her husband had acted upon the settlement, and had obtained an inhibition against her in the Scotch courts, which, it was alleged, exonerated him from all liability for his wife's debts. The learned gentleman stated that there was no evidence before the court proving that Mr. Busby was not fit to manage his own affairs, neither was there any proof of his drunkenness. There was no consideration for the settlement, since, assuming the contract was carried into execution, she would still be entitled to dower; but, with regard to the inhibition, he could not well understand its force; it was an act of the Scotch courts, by which it was supposed the wife was restrained from incurring any debts for which her husband would be liable. He (Mr. Pemberton) could not see the use of it, especially in England; but, allowing it to be of the value contended for, this inhibition could not have any force after the maintenance allowed to Mrs. Busby had ceased to exist.

Mr. Kindersley followed on the same side.

Mr. Spurrier appeared for Mr. E. S. Busby the elder, and submitted to act as the Court should direct.

Mr. Tinney appeared for Sarah Willats, the widow of the original plaintiff, and insisted that the settlement made by Mr. Busby was void within the meaning of the 27th Elizabeth.

Mr. Campbell appeared for the trustees of Joseph Merceron.

Mr. Stuart (with whom was Mr. Bacon), on behalf of Mrs. Busby, stated that E. S. Busby had intermarried with his present wife, Janet Connell, but, in consequence of disagreement, they separated, and on that occasion he had executed the deed now sought to be set aside. That deed, however, was not a voluntary deed within the meaning of the 27th

Elizabeth, neither were its provisions; but, even assuming that the deed was originally voidable, it had ceased to be so by acts *ex post facto*. He, however, denied that E. S. Busby the elder, could in a court of equity consent to substitute one voluntary settlement for another. This suit could not be looked upon in any other light than the suit of Mr. Busby himself, which was contrary to the rules of equity, since a person was never permitted to invalidate his own act. The deed, however, was executed in consideration of the dower to which Mrs. Busby was entitled; the provision, therefore, must be considered as an equitable jointure; but, in addition, she had been in the receipt of the rents for nearly twenty-seven years, and, therefore, the deed could not be disturbed without putting her to her election either to take her dower or the jointure given in lieu of it. But, supposing the *cessu que trust* had raised any money upon the security of the interests to which they were entitled under the deed, those charges could not be disturbed. But on the strength of the settlement Mr. Busby had sought to protect himself from all debts his wife might incur, and accordingly on the 3d of December, 1816, he obtained an inhibition in the Scotch courts against her. This also was a consideration for maintaining the deed, since the husband had actually sought and obtained relief and protection from the debts of his wife through the medium of a court of law, but the real plaintiff before the Court was not Mr. Willats, but Mr. Busby, and his name was used merely as a means of avoiding the deed. The sons of Mr. and Mrs. Busby were not before the Court, but they were necessary parties, and no decree could be made against them in their absence, and though they were residing in Scotland, and out of the jurisdiction of the Court, the process under the 1st and 2d William 4. would enable it to proceed, but in the present state of the record it certainly did appear that there was some reason for preventing the children from appearing. He trusted, therefore, the Court would see no reason for avoiding the settlement.

Mr. Pemberton replied, and observed that there was no proof that the inhibition related to or was grounded upon the voluntary deed; but, if so, it must have been upon an erroneous view of the English law.

Lord LANGDALE was of opinion that David William Busby and Edward Slater Busby, the two sons of Mr. and Mrs. Busby, were necessary parties to the suit, consequently the cause must stand over to make them parties, after which the plaintiff will be at liberty to take such steps as he should be advised to bring them before the Court, or show that he had used his best endeavours so to do.

COURT OF EXCHEQUER.

Equity Sittings.—Jan. 11.

Before Mr. Baron ALDERSON.

Foot v. BESANT.

Practice—Pleadings—Bill for Tithes—Who are proper parties to a Bill for relief in Equity in regard to Tithes.

ALDERSON B. delivered the following judgment in this case—

The bill stated that the Rev. Matthew Irving, being the owner of the tithes in question, demised them for a term of years yet unexpired to George Foot, and it prayed that the defendant might be decreed to pay the amount, after account taken, either to Irving or to Foot. It might be conceded, for so the law undoubtedly was, that if it appeared that either Irving or Foot had no interest at all, equitable or legal, in the subject matter of the suit, the bill must be dismissed. For it was a fatal objection to join a party having no interest in a suit with one who had the sole interest. If then the statements in the bill import necessarily that this was the case, the defendant ought to prevail. It turned therefore on the statement that Irving had demised the tithes to Foot. It was not stated whether this was a demise by parole. If it were a demise by parole, the plaintiff would be right, for then Irving would have the legal, and Foot the equitable, right, in the tithe, and both ought to be joined in a suit for them. But if it were to be understood to be a demise by deed, then Irving had no interest at all, and the defendant's objection would be good. Now, according to the cases cited of "Jackson v. Benson," 3 Eagle and Young, and that of "Heming v. Willis," 2 Eagle and Young, it appeared that when a bill stated only that A. B. demised or granted to C. D. the tithes, the court held it to be an insufficient statement of the right in C. D. to have any relief in equity without making the owner also a party to the bill, and a demurrer on each of these cases prevailed. In the present case the owner was made a party. But it was said that if a plaintiff used ambiguous words, the defendant had a right to take them in any of the senses in which they might be used, and if any of those senses were such as that the plaintiff was not entitled to relief, it was sufficient. In support of this, the cases of "Vernon v. Vernon," 2 My. & Cr. 176, and "The Attorney-General v. the Mayor of Norwich," 2 My. & Cr. 422, were cited. No doubt, in all pleadings, both at law and in equity, it was true that a plaintiff must state such a case, that if the court saw it was true, he should be entitled to redress. It was not sufficient that he might, or he might not, be entitled to it. In "Vernon v. Vernon" the same fact was stated in two ways contradictory of each other, and the Lord Chancellor held, that if he was bound to assume the fact one way or the other,

he ought to take the statement which made for the defendant. In the Norwich case the bill stated an intention on the part of the defendants to pay certain charges, but it did not expressly state their intention to be to pay them out of a fund which would be illegal; and there appeared by the bill to be two funds out of one of which they could lawfully pay them, and not from the other. The Chancellor held, most correctly no doubt, that the bill did not allege necessarily any intention to violate the law. But this was a suit instituted by two persons. They might properly join in the suit if one had demised to the other by parole, but they could not do so if the demise were by deed, and the statement simply was, that A. B. demised. Now, two senses might perhaps be reasonably put on that expression; but why was he bound to put that construction upon it, which it was obvious the plaintiff did not intend, because such a construction would make the suit erroneous? Besides, the defendant was not without a remedy, for he might have raised the question easily enough. If he knew that it was a demise by deed, he might have stated as much in his answer; or if he knew nothing about it, he might have put the plaintiff to the proof of the fact, and then, if the point turned out favourably for him, he would have been entitled to take advantage of the objection. But, instead of that, he admitted the plaintiff's title, as stated in the bill. Taking all the circumstances of the bill together, he thought he ought to read the word "demised" as equivalent to a demise by parole, adopting that construction as the most natural, and at all events as the most reasonable, because it would give full effect to the whole bill taken together. If, indeed, a demise by deed had been expressly stated, a plaintiff could not be allowed to join both parties in the suit. Upon the whole, therefore, he thought the plaintiff was entitled to an account, but he would reserve the question of costs.

PREROGATIVE COURT—Jan. 16.

In re CATHERINE WOODINGTON.

New Wills Act, sec. 9. (a)

Will SIGNED in the presence of one witness, and afterwards ACKNOWLEDGED in the presence of two witnesses.

Mrs. Catherine Woodington made her will in her own handwriting, which she signed in the presence of *one witness*, and afterwards, on the same day, she *acknowledged* the will in the presence of such witness and in that of another person, to be her will, and that it was in her handwriting, and the question rose was, whether this was an acknowledgment of the signature within the terms of the 9th section of the new act.

Sir H. JENNER held that the acknowledg-

(a) See re Ayling, ante, p. 48; re Newman, ante, p. 110.

ment of the will and of its being in the testatrix's handwriting, in the presence of two witnesses, was equivalent to an acknowledgment of the signature.

Probate decreed

WILL OF MARY WARNER, DECEASED.

New Statute of Wills, sec. 9.

What is a sufficient signature and attestation.

In this case the testatrix had *written* her will and signed it, but *not in the presence* of any witnesses. After the writing the will, and putting her name to it, she sent for witnesses who, when they arrived, she expressed herself, "I am very glad of it, thank God!" She requested the persons to witness her will, and they did so by subscribing their names in the presence of the testatrix, and of each other. The testatrix did not sign the will in the presence of the witnesses, nor did she acknowledge her signature, and upon motion for probate, it was contested on the ground, that this was not a sufficient compliance with sec. 9 of the new Statute.

Sir H. JENNER, in pronouncing sentence, said he was inclined to think that where a will is in the *handwriting* of the testator, and in the presence of witnesses, he says, "this is my will," it is a compliance with the Act—that the only question in this case was, whether the deceased was aware of the intention with which the witnesses had come, and he was of opinion that her exclamations were an acknowledgment.

Probate decreed.

COURT OF REVIEW.

March 23.

FLAT AGAINST FREDERICK JAMES, A BANKRUPT.

Petition of the Bankrupt—Jurisdiction of the Court upon Petition to discharge a Bankrupt from Custody, who had been committed by a Commissioner in the Country.

This was a petition by the bankrupt praying to be discharged from a commitment by the commissioners.

The petitioner carried on business at Bideford as a grocer, tea-dealer, and paper-seller, and was in the habit of visiting various towns in Devon, Cornwall, and Somerset, in furtherance of his business. During his absence from home, in the latter end of February, a flat issued against him, and he was adjudged a bankrupt on the 4th inst. The commissioners signed a summons for the bankrupt's attendance. The messenger, however, did not merely serve the notice on the bankrupt, but took him into custody by violence, carried him to Exeter, and called the commissioners together. The arrest took place on the 9th inst., and on the 11th a meeting was held at Crediton, when the bankrupt was examined, but without any access to his books and papers,

and, the answers being thought unsatisfactory, he was forthwith committed to prison.

Mr. Swanson, for the petitioning creditor, supported the commitment, and objected to the application by petition, instead of a writ of *habeas corpus*.

Mr. Bethell, said it was a case in which the Court was bound to interfere, it having power to order the commissioners to assent to the bankrupt's discharge.

Sir G. Rose said, if a positive discharge were asked, it was questionable how far there could be an interference except by *habeas corpus*, on which the jurisdiction of the Court was doubtful. He regretted the Court had not the power, but it would be of less consequence, as Mr. Justice Colman was in attendance in the neighbourhood.

Mr. Bethell quoted Lord Eldon's decision in Crowley's case (2 Swanson).

Mr. Montagu, as *amicus curiae*, said Lord Eldon had refused to proceed on petition alone; where reference to particular facts was requisite, the petition and *habeas corpus* had come on together.

Mr. Bethell said, the messenger took the bankrupt into custody on the notice, and without any warrant. After the examination, he was sent to prison, where all access was refused, the gaoler having received instructions to refuse admission. Being illegally in the custody of the messenger, was the subsequent commitment good? Could such an outrage be tolerated? The bankrupt, hunted by a messenger, oppressed by the commissioners, miles distant from his home, without access to his books, and, consequently, unable to answer the questions and explain the disposal of his property—was not this enough to induce the Court to say the proceedings were illegal, and direct the discharge? It was requisite that collateral circumstances in bankruptcy should be taken into consideration, and an application to another judge would not bring the whole matter in view on a question as to the sufficiency of the grounds for commitment. He felt a difficulty in arguing the question of jurisdiction after the opinion given by Sir George Rose, and the explanation of practice tendered by Mr. Montagu; but he trusted the Court would not say it had no jurisdiction and no power to interfere, in a case where interference was so requisite. An affidavit on the other side had been filed by the petitioning creditor, alleging that the bankrupt had left Bideford with a large quantity of goods in a van for the purpose of converting the same into cash and absconding to America; that the shop had been stripped of goods, for which false packages had been substituted; and that the bankrupt was on his way to Bristol for the purpose of quitting the country; that the messenger found the bankrupt on Salisbury-plain, where he seized the goods and took the owner into custody; that he escaped, but was subsequently retaken, having been found concealed in a plantation; that he was taken to Exeter, and appeared on the day named in the summons, when he sub-

mitted to be questioned by the commissioners. His (Mr. Bethell's) client had had no opportunity of answering these allegations, not even his solicitor having been allowed access to him.

Sir John Cross.—Did he deny any intention of going to America?

Mr. Bethell said, it was impossible. There being no means of access to him, he had made no affidavit. His brother's affidavit was the only one procured. Nothing more monstrous was ever heard of. Were such conduct allowed, a man might lie in gaol until his dying day.

Mr. Swanson said there was no case in which the Chancellor had discharged a bankrupt from custody in which the warrant had not been produced. No order could be made on the petition. He appeared for the petitioning creditor, who was no party to the proceedings by the messenger and commissioners. It was no matter how the bankrupt came before the commissioners; when there he did not answer satisfactorily. The refusal of access was undoubtedly improper, and ought to be remedied by application to the proper authority, but to that the petitioning creditor was no party.

Sir J. Cross observed that the complaint was, that the commissioners had done an illegal act under colour of their authority, and they were the only parties who could answer the charge or explain the proceedings.

Sir G. Rose had no disposition to recede from the opinion he had given in *Ez parte Jones* (2 Mont. and Ayrton, 4 Deacon and Chitty); but he had no objection to an intimation that the examination had not gone far enough, and ought to be resumed. If the bankrupt had been in custody on the illegal arrest by the messenger, the Court would have interposed, but having been before the commissioner, and being committed, nothing could be done without the warrant. If, however, the bankrupt had been properly before the Court, he could not take upon himself to say that he had answered satisfactorily. It was a proper case to be pressed to further examination, but not one in which the Court ought to direct his discharge.

Mr. Swanson remarked, that the bankrupt had no books of accounts, and that all his invoices had been destroyed.

Sir J. Cross said, the petition prayed an absolute discharge; and he was of opinion that the Court could not go to that extent without having the gaoler before it. This, however, did not preclude a prayer for an order on the commissioners to discharge the bankrupt. As regarded the jurisdiction, the course proposed was the most convenient one, and the second section of the act gave the Court "superintendance and control in all matters in bankruptcy." He had looked into the questions, and examined Jones's case as to hearing on petition. Under Crowley's case a discharge might issue on petition. In Jones's case the Court agreed that the party was not entitled to relief on the merits. It was doubt-

ful whether signing a certificate or commitment of a bankrupt were not matters purely within the discretion of the commissioners. There was a difference in the two cases, as the Court could not order commissioners to be satisfied if they were not; but the order for discharge did not involve that contradiction. He would defer giving his opinion, and at present no order could be made. He had not come to the discussion of the case with any doubt on the jurisdiction; but, having heard the opinion of his colleague, he wished for time for deliberation.

Mr. Bethell pressed for an early decision.

Sir J. Cross said it was a question affecting the liberty of the subject. The bankrupt was in the power of the assignees under an alleged abuse of authority. It was an important question to the commercial community whether or not the Court had jurisdiction, and he was not disposed to treat the matter lightly or hasten over it.

Sir G. Rose said the illegal act of the messenger, for which he was distinctly liable, had nothing to do with the question before the Court. The bankrupt being brought before the commissioners, it was no matter how, except so far as to explain his confusion, and allow a claim for further time for explanation on re-examination. If, however, his learned colleague thought it could be done, and ought to be done, he would cheerfully join in giving the petitioner the benefit of the discharge.

Sir J. Cross felt it due to take time for consideration, but there should be no delay.

Mr. Bethell said he could not, on behalf of his client, accept of any order but one for discharge. It was incumbent on a court of justice to express its abhorrence of such proceedings; and the conduct of the commissioners was a fit subject to be brought before the Lord Chancellor.

COURT OF THE SHERIFF OF MIDDLESEX.

January 10.

BRAGSHAW v. EATON.

Infancy.—Necessaries.—Whether a Macintosh coat of the first cut and most fashionable appearance, shall be considered as a NECESSARY for an ARTICLED CLERK.

The plaintiff, a tailor, brought this action against the defendant, who was an *Articled Clerk* to a *Solicitor*, to recover 9*l.* 10*s.* for clothes.

PLA—*Infancy.*

It appeared that in July, 1836, the defendant applied to the plaintiff to furnish him with a macintosh coat of the first cut and of the most fashionable appearance, and also with a pair of pantaloons of lasting cord. The goods were sent to the defendant. Soon afterwards the defendant wished to have a Spanish

cloak lined with silk, but the plaintiff declined until the macintosh, &c., were paid for.

The delivery of the goods was proved, and it was for the defendant submitted, that in law the plaintiff must be “called.” The defendant was underage at the time he contracted the debt, and a macintosh of a Newmarket cut was not a necessary article for an articled clerk. The defendant’s mother had told the plaintiff not to furnish him with clothes, as they had a family tailor, who furnished the defendant with all that was necessary for his use, and that tradesmen were bound to make diligent inquiry of the parents and guardians of infants before they trusted them. The mother of the defendant said she cautioned the plaintiff when he called on her in the winter of 1836, not to let him have any clothes. Her son came of age in April last.

Mr. BURCHELL, the Under-Sheriff, said that this injunction was not until after the clothes had been supplied in July.

This fact was admitted.

The UNDER-SHERIFF said the statute was a very important one, and whilst it threw its shield over the tradesman, it equally protected the infant. The jury would say by their verdict whether the goods were necessaries or not.

*Verdict for the plaintiff for the full amount, 9*l.* 18*s.**

Liberty was given to move the court above on the point of necessity. (a)

SPRING ASSIZES.

NORTHERN CIRCUIT—March 30.

Liverpool.

Before Mr. Baron PARKE.

DOE DEM. HAWORTH AND ANOTHER v. HELME.
Devise.—Whether, a Leasehold Estate, devised in such terms, as if it had been a Freehold, would have created an estate tail, will, as a chattel, pass the whole interest, such as it may be.

Ejectment brought by the plaintiffs, who were administrators of the personal estate and effects of Michael Hornby, who was mortgagee of the property in dispute against the defendant, who was heir-at-law of the father of the mortgagor, and claimed under a devise as his right heir—the latter was also in possession of the property that the plaintiffs now sought to recover.

It appeared that in the year 1792, Earl De Wilton devised the two cottages in question to a person named John Walker, for a term of 99 years. In 1812, John Walker made his will and gave the cottages to his son, Peter Walker, and the heirs of his body, and if he, the said Peter Walker, should die without such heirs, then to the heirs-at-law of him the said John Walker. The testator died in 1814, and

(a) See Dalton v. Gibb, ante, p. 205.

in 1817, Peter Walker mortgaged the cottages to a Michael Hornby, and then died, leaving the defendant the right heir to John Walker. In 1831, Hornby died, and administration was granted of his personal estate to the plaintiffs. On the part of the defendants it was objected that by the will of John Walker, a qualified interest only passed in the leaseholds, but on the part of the plaintiffs it was argued that where a leasehold interest was given in such terms, as if it had been a freehold, would have created an estate tail, it nevertheless being but a chattel passed the whole interest.

Baron PARKER agreed with this view of the case, and a verdict was accordingly taken for the plaintiffs.

OXFORD CIRCUIT—March 28.

Monmouth.

Before Mr. Justice ERSKINE.

DOZ DEM. THOMAS v. BEYNON.

Ejectment—Illegitimacy—whether a devise to three daughters by name of A. B., shall include an illegitimate daughter bearing one of such names.

An action of ejectment was brought by the plaintiff *Elizabeth Thomas* to recover some property at Llandover.

It appeared that the plaintiff, *Elizabeth Thomas*, was the illegitimate daughter of one *Mary Beynon*, who had three daughters, *Mary*, *Elizabeth*, and *Ann*, by her husband, *John Beynon*. After his death she had another child (the plaintiff who was also christened *Elizabeth*) while she remained unmarried, by one *Thomas*, who she afterwards married, and had several other children. The child, *Elizabeth Beynon*, died when only six weeks old. The uncle of *Mary Beynon*, died in 1802, having shortly before made his will and devised a real estate to *Mary Beynon*, widow, who was, however, at that time, in fact, married to *Thomas*, for life, and after her death "to *Mary*, *Elizabeth*, and *Ann*, the daughters of *Mary Beynon*." The legitimate daughter had been dead six years, but the illegitimate daughter *Elizabeth*, was then three years old, and she contended that the devise applied to her, and *Mary Beynon* being now dead, that she was entitled to a third part of the devise.

For the defendants it was contended, that the testator did not intend the illegitimate daughter, and evidence was produced to show that he did not know of the existence of the latter, who had been carefully kept away from his knowledge, nor indeed did he seem to have known of the second marriage of *Mrs. Beynon*.

Mr. Justice ERSKINE told the jury, that as the lessor of the plaintiff was illegitimate, and there was no presumption in her favour, it was incumbent upon her to satisfy the jury that the testator intended her to be the devisee, and for this purpose she was bound to show that he

knew that the first *Elizabeth* was dead, and that the second was in existence at the time he made his will. If she did not satisfy them, the defendant would be entitled to a verdict.
The jury found for the defendant.

NORFOLK CIRCUIT.

BURY ST. EDMUNDS, April 2.

Before Mr. Baron VAUGHAN.

MARY GLEDDALL, BY HER NEXT FRIEND v. STEGGALL.

Medical Men.—Their liability for negligence and want of skill.

This action was brought by the surgeon of the parish of Gedding, as the next friend of the plaintiff, *Mary Gleddall*, who was too poor to bring the action herself and was only ten years of age, against the defendant who is a *Clergyman and Perpetual Curate* of the parish of Gedding, where he also carried on the profession of a *surgeon and apothecary*, as a means of gain, for negligently conducting himself in endeavouring to cure the plaintiff of an inflammation, by means whereof it became necessary to amputate the plaintiff's leg. In the month of March last year the plaintiff had been employed in the fields as a "dropper," that is, in following a person who "dibbs" holes in the fields, into which she dropped the corn they are intended to receive—a mode of sowing corn very generally adopted in this county. When she had been thus employed for two days, she complained to her mother of a pain in her knee and ankle, and the mother sent for the defendant on Friday the 23d of March, for his *surgical* advice. After asking the plaintiff several questions, the defendant, according to the mother's account of the interview, said, "there was a fracture; one of the bones had slipped out and in again, and had dislocated three small bones on the top of the foot." He bandaged the leg with some calico, and desired the child's mother to send to his house for some cooling lotion, which he directed to be applied without intermission during the night. This was done, but the plaintiff got rapidly worse, and continued throughout the night in great agony. The leg was so hot and inflamed, that the lotion "steamed," as the witnesses described it, whenever it was applied, and dried with the utmost quickness. This treatment was continued until Sunday, the pain growing greater and greater, and the leg swelling very much. On the Sunday the plaintiff's mother loosened the bandages, and the next day they were wholly removed by the defendant. Upon their being taken off, it was found that there was a blister on one of the ankles, which on being lanced gave out a considerable quantity of matter. Poultices were then ordered by the defendant, who also administered tonics and other proper medicines, but the child got very much worse,

and on the 2d of April the defendant called in Mr. Cottingham, a neighbouring surgeon, and other proper remedies were applied. On the 3d of April the clergyman of the parish sent wines to the plaintiff, and recommended the calling in of Mr. White, the plaintiff's next friend in this action, and who was the parish surgeon, which the plaintiff's parents neglected to do. The defendant continued to call daily at the house of the plaintiff, and to prescribe and apply the proper remedies till Friday, the 13th of April, when Mr. White was called in. The next day Mr. White called a consultation of surgeons, and it was resolved that nothing but an immediate removal of the diseased leg could give them the least hope of saving the child's life: and accordingly Mr. White performed the operation immediately. It was then found that there was no fracture of any bone, that the ligaments were entirely gone, and the bones were in a state of the most dreadful decay, arising from the inflammation. The poor child rapidly recovered after the leg had been removed, and is now quite well. Several medical men were called by the plaintiff, who gave it as their opinion, judging by the evidence, that the defendant had been guilty of unskilfulness in not applying leeches upon his being first called in, three weeks before her leg was removed, and in the application of the bandage. His subsequent attention to and treatment of the case was proper, the want of skill being said to have been shown in the treatment adopted when he was first called in to attend the plaintiff.

It was contended for the defendant that the application of the cooling lotion the very first night of his being called in by the plaintiff, and the subsequent application of poultices, afforded abundant evidence of the correctness of his treatment; and that it would indeed be hard upon medical men if they were to be rendered liable for an accidental failure in a case in which they might be engaged. That not a single surgeon who saw the child from the time when she was first attacked until the day when her leg was removed had been called; for Mr. Cottingham was not put into the box, although he was in Court.

*Verdict for the plaintiff, with 10*l.* damages.*

Cambridge.

March 30.

Public rights—Whether the public have a right "to boat," (or to row their boats) on that portion of the river Cam, which lies between Cambridge and Grantchester.

This was an action of trespass for cutting a chain belonging to the plaintiff, placed across the river Cam.

Plea that the chain was placed across a public navigable stream and highway, and being an obstruction was a nuisance which the defendants were justified in removing.

The question involved in this cause was whether that portion of the river Cam which

lies between Cambridge and Grantchester is a common and public stream, on which the public have a right to row, or whether the plaintiff had the right to prevent its use altogether by Her Majesty's subjects. The river at this part, as is well known to all who have graduated at this University, is very beautiful, and terminates in the pretty and picturesque village of Grantchester. On one side of it stands the village of Trumpington, where the plaintiff lives, which is the scene of Chaucer's "Miller of Trumpington," and of which he says—

"At Trompington, not far fro' Grentebrigge,

"Thair goth a brooke, and over that a brigge,
"Upon the whiche brooke thair stont a melle,

"And this is very sothe that I you telle."

This "melle" stands to this day upon the stream, and forms one of the *termini* of the disputed part.

The evidence for the defendant showed that the public, as well inhabitants of the town as members of the University, had navigated the river lying between Cambridge and Grantchester for a period ascending upwards to the year 1760. During that time, most of the witnesses had themselves been upon the disputed part of the water in boats, and all of them had, for various periods, seen it used by numerous other persons, without regard to rank or degree, and without hindrance or obstruction. The degree of user had gone on increasing progressively as the population of the town and the members of the University increased. At the beginning of the present century only a dozen public boats existed in the town, but for the last 30 years the exercise of "boating," had come into fashion among the members of the University, and being encouraged by the authorities as a healthful and temperate amusement, there are now some hundreds of boats, and the defendant himself has 30, which he keeps stationed above the mills, which stand on the stream by Queen's College.

The witnesses for the plaintiff, whilst they showed a very great user of the water by persons in boats for the last 15 or 20 years, for the most part spoke to their having seen no boats on the surface before that time. One of his witnesses, however, a fellow of King's, admitted that he had himself been upon it in a boat some three or four times towards the end of the last century; and another to his having seen a fellow of Emmanuel rowed up by his "gyp" in the year 1786.

The LORD CHIEF JUSTICE then summed up the evidence. The learned Judge observed, that there were but three modes in which a right on the part of the public to a way of this kind could be claimed. The first was by an act of Parliament, which did not exist in this case. The second, and that which had been chiefly insisted upon by the defendant, was by prescription. In order to support that, the jury must be satisfied that the right claimed had existed from time immemorial; in point of practice, juries were justified in presuming, and ought to presume, that the

right is immemorial, if it appear to their satisfaction that as far back as the memory of living witnesses extends the right has been freely and uninterruptedly enjoyed. If therefore they were satisfied that as far back as the evidence of living men extends this river had been used as a public navigable river by everybody who had occasion to use it, their verdict must be for the defendant. Wherever we find that any right has been exercised for a very long period of time, it behoves juries to refer that right to a foundation on which it may lawfully stand, if they can do so; and, if there be nothing to show that it cannot have had its origin in the manner stated, to give support to it. Unless they did so, many valuable rights,

public as well as private, which depended on usage only, would be lost. The third mode in which a right of this nature could be established was by proof of a dedication, on the part of the owner of the river, to the public. No particular length of time during which the public had been allowed to enjoy the right was necessary to be shown in order to prove a dedication; but the jury must be satisfied that the plaintiff, either by himself or his agent, with a full knowledge of the circumstances, had abandoned and dedicated the right to the public.

Verdict for the plaintiff, thus negativing the right of the public to row their boats on the river in question.

COURT OF COMMON PLEAS.

Sittings at *Nisi Prius* appointed in Middlesex and London, before the Right Hon. Sir N. C. Tindal, Knight, Lord Chief Justice of her Majesty's Court of Common Pleas, at Westminster, in and after Easter Term, 1839:—

IN TERM.

Middlesex.	London.
Wednesday	April 24
Wednesday	May 1 Friday April 26

AFTER TERM.

Middlesex.	London.
Thursday	May 9 Friday May 10

N. B. The Court will sit at 10 o'clock in the forenoon on each of the days in term, and at half-past 9 precisely on each of the days after term.

The causes in the list for each of the above sitting days in term, if not disposed of on those days, will be tried by adjournment on the days following each of such sitting days.

On Friday, the 10th of May, in London, no causes will be tried, but the Court will adjourn to a future day.

EXCHEQUER OF PLEAS.

Sittings in Middlesex and London before the Right Hon. James Lord Abinger, Chief Baron of her Majesty's Court of Exchequer, in and after Easter Term, 1839:—

IN TERM.

Middlesex.	London.
1st Sittings . . . Wednesday . . . April 17	1st Sittings . . . Wednesday . . . April 24
By adjournment (if necessary.)	By adjournment (if necessary.)
Thursday . . . April 18	Thursday . . . April 25
Friday . . . April 19	
Saturday . . . April 20	
2d Sittings . . . Monday . . . April 29	2d Sittings . . . Saturday . . . May 4
By adjournment (if necessary.)	By adjournment (if necessary.)
Tuesday . . . April 30	Monday . . . May 6
Wednesday . . . May 1	
Thursday . . . May 2	

AFTER TERM.

Thursday . . . May 9 | Friday, May 10, to adjourn only.

No Special Juries will be taken in or after Easter Term (Revenue Causes excepted.)
The Court will sit during Term at 10 o'clock.

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PART V.

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The Legal Guide.

No. 24.]

SATURDAY, APRIL 13, 1839.

MORTGAGORS AND MORTGAGEES.

AN ESSAY

*Upon the Character in which a MORTGAGOR
IN POSSESSION may be considered.*

(Continued from p. 356.)

WE will proceed to follow up our engagement by showing that the *more fact* of a mortgagee having received interest down to a time *later* than the day of the demise laid in the declaration does NOT amount to a recognition by him that the *mortgagor* or his tenant was in lawful possession of the premises till the time when such interest was paid, and consequently is NO defence to an ejectment. This was determined after the case we stated in our last. In *Doe dem. Rogers v. Cadwallader*, where we find that the wife of the lessor of the plaintiff was mortgagee of the premises in question by a deed, dated the 7th of May, 1828, (before her marriage.) Interest was payable on the 25th of December every year, and on the 15th January, 1831, the husband of the mortgagee, had admitted that he and his wife had been paid all interest up to the 25th December, 1830; the demise was laid on the 1st of July, 1830; the defendant was *tenant to the mortgagor*, and it was contended on the authority of the case last cited, (a) as an answer to the action of ejectment brought by the plaintiff, that it was not maintainable, be-

cause it was not competent to a mortgagee to treat the mortgagor or his tenants as trespassers at any time during which their lawful possession had been recognised, and that the mortgagee having received the interest on the mortgage money to the 25th Dec. 1830, had thereby acknowledged, that, to that time, the defendant, the tenant of the mortgagor, was in lawful possession of the premises. The action was tried before *Patteson, J.* at the Salop Spring Assizes, 1831, who, on the authority of the case last cited, nonsuited the plaintiff, but with liberty to move the court for a verdict in his favour. Upon shewing cause upon a rule that had been accordingly obtained, *Lord Tentorden*, in delivering judgment, said, (b) "I think this case is not governed by that of *Doe dem. Whitaker v. Hales*. There the defendant, in order to shew that he was not a trespasser on the 25th of Dec. 1829, proved that in April, 1830, he was in possession of the premises, and that an agent of the lessor of the plaintiff called on him, demanded payment of interest on a mortgage to the lessor of the plaintiff, and received money *so nomine* as interest, the defendant being required to pay it instead of rent to the mortgagor. *Lord C. J. Tindal*, after stating these facts, observes, "This, therefore, was a demand made by the agent of the mortgagee, and with full knowledge of all the circumstances of the parties, namely, that the

(a) *Ante*, p. 355.

defendant was tenant to the mortgagor, and not to the lessor of the plaintiff; and if a party employs an agent who has full knowledge of circumstances, it must be presumed that the principal has the same knowledge. So that the lessor of the plaintiff having recognised and availed himself of the possession of the defendant so late as April, 1830, cannot treat him as trespasser in 1829." That case is very distinguishable from the present. The evidence in this case was only that the mortgagee had received interest on the money advanced by him for a period covering the 1st of July, 1830, the day of the demise mentioned in the declaration. By so receiving the interest, he did NOT recognise the defendant as a person in lawful possession of the premises; nor did he avail himself of that possession to obtain payment of the interest."

Littledale, J. observed, that he was not prepared to go to the length which the Court of Common Pleas appeared to have done in *Doe v. Hales.*

Parke, J. said, the proof was, that there had been a payment of interest in respect of the original debt, but that was no recognition of the right of mortgagor, or his tenant, to hold possession of the premises. *Doe v. Hales* only shewed, that where the mortgagee recognises a party as being in lawful possession of the premises at a given time, it is not competent to him to say afterwards that at that time he was a trespasser. Here the lessor of the plaintiff never recognised the defendant as being in lawful possession.

Taunton, J. observed that the evidence that the mortgagee had received interest on the money lent and advanced by him was no acknowledgment on his part that either the mortgagor or his tenant were in lawful possession of the premises mortgaged. And the *rule was made absolute.* So that the result of this case would seem to establish that mere receipt of interest by the mortgagee, coupled with no other fact, would not be evidence fit to be left to the jury, on the question of recognition.

It must be observed in the latter case, that Lord Tenterden took some pains to distinguish it from *Doe dem. Whitaker v. Hales.* The question, therefore, is whether

the mortgagee having recognised the tenant of the mortgagor, as his tenant, appears to be a question, more of fact, than of law, and probably would be left to the consideration of the jury, provided there were any evidence fit to be submitted to them. When once it has been proved that the mortgagee has recognised the tenant of the mortgagor as his tenant, he cannot treat him as a *tortfeasor*, nor, if he elect to treat him as a *tortfeasor*, can he maintain any demand against him in which he is charged as a tenant; a man cannot be treated at once both as a tenant and a trespasser. The doctrine is most elaborately treated by Buller, J. in *Birch v. Wright,* (c) which was an action for use and occupation, tried at the sittings at Westminster after Easter Term, 1786, when a verdict was found for the plaintiff, subject to the opinion of the court. The defendant, before the 18th of July, 1777, was tenant from year to year to Mr. Bowes, at the yearly rent of 223*l.* 10*s.* payable half yearly on the 12th of May and the 22d of Nov. On the 18th of July, 1777, Mr. Bowes and his wife Lady Strathmore granted annuities to several persons for the life of Lady Strathmore, and they covenanted to levy a fine to the use of the plaintiff and another person then dead, upon trust to receive the rents and pay the annuities out of them, and then to pay the residue to Mr. Bowes and Lady Strathmore, and a fine was levied accordingly. The defendant paid all the rent which was due on the 22d November, 1784, except 81*l.* 15*s.* to Mr. Bowes, which sum of 81*l.* 15*s.* was still unpaid; and no rent had been paid by the defendant since that time. In May, 1785, the plaintiff brought an ejectment against the defendant, and laid the demise on the 6th of April, 1785. Judgment was had in Trinity Term, 1785, and in September, 1785, the plaintiffs gave notice to defendant of their title, and required him to attorn to them and to pay them the money already in his hands: but the defendant refused to attorn, and thereupon a writ of possession was executed, and the defendant quitted the premises men-

(c) 1 Term Rep. 378.

tioned in the declaration. Lady Strathmore was still living, and the question for the opinion of the Court was, whether the plaintiff was entitled to recover any and what sum of money in the action?

To the judgment delivered by Mr. Justice BULLER we particularly direct the attention of our readers. His lordship said,

Upon this case two questions have been agreed; 1st, Whether the plaintiff is entitled to any of the rents and profits of the lands occupied by the defendant? And 2dly, Supposing him to be entitled to them, whether he can recover them in this form of action?

The material thing to be considered is, who are the parties in the business, and what are their respective interests?

First, I will begin with the defendant, who is the tenant. He originally came into the estate as tenant from year to year to Mr. Bowes; he was so at the time of the conveyance from Mr. Bowes to the plaintiff, and he continued to hold the estate as such, without any new agreement or notice of the conveyance till the ejectment was brought. Whilst he was tenant to Mr. Bowes, he clearly was entitled to six months' notice before the end of a year to quit, and he could not have been turned out without it. I hold that he was entitled to the same notice from the plaintiff before he could be evicted; for as the plaintiff claims under a conveyance from Mr. Bowes, he cannot be in a better situation than Mr. Bowes himself was. He stands exactly in the place of Mr. Bowes, with this difference, that his title is subsequent to the title of the defendant. I mention this difference only for the purpose of at once laying the case of Keech and Hall, (d) out of the question. There a mortgagor made a lease for years *subsequent to the mortgage*, and that lease was helden to be void as against the mortgagee. In this case I consider the defendant as holding during all the time under a demise made *before* the conveyance to the plaintiff; for if a tenant from year to year holds for four or five years, either he or his landlord at the expiration of that time may

declare on the demise as having been made for such a number of years. So it is expressly laid down by the court in Legg v. Strudwick, Salk. 414; though in the next preceding page there are two cases, which at first seem to have been determined otherwise; the one in the Court of Common Pleas, the other by Holt, C. J. at *Nisi Prius*; but those are short loose notes jumbled together with others, and *not to be relied on*. Besides, when those cases are examined they will be found not to contradict the case of Legg v. Strudwick. That in the Common Pleas was Bellasis and Burbruch; and Salkeld states it thus: on a lease made for a year, and so from year to year so long as both parties pleased, it was adjudged a lease for two years, and afterwards at will. The same case is reported in Lutw. 213. and it was an action for a rescue; and the plaintiff stated in his declaration a demise for a year and so from year to year, &c. and he distrained for a year and a half's rent. It was objected that the lease determined at the end of one year, and so the plaintiff could not distrain for the rent of that year and half a year more: but it was answered, and so agreed by the court, that it was a good lease for two years *at the least*. Two years covered the whole time which was material in that case; it was quite unnecessary to say what would be the effect of the lease after the two years, and therefore the court said nothing about it, much less did they say that after the two years it was only a *lease at will*: on the contrary, the expression of *at the least* imports that it might be good for more. The other is a case said to have been determined by Holt, C. J. at *Nisi Prius* at Lincoln; and Salkeld reports it thus; if A demise lands to B for a year, and so from year to year, this is *not a lease for two years and afterwards at will*, but it is a lease for *every particular year*, and after the year is begun the defendant cannot determine the lease before the year is ended. But in a lease at will, the defendant may determine his will after the payment of his rent at the end of a quarter, but not in the beginning, lest his lessor should lose his rent. In that case the question seems to have been, whether, after the third year

(d) See ante, p. 353.

commenced, the lessor was entitled to the whole year's rent, and *Holt* held that he was; because the tenant could not determine the estate in the middle of the year. And the expression for every particular year does not mean that such a lease operates as a distinct demise for each year separately, but that when any year has commenced, it is good for the whole of that year. Besides, if the case admitted of any other construction, yet after *Legge* and *Strudwick*, which was decided by *Holt* himself in this court ten years afterwards, it is impossible to entertain a doubt about it. It would be unjust to a tenant to say he should be turned out by the assignee of a reversion, or by any person claiming under his lessor, when he could not be turned out by the lessor himself. On the other hand, it is no injustice, it is no hardship on the assignee to say he must comply with the same rules and conditions as the person of whom he bought, has subjected himself to.

"Whether the plaintiff be considered as a mortgagee only, or as a purchaser or assignee of the reversion, it will make no difference in this part of the case. His title first accrued in July, 1777; it was too late then to give notice to the defendant to quit at the end of the current year, for that expired on the 22d of November. The defendant therefore, at the time that the Plaintiff's title accrued, had as permanent an interest in the estate until the 22d November 1778, as if it had been leased to him by deed until that time. He had also a further interest in it, unless determined by six months' notice previous to that time; which notice never having been given, he continued *rightful tenant to some one*, down to the time that the ejectment was brought.

This brings me to consider who is entitled to the rent? That depends on the nature and effect of the conveyance from Mr. Bowes to the Plaintiff, and the operation of the stat. of the 4th Anne, c. 16. And whether it be considered as a mortgage, or as an absolute grant of the reversion, in my opinion it will make no difference. There is in some respects an analogy between this case and the case of a mortgagee, for it is a security for money; the annuities

or rents are to be paid out of the rents and profits, and then the remainder of those rents and profits is to be paid to Mr. Bowes. So in the case of a mortgagee, until the principal is called for, the interest is to be paid out of the rents and profits, and the remainder is to be retained by the mortgagor. In both cases the borrower would be liable to pay it, if the rents and profits were not sufficient; but that is by virtue of the covenant. In other respects this case is not at all like a mortgage; for a mortgage is always in its nature redeemable, but these annuities are not made so. And I hold that this is a grant of the reversion, and not a mortgage. But I will first state how the case would stand, supposing Mr. Bowes and the plaintiff are to be considered as mortgagor and mortgagee. In that light it would be said that there is an implied agreement between the mortgagor and the mortgagee, that the mortgagor shall hold as *tenant at will* to the mortgagee, paying the interest from time to time, and the principal when called for.

If the mortgagor be tenant at will, he is entitled to the rents and profits till that will is determined; and whenever the will is determined, it cannot have relation back to a former time; because that would be by a subsequent act to make an estate tortious, which was rightful at the time it existed. That a mortgagor has often been called tenant at will to the mortgagee in courts of law and equity, is undoubtedly true, but I think inaccurately so, and the expression has been used when it was not very material to ascertain what his powers or interest were, or to settle with any great precision in what respects he did, and in what respects he did not, resemble a tenant at will. In old cases he is sometimes called tenant at will, and sometimes tenant at sufferance. In *Keech v. Hall*, Wallace called him the agent of the mortgagee, and Lord Mansfield stated him to be tenant at will to some purposes, but not to others. In *Moss v. Gallimore*, Lord Mansfield said, a mortgagor is not in reality a tenant to the mortgagee; if he were he must pay rent, but that is not so. To many purposes he is *like tenant at will*, but he does not pay rent; he must

pay interest only. Mr. Justice Ashurst said, "in some respects a mortgagor is strictly tenant at will;" but that is not so here, for the mortgagor is not in possession, and there cannot be a tenant to a tenant at will. If a tenant at will leases, it determines the will.

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XXII.

Of what do Incorporeal Hereditaments consist?

An *incorporeal hereditament* is a right issuing out of a thing corporeal (whether real or personal), or concerning, or annexed to, or exerciseable within the same, (Co. Litt. 19, 20.)

Incorporeal hereditaments are principally of eight sorts: 1, Advowsons; 2, Tithes; 3, Commons; 4, Ways; 5, Offices; 6, Dignities; 7, Franchises; 8, Rents (*a*); all of which I will here shortly explain.

1. And first as to *Advowsons*. An advowson is a right of presentation to a church or ecclesiastical benefice, (1 Inst. 17, b.)

The right of presentation and nomination to a church, although sometimes confounded, are distinct things. Presentation being the offering a clerk to the bishop, whilst, nomination is the offering a clerk to the patron.

Advowsons are either *appendant*, or, *in gross*. An advowson *appendant* is the right of presentation which was originally allowed to the persons who built or endowed a church, and became by degrees annexed to the manor in which it was erected; and, as the endowment was supposed to be parcel of the manor, and held of it, the right of presentation passed with the manor, from whence the advowson was said to be *appendant* to the manor. But where the property of an advowson, has been once separated from the manor to which it was appendant by any legal conveyance, it is then an advowson *in gross*, and never can be ap-

(a) Besides these, Sir W. Blackstone has added two others, namely, Coronies or Pensions, and Annuities. (See Black. Com. vol. ii. p. 40.)

pendant again except in a few cases mentioned in Cruise's Digest, p. 5.

2. As to *Tithes*. Tithes are defined to be the tenth part of the increase yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants, and are divided into great and small tithes; the former of which is paid to the rector, and the latter is usually paid to the vicar of the parish, unless there is a custom to the contrary, or the tithes are granted to some other person. In consequence of the 6 & 7 W. 4. c. 71, which makes provision for granting a rent charge (*b*) in lieu of tithes, I shall not trouble the reader with any thing further relating to them.

3. *COMMON*, or *Right of Common*, is a privilege which one or more persons have to take or use some part or portion of that which another person's lands, waters, woods, &c., produce.

By the 2 & 3 W. 4. c. 71. s. 1., it is enacted, that claims to right of common and other profits à prendre, shall not be defeated after thirty years' enjoyment, by shewing the commencement thereof, and that, after sixty years' enjoyment, the right shall be absolute, unless had by consent or agreement.

i. *Common of Pasture* is a right of feeding one's beasts on another's lands; for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor. This kind of common is either appendant, appurtenant because of vicinage, or in gross, (Co. Litt. 122.)

Common *appendant* is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor, and can only be claimed by prescription, (1 Rol. Ab. 396.)

Common of pasture is regularly annexed to arable land only; yet it may be claimed as appendant to a manor, farm, or carve of land, though it contain pasture, meadow, or wood; for it will be presumed to have all been originally arable (4 Rep. 37. a.)

(b) As to the nature of a rent charge, see post, "Rents."

Common *appurtenant* ariseth from no connexion of tenure, nor from any absolute necessity; but may be annexed to lands in other lordships (Cro. Car. 482; 1 Jon. 397), or extend to other beasts besides such as are generally commonable. This not arising from any natural propriety or necessity, like common appendant, can only be claimed by usage and prescription, (Co. Litt. 121, 122.)

Common *because of vicinage*, or neighbourhood, is, where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of one straying mutually into the other's fields without any molestation from either. This, therefore, being only a permissive right, either township may inclose and bar out the other, though they have intercommoned time out of mind (c)—(2 Bl. Com. 33.)

Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's possession; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, or by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor, (Ibid.)

ii. *Common of estovers*, is a right of taking necessary housebote, ploughbote, and hedgebote, in another person's woods or hedges, without waiting for any assignment thereof.

iii. *Common of turbary* is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appendant to a house, not to land; for the turfs are to be burnt in the house; nor can it extend to a right to dig turf for sale, (Valentine v. Penny, Noy, 145.)

iv. *Common of piscary* is a right to fish in the soil of another; or in a river running through another's land.

Copyholders are not entitled, by general custom, to common on the wastes of the manor of which their estates are held; but copyholders in fee, or for life, may, by par-

ticular custom, have common on the demesnes of the manor, (6 Rep. 60. b.)

(*To be continued.*)

TO THE EDITOR OF THE "LEGAL GUIDE."

On H. D. M's answer to Problem XVI.
p. 294.

SIR,— I beg to correct an error of H. D. M's in his answer to Problem XVI. wherein he says, "But if in the devise the words of perpetuity be omitted, then an estate for life shall only devise." Now, had H. D. M. looked at the 28th sec. of the 1 Vic. c. 26, he would have seen that the legislature had made a law in accordance with the opinion expressed by Lord Mansfield in the case of *Right v. Sidebotham*; (Doug. 759.) by enacting "that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will;" thus plainly making it law that no words of perpetuity are necessary in the case mentioned by H. D. M.

I am, SIR,

Yours obediently,

C. B.

8th April, 1839.

Imperial Parliament.

HOUSE OF COMMONS.

ENGLAND.

April 8.

Act for abolishing Arrest for Debt on mesne process in Civil Actions. 1 & 2 Vict. c. 110.

The Attorney-General gave notice, that on Thursday he should move for leave to bring in a bill to amend that part of the Imprisonment for Debt (Abolition) Act which made it obligatory upon newspaper proprietors to insert the advertisements of insolvent debtors for the sum specified in such act, whatever might be the length of such advertisements. (d)

(d) We would ask why this notion was not extended to a more general amendment of the act which, as it now stands, is a disgrace to government?

(c) But query as to this now. See supra 2 & 3 W. 4. c. 71. s. 1.

April 9.

INCLOSURE BILLS.

Mr. Eaton moved the second reading of the Melbourne (Cambridge) Enclosure Bill.

Mr. Harvey in calling the attention of the house to the general subject of enclosure bills, said, one could not read the different bills of this description which were brought before the house without being struck with the discrepancies between them. In some acts the whole quantity of waste land which was to be enclosed was stated, while in others no such statement was to be found. The quantity of land, too, proposed to be set apart for the re-creation of the people of the district was very various in different bills, and was, in fact, subject to no general rule, and, he believed, in no case exceeded ten acres. Now, it was very important to the house to know the quantity of land proposed to be enclosed, and the quantity intended to be reserved for the purpose of affording recreation, in order to judge of the proportion which the one bore to the other. In some bills the lord of the manor received one-twentieth of the enclosed land as a compensation for his rights, in others only one-seventeenth where the circumstances were precisely the same. In many bills there was no provision for the enclosure of the portion set apart for the public, although in some bills then before him the expense of enclosing the land allotted to the clergy in respect of tithe was to be defrayed out of the funds in the hands of the commissioners. He suggested it would be a wholesome safeguard, if for the future, not only the quantity of land to be enclosed were stated, but also what proportion of it was intended to be reserved for public recreation. He also thought that the same provision should be made for enclosing the part reserved for the people as was made in favour of the clergy and the lord of the manor; and that provision should be made for preserving the ground and keeping up the fences. He threw out these suggestions, because bills of this description were considered merely as private business, and received in general no attention from the house.

The bill was then read a second time, and ordered to be committed.

SCOTLAND.

April 8.

Conveyances of Heritable Estates in Scotland.
enfeoffments therein.

The Lord-Advocate obtained leave to bring in a bill to facilitate the conveyance of heritable estates in Scotland and enfeoffments therein.

COURT OF CHANCERY.—April.

In re HALL, AN ALLEGED BANKRUPT.

Petition praying a reversal of the Order of the Court of Review annulling this Fiat (a) and for a Procedendo to be directed to that Court.

Jurisdiction of the Lord Chancellor under 1 & 2 W. 4. c. 56. ss. 3. 12. and 17.

Mr. George Hall, a shareholder and director of the Northern and Central Bank of England, was declared bankrupt in November 1838, under a *fiat* issued against him by Mr. Stubbs, the registered public officer of that bank. Mr. Hall presented a petition to the Court of Review, praying that the *fiat* might be annulled. And in the order of that court to that effect, the Lord Chancellor made an order for superseding the *fiat*. Stubbs then presented a case for the approbation of a Judge of the Court of Review, for the purpose of appealing to the Lord Chancellor from that court's decision. The Judge would not approve of that case, but he drew a case himself, which Stubbs would not accept, and he then presented a petition to the Lord Chancellor, praying his Lordship to hear the appeal otherwise than by a case, and to restore the *fiat*. One of the questions raised in the argument before the Lord Chancellor on that petition was, whether it was competent for his Lordship to hear such appeal, notwithstanding the third section of the Bankruptcy Court Act, which declares that appeals from that court to the Lord Chancellor are to be confined to matters of law and equity, and to the refusal or admission of evidence, "and in all cases of appeal to the Lord Chancellor by virtue of that act, such appeal shall be on a special case, and no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct, which special case shall be approved and certified by one of the Judges of the said court." His Lordship, however, did hear the appeal, and the LORD CHANCELLOR stated the facts, and after referring to the 3d, 12th, and 17th sections of the Bankruptcy Court Act (1 and 2 Wil. 4. c. 56), said they were conclusive against his jurisdiction in this matter. With respect to the annulling of the *fiat* the act reserved that jurisdiction to the Lord Chancellor, but it must be exercised only upon appeal. Petitions to rescind commissions of bankruptcy constituted a great deal of the business before the Lord Chancellor before the passing of that act, and it was not to be supposed that in relieving itself of bankruptcy the court reserved to itself power over those questions relating to the validity of *fiats*. His Lordship added, he would not attempt to lay down a general rule as to the cases in which the discretion given to the Chancellor

(a) See the Case reported, ante, p. 92.

should be employed, but he thought he should be departing from the spirit of the act if he interfered on the present occasion, and the petition must therefore be dismissed with costs.

VICE CHANCELLOR'S COURT.

April 11.

ATTWOOD v. SMALL & OTHERS.

Joint Stock Companies—Liabilities of Directors in their several characters of Contractors, Trustees, and Directors.

The original suit instituted in the Court of Exchequer by Mr. Small and other members of the British Iron Company to rescind the contracts they had entered into with Mr. Attwood, on the ground of fraudulent misrepresentations as to the value of the mines, having been dismissed with costs, Mr. Attwood, in order to obtain the benefit of the decree he had obtained in the House of Lords, instituted three distinct suits in this court against the different members of the company, in their several characters of trustees, directors, and contractors on behalf of the company with a view to enforce the contracts, and to fix the defendants in one of those capacities with personal responsibility for the payment of the rest of the purchase-money.

The cause was argued in February last upon three demurrers made by the defendants in the different characters in which they are sued, on the grounds of the want of equity, defect of parties, and multifariousness, and impeached not only the frame of the suit, but insisted generally that Mr. Attwood would only be considered in law as a mortgagee of the mines to the company for the rest of the purchase-money, and that he can only come upon the ruins of the mines for payment of what is due to him without any account being taken of the minerals extracted. While the original suit was pending in the Court of Exchequer Mr. Attwood filed a bill for a specific performance of the contracts the plaintiffs in that suit had entered into with him, but the day after the decree of Lord Lyndhurst was pronounced, declaring the agreements void, he obtained an order to dismiss this bill with costs. On the reversal of the decision of Lord Lyndhurst in the House of Lords, and the argument being consequently declared valid, Mr. Attwood then stood in this singular position, that his bill for a specific performance of the agreements stood dismissed for want of prosecution, on his own application, and no attempt had ever been made to get rid of that dismissal. Under these circumstances it became necessary for Mr. Attwood to seek redress in this court, not by a bill for a specific performance, but by a declaration that upon the true construction of the agreements the defendants, or some of them, are personally liable to him under the contracts for payment

of the remainder of the purchase-money. The bill for this purpose set out the three agreements. By the first, Small, Shears, and Taylor, the managing directors of the company, agreed to purchase the mines of Mr. Attwood for 600,000*l.* Of this sum 25,000*l.* was to be deposited in Exchequer-bills on the execution of the agreement, 200,000*l.* was to be paid on the 1st of October following, and the rest by instalments bearing interest.

Mr. Attwood was to make out a title by the 1st of October, and give possession to the trustees of the company, to whom the property was to be conveyed to secure the instalments. The second agreement was made on the 1st of October, which recited that it had been determined, in consequence of the state of the title, to vary the former agreement, and to make an abatement of 50,000*l.* in the purchase-money, and that it was agreed upon the delivery of the Exchequer-bills, and payment of the 200,000*l.*, Small, Shears, and Taylor should be let into possession in as ample a manner as if the title had been accepted without such possession being deemed an acceptance of the title, or abandonment of their right to have all reasonable objections to the title removed at Mr. Attwood's expense, who was, on or before the 15th of April, 1826, whether the title was then completed or not, to convey the estates as though the title were complete under the former agreement, but the payment of the instalments was not to be disturbed, nor the interest on a sum of 75,000*l.* down to October, 1827; but instead of that instalment being then paid it should be left for 14 years as a security by way of mortgage of the estates at 4*l* per cent.; and if on the 14th of October, 1827, there should be any valid objections remaining to the title, then Small, Shears, and Taylor were to be at liberty to remove such objection at the expense of Attwood, but such objection, if it should not be in the power of Attwood to remove, should be waved by the company, and Attwood was to execute a bond of indemnity against any remaining defects in the title, and the 75,000*l.* was to continue during the 14 years upon trusts for the like indemnity, and the whole, if necessary, or a proper part, was to be detained at the end of the 14 years in the names of the trustees for the same purpose. By the third agreement, executed in November, 1825, which was the most material as to the personal responsibility of some of the defendants, it was agreed that Small, Shears, and Taylor, should be exonerated and discharged from all personal liability to the payment of any sum of money by reason of their having been parties to or having signed the former agreements, or from any act whatsoever, in anywise relating thereto, or consequent thereon, except that they should remain liable for the payment of the interest on the remaining instalments of the purchase-money, but that Attwood should be content as his security for the principal with the security of the estates to be conveyed to trustees, in the manner expressed in the agreements, with powers of sale,

to enable the trustees to raise and pay such of the instalments as should fall due from time to time with the interest, it being, nevertheless, understood that no sale should be made or proceedings taken for that purpose until Attwood should have given six months' notice previous to such sale, nor until the time mentioned in the notice had expired. After detailing these agreements, the bill set forth the proceedings in the original suit in the Court of Exchequer, and then went on to state that no trustees had ever been appointed, nor any conveyances executed to the company, but that the company had entered into possession of the mines, and were still in possession by their agents, and, in addition to having worked the old mines, had opened new pits and extracted great quantities of coal and ironstone. It further stated that Attwood had been induced to forego the personal responsibility of the three managing directors, who had signed the contracts on behalf of the company, on the faith and confidence that they would honestly discharge the debt, and without any apprehension they would have involved him in a suit of such enormous magnitude as he had been subject to in the Court of Exchequer. The bill further alleged, that when the last agreement was entered into only a small part of the capital had been paid, and that a sum of £25,000*l.* still remained due to him, which the company declared their intention not to pay if they could help it, while they were working the mines for their own benefit. It therefore prayed, all such declarations might be made by the Court as were just and necessary with regard to the rights and interests of the plaintiff, and in regard to the personal liabilities of Small, Shears, and Taylor, the contracting directors, and as to the liabilities of the other directors, and as to the liabilities of the trustees, and also as to the liability of the company in respect of the several members thereof, and as to the liability of the estates of the company, and the estates of the deceased directors and members, to pay the plaintiff the sum of £50,000*l.* together with such interest on £25,000*l.* as should be owing when the £25,000*l.* was paid; that an account should be taken, and any deficiency raised by sale or mortgage of the estates of the company, and that all directions should be given that were necessary to make the indemnity or equitable charge available for the purpose of the plaintiff being paid the money due to him. The main points contended for by the defendants in support of the demurrer were, that this was not a bill on which the Court could grant a specific performance of the contracts, for it prayed something else, while that was its secret object; that the contract was with three individuals who were the original contractors for the company, and that no subsequent contract could extend their liability to others; that possession was given that the mines might be worked, and therefore Mr. Attwood was not entitled to any by-gone account; that the indemnity went for nothing, and that he had no title to maintain the pre-

sent suit because he had not given the notice mortgagor was entitled to, but had only the ordinary remedy of a mortgagor. In support of the bill it was argued the demurrs had only been put in for the purpose of delaying a settlement the defendants must one day come to, for even if this was not technically the correct mode of proceeding, the right one was still open to Mr. Attwood, and he would pursue it. The company had got the plaintiff's property, they had taken away the inheritance, and were bound in conscience to pay for it. The present course was the only one left open to him to obtain the relief he was justly entitled to, for it would have been mockery to attempt to enforce the performance of the contracts when the company were struggling to get rid of them altogether, and there was no other mode of compelling them to appoint trustees.

The VICE-CHANCELLOR now pronounced judgment.

His HONOUR commenced by observing, that many points had been raised upon the three demurrs, but they might all be disposed of by considering two great questions—first, whether the plaintiff was entitled to any relief; and, secondly, if he was entitled to relief, whether he was entitled against any other persons than Small, Shears, and Taylor, the original purchasers, or, what was the same thing in substance, to any relief against the purchasers beyond a specific performance of the contract. Upon the first question it appeared to his honour quite plain that the plaintiff was entitled to some relief in the nature of specific performance of the agreements against Small, Shears, and John Taylor, for there was no objection to the agreements on the face of them, nor upon what appeared in the bill was there anything to affect them, and they had been partly performed by the purchasers taking possession, and partly paying the purchase-money. The objection that six months' notice had not been given was no objection to giving some relief, but was only applicable to the mode of dealing with the trust to be created in pursuance of the agreements. One ground, therefore, for supporting the demurrer by Small, Shears, and John Taylor, namely, the general want of equity, failed. The second question was, whether the plaintiff could have relief, beyond a specific performance, against the original purchasers. His Honour thought that merely by virtue of the agreements he was not entitled to relief against any other persons than the purchasers, and that it was upon the ground of conduct only that he could have relief against any of the other defendants. But if he was not entitled to ulterior relief against the purchasers in respect of their personal liability, grounded upon conduct, he could not be entitled to relief against any other persons. The purchasers were three of the trustees, and they and the two other trustees and eleven other persons were the directors, and the conduct of the directors and of their superintending agent, Philip Taylor, was in effect the conduct of the

purchasers. The case before the Court was one wherein the plaintiff expressly contracted not to have the personal liability of the purchasers except in the limited case of their being in possession, in which case the purchasers were to be liable for the interest on the remaining instalments of the purchase-money. The plaintiff acted upon that, and after he had given up possession to them, brought actions against them successfully for the interest. At the time the actions were brought the company were in possession, but it was a possession derived from the purchasers, and therefore it was their possession, both in the view which they as well as the plaintiff entertained, and in the view which courts, both of law and equity, took of the matter. It appeared that the plaintiff by his cross bill in the Exchequer prayed a receiver, but it did not appear that he ever applied for one. The contract was completely acknowledged by both parties, except so far as an attempt was made to get rid of it, on the ground of fraud upon the purchasers. Mr. Attwood's counsel in the course of the argument contended not only that the purchasers were by reason of conduct liable beyond their liability on the agreement, but that by reason of conduct the directors and their agent, and the company, were liable, and referred to a passage in "*Hanson v. Gardiner*," 7 Ves., where it was stated, "this principle operated, that unless there was some jurisdiction to prevent it, there would be a great failure of justice in the country." That observation, however, was made with reference to the case of trespass, where irreparable damage was the consequence, but had no reference to a case where a party chose to contract to give up certain remedies or expose himself to certain inconveniences.

Mr. Wakefield next referred to passages in the case of "*Pulteney v. Warren*," 6 Ves. 92.— "If there be a principle upon which courts of justice ought to act without scruple, it is this—to relieve parties against the injustice occasioned by their own acts or oversights at the instance of the party against whom the relief is sought;" and what followed? All those observations were made with reference to a case where Dr. Warren, the tenant, had first by his application at law in an ejection against him by the reversioner, and afterwards by a bill in equity, restrained the reversioner from taking possession, and Lord Eldon held that the executors of Dr. Warren were liable to account for mesne profits. Lord Eldon said, "The equity as to all of them—namely, Dr. Warren and the other tenants—arises from their joint act operating to prevent the plaintiff from having that redress at law which in all moral probability he would have had if this court had not interfered, and which in all moral justice he ought to have had." Reference was also made to cases where the obligor in a bond had obtained an injunction against the obligee, and where a mortgagee continued in possession after he had satisfied his principal and interest, in which cases equity gave relief against the wrongful act. But in

what way did the proceedings of the purchasers in the Exchequer prevent the plaintiff from having any remedy for the recovery of the unpaid purchase-money which he might have had, or chose to have, consistently with the agreements? By the agreements, after payment of the 225,000*l.*, which was paid on delivering up possession, 50,000*l.* was to be paid on the 15th of April, 1826; 100,000*l.* on the 15th of October, 1826; 100,000*l.* on the 15th of April, 1827; and 75,000*l.* was to be left on mortgage for 14 years from the 15th of October, 1827. When possession was given up by the plaintiff did not precisely appear, but it seemed to have been soon after the 4th of November, 1825. The original bill in the Exchequer was filed on the 27th of June, 1826; the cross-bill on the 12th of July, 1827. Before that day the company had raised upwards of 120,000 tons of coal, and upwards of 60,000 tons of ironstone, and had cut the greater part of the timber or timber-trees on the estate. The letter from Mr. John Taylor to Mr. Attwood on the 29th of November, 1825, apprised him that the company meant to pay him out of their returns—namely, the proceeds from Corngreaves—and the letters of the 8th and 13th of April, 1826, showed that the plaintiff consented to postpone payment of the instalment of 50,000*l.* which was due on the 15th of April, 1826. The half-yearly payments of 8,125*l.* due on the 1st of October, 1826, 1st of April, 1827, 1st of October, 1827, and the 1st of April, 1828, were paid in consequence of actions brought by the plaintiff. One of those actions was defended and tried in 1827, when the plaintiff recovered a verdict for two payments due in October, 1826, and April, 1827. There were, therefore, at least two actions, and there might have been three. Another action was brought for the half-yearly payment due in October, 1828, in consequence of which the order of the 28th of February, 1829, was made for an injunction on the terms of bringing the money into court. There was no appeal from that order, and the monies paid in court the plaintiff had received or might receive. By bringing actions at law for the interest, the plaintiff admitted the right of the purchasers to be in possession. He did not bring any ejection against them, as he might have done quite consistently with the purchasers' bill, and, as His Honour thought, with his own cross bill for specific performance. But if the ejection would have been inconsistent with his cross-bill, it could only have been so because the purchasers under the agreements had a right in equity to keep possession. In the plaintiff's cross-suit he did not apply for a receiver and manager, but was content that the purchasers should be in possession for their own benefit. He did not even choose to have a specific performance of the agreements, but dismissed his cross-bill voluntarily, though the reasonable inference was, that if he had brought it to a hearing, and the court had dismissed, as probably the Court would have done, the House of Lords would upon appeal have reversed the decree

of dismissal, and have decreed for specific performance. The plaintiff virtually put his equity for having relief beyond mere specific performance upon this, that a large portion of the minerals in the property sold had been obtained by the wrongful act of the company, and thereby the plaintiff's security had been greatly diminished. But the answer to that was, that the plaintiff chose it should be so, in order that he might have the half-yearly payments of £8,125*l.* There was no new agreement when the plaintiff gave up possession that he should have any other security than that which at that time was provided by the agreements. He says he gave up possession in faith and confidence that the remaining instalments would be duly paid, but he did not state that any new agreement, verbal or otherwise, was then made. The letters of the 8th, 12th, and 13th of April, 1826, showed that the plaintiff knew that further security was refused; and the truth was, that the agreement supposed that possession might continue with the purchasers, and the principal sum of £325,000*l.* remain unpaid long after the different times for payment of it had passed; and of course, if the purchasers were in possession for their own benefit, they could only be so by working the minerals and exhausting the mines. His Honour was therefore of opinion, upon the ground of conduct no relief could be had against Small, Shears, and John Taylor, and, *a fortiori*, none against the other directors, or their agent, or the company. The consequence was, that the demurser of Baily and others and the demurser of Burton and others must be allowed, with costs. But though he was of opinion no relief could be given against Small, Shears, and J. Taylor, on the ground of conduct yet, as some relief could be given against them in the way of a specific performance, their demurser must be overruled. In his Honour's view of the case, all that was stated in the bill about conduct was mere surplusage, and it was not necessary to decide upon any other ground raised by the demurser of the purchasers than the want of equity. For the purpose of costs, however, he must advert to one ground—namely, the absence of a personal representative of John Morice, which he thought would have been a good ground for demurser, if the case of conduct could have been sustained, and therefore the demurser of Small, Shears, and Taylor must be over-ruled, without costs.

ROLLS COURT—April 9.

WIGGINS v. LORD.

Practice—Order to amend Bill after Injunction—Whether of course or not.

The OPINIONS of the CHANCERY JUDGES AGAIN AT VARIANCE.

Mr. Pemberton, for the defendant, stated, that the plaintiff having filed his bill obtained the common injunction, and after that pre-

sented a petition to amend his bill, upon which an order of course was obtained. This order did not contain the words "without prejudice to the injunction." He had moved on a former day to discharge the order for irregularity, and his Lordship had expressed an opinion that leave to amend a bill after an injunction was not a matter of course, but that the application for it should be made in open court upon notice. The Lord Chancellor had held such an application to be a matter of course, and the Vice-Chancellor had decided that it was a motion that must be made in court.

Lord LANGDALE said, that on looking into the authorities he concurred with the Vice-Chancellor in opinion, and he should therefore grant Mr. Pemberton's motion to discharge the order. The practice was, however, in an uncertain state, and ought to become the subject of a general order, and such an order was now in preparation.

PREROGATIVE COURT—Jan. 24.

WINTLE v. WINTLE.

Will obtained by Fraud and Conspiracy—Probate refused.

The deceased, Mr. T. Wintle, died in June, 1837, at the age of 83 or 84, leaving a widow, a second wife, to whom he had been married about 17 years. One son, the issue of a former marriage, died about 14 years before the testator's death. He had 19 nephews and nieces. The property at his death was about £1,600*l.* The deceased had been at different periods an Excise officer, a stock broker, a silversmith, and a publican, but he had retired from business for several years. The testamentary papers before the Court were a will, dated in August, 1832; a codicil in September of that year, and another in April, 1836, whereby a provision was made for the widow, giving her a clear income of £4*l.* a-year, the house they lived in, and the furniture absolutely, and the first year's rent of certain leasehold houses, with the residue, and the wife was appointed one of the executors. These instruments remained uncancelled at the testator's death, having been deposited with Mr. Bevan, one of the executors, who produced them to the family after the funeral. On that occasion, however, a later will was produced by Mr. John Marriott Wintle, a nephew, dated in March, 1837, about three months before the testator's death, whereby the widow's benefit was reduced to an annuity of 50*l.*, and the use of the house and furniture for life; the rest of the property being given to Messrs. John M. Wintle and Jacob Wintle, the nephews (whom it appointed executors), in trust for the nephews and nieces. The widow was till that time in ignorance of the existence of this will. It had been admitted on the part of the nephews that there were adverse circumstances in the case; that the will had been drawn by John Wintle, who took a larger benefit under

it than under the former will; there was no proof of instructions from the deceased; it was witnessed by three persons who were almost entire strangers to the deceased; the execution was brought about by stratagem to conceal it from the wife, and it revoked a will confirmed so late as April, 1836. Under these circumstances, nothing but clear and indisputable evidence could justify the Court in pronouncing upon a will so prepared; for the question was not whether the evidence was such as to *enable* the Court to pronounce for the will, but whether it was such as to *compel* the Court to do so, for here was not a single presumption in favour of such a paper. The husband and wife, it was clear, had lived on the most affectionate terms; there was not any symptom of diminution of regard and affection towards the wife, or a single expression spoken to, denoting an intention to disturb the former disposition, which would have been the height of injustice to the wife, from whom the testator had received the bulk of the property. The faculties of the deceased from the end of 1836 had become impaired by his great age; he was extremely feeble in body, could hardly "toddle" about the room, was palsied all over, and his limbs trembled so much that he could not keep them still. Though not in a state of imbecility and fatuity, his intellects were so impaired, and particularly his memory, that it was necessary to rouse him and call his attention to any act to be done by him, though with care and caution and due explanation he might still have been competent to do a testamentary act. As there was no evidence to show that the deceased contemplated an alteration of the former disposition, the case depended upon the evidence of the subscribed witnesses; it was necessary, therefore, to see whether they were persons who by their conduct were entitled to credit. The two nephews were the persons by whom this will was procured. A former will in February, 1837, had been executed, the exact contents of which did not appear. This will was likewise drawn by Mr. John Wintle (who was a clerk in a solicitor's office), but it appeared that he had taken under it a larger share of the deceased's property than his brother, Mr. Jacob Wintle, thought he ought, and consequently another will was prepared. It was material to see the character which the two brothers imputed to each other. One of the subscribed witnesses to the will of March, 1837, stated that John Wintle told him that his brother Jacob was a hungry, overreaching fellow," and the learned Judge observed, it might be inferred from the conduct of Mr. Jacob Wintle, in respect to the will of February 1837, that he thought his brother John also a hungry overreaching fellow. These were the opinions the two brothers entertained of each other, and this was the way the transaction set out; the family seemed to have acted *pro sequaque*, taking care that nothing should go out of the family, the widow's share being their spoil.

Sir H. JENNER, in delivering sentence, read

the depositions of the three attesting witnesses as to the execution, in which they admitted that means and contrivances were used, in which they co-operated, to keep the execution from the knowledge of the wife, whereby the learned judge observed, they had made themselves parties to a concerted scheme; he could call it no other than a conspiracy to obtain this will from the deceased. One witness stated that this palsied and infirm old man signed the will on his knee, standing up, and putting his foot on a chair, without assistance. Another, that he sat on a chair, and signed it on his lap. The statements were utterly improbable. The Court could not, on the evidence of such witnesses, pronounce for the validity of a will which appeared to have been obtained by fraud and conspiracy.

The Court pronounced against it, and condemned the parties propounding it in costs.

CENTRAL CRIMINAL COURT.

April 8.

Charge of the Recorder to the Grand Jury, occasioned by the case of Francis Hastings Medhurst.

The circumstances which constitute murder and manslaughter.

The point for the consideration of the Jury—whether the employment by the prisoner of a knife constitutes a preconceived design to murder.

The RECORDER in his charge to the grand jury, observed, that although the cases for trial were rather numerous, and some of them of a very painful character, he did not apprehend that they would present any difficulty either as regarded law or fact. There was, however, one case—a charge of murder—upon which he felt it necessary to make a few observations. The party charged with the crime was named Francis Hastings Medhurst, who was committed in the first instance on the coroner's warrant for murder; but when he was subsequently brought before the magistrate the offence was reduced to manslaughter. His Lordship then proceeded to explain the circumstances which would constitute murder and manslaughter in the eye of the law, and told the grand jury that it would be for them to judge, in the progress of their inquiry, whether the act of killing in this instance was the result of a malignant and wilful spirit on the part of the accused, or whether it occurred in the heat of blood and without malice during the struggle which took place between the prisoner and the unfortunate deceased. Mr. Justice Foster had laid down that neither words nor provoking actions were sufficient provocation to justify the use of a deadly weapon unless an assault was actually committed on the party charged, and that in all other cases the use of deadly instruments so as to cause the death of a party would constitute the crime of murder, and could not be excused on the

ground of human frailty. The law, therefore, was, that neither insulting words, insolent demeanour, nor any provocation, short of an actual assault, would reduce the offence below the crime of murder; and although words of an insulting description might be more aggravating than a slight assault, still he was bound to state, that language, however insulting and degrading, formed no excuse for the death of a fellow-creature. The learned Recorder then referred to the facts of the case as they appeared on the face of the depositions, and said that the grand jury would have to consider whether any unfriendly feeling or ill-blood existed between the prisoner and the deceased previous to the melancholy catastrophe. It appeared that when the prisoner Medhurst entered the room he had a large stick in his hand with a knob at the end of it, and had that stick been the instrument which produced the death of the deceased, the prisoner would have been guilty of manslaughter only, because that stick, not being a deadly weapon, was in the hand of the prisoner when the quarrel took place. It happened unfortunately, however, that the prisoner having first struck the deceased with the stick in the irritation of the moment when the terms "liar" and "blackguard" were applied to him, had the stick wrested from his hand by the deceased, who was the stronger of the two, and being struck in return with the stick, he had recourse to a knife, which he took from his pocket, and which opened with a spring, and stabbed the deceased in the bowels, of which wound he

died. Now, the point for consideration was this—was the employment by the prisoner of so dangerous an instrument as a knife a pre-conceived design on his part to murder the deceased, because if that should appear, the prisoner would undoubtedly be guilty of the higher offence; but inasmuch as the language originally used by him was addressed to the Rev. Mr. Sturmer, and applied to another party, and not to the deceased, and inasmuch also as the prisoner did not strike the deceased with the stick until the insulting epithets were used by the latter, the grand jury would consider how far those facts ought to operate in favour of the accused. If they should be of opinion that the prisoner used the knife while smarting under the effects of the blows which were dealt him by the deceased with the stick, aggravated by the recent insult he had received; and if they should also be of opinion, upon a full inquiry into the facts of the case, that the knife was accidentally in his possession at the time, and that it was not procured for a mischievous purpose, but that it was had recourse to in a moment of sudden passion during the unfortunate broil, when the blood of both parties was heated, the grand jury would in that case be justified in returning a bill for manslaughter; but if they had any doubt upon the subject, and could not bring their minds to a satisfactory conclusion, they should return a bill for the higher offence, and leave the case to be decided by the petty jury under the direction of the learned judges.

SITTINGS IN THE COURT OF CHANCERY, Before and in Easter Term, 1839.

BEFORE THE LORD CHANCELLOR, AT LINCOLN'S INN.

Saturday, April 13

- Petitions and Appeals.

EASTER TERM.

Monday, April 15

- Appeal Motions and Appeals.

Tuesday, " 16

-

Wednesday, " 17

-

Thursday, " 18

-

Friday, " 19

-

Saturday, " 20

-

Monday, " 22

-

Tuesday, " 23

-

Wednesday, " 24

-

Thursday, " 25

-

Friday, " 26

-

Saturday, " 27

-

Monday, " 29

-

Tuesday, " 30

-

Wednesday, May 1

-

Thursday, " 2

-

Friday, " 3

-

Saturday, " 4

-

Monday, " 6

-

Tuesday, " 7

-

Wednesday, " 8

-

Appeal Motions.

Appeals and Causes.

Appeal Motions.

Appeals and Causes.

Appeal Motions.

Appeals and Causes.

Appeal Motions.

Such days as his Lordship is occupied in the House of Lords excepted.

BEFORE THE VICE-CHANCELLOR.

Tuesday,	April	9	-	- The Seal pay.—Motions.
Wednesday,	"	10	-	- Petitions.
Thursday,	"	11	-	- Motions.
Friday,	"	12	-	- Short Causes, unopposed Petitions and Motions
Saturday,	"	13	-	- Motions and remaining Petitions.

EASTER TERM.—AT WESTMINSTER.

Monday,	"	15	-	- Motions.
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BEFORE THE MASTER OF THE ROLLS.

Tuesday,	April	9	-	- Motions.
Wednesday,	"	10	-	-
Thursday,	"	11	-	-
Friday,	"	12	-	-
Saturday,	"	13	-	- } Pleas, demurrers, causes, further directions and exceptions.

AT WESTMINSTER.

Monday,	"	15	-	- Motions.
Tuesday,	"	16	-	- Petitions in the general paper.
Wednesday,	"	17	-	-
Thursday,	"	18	-	-
Friday,	"	19	-	- }
Saturday,	"	20	-	- Pleas, Demurrs, Causes, Further directions and Exceptions.
Monday,	"	22	-	-
Tuesday,	"	23	-	-
Wednesday,	"	24	-	- Motions.
Thursday,	"	25	-	-
Friday,	"	26	-	-
Saturday,	"	27	-	- }
Monday,	"	29	-	- Pleas, Demurrs, Causes, Further directions and Exceptions.
Tuesday,	"	30	-	-
Wednesday, May	1	-	- Motions.	
Thursday,	"	2	-	-
Friday,	"	3	-	- }
Saturday,	"	4	-	- Pleas, Demurrs, Causes, Further directions and Exceptions.
Monday,	"	6	-	-
Tuesday,	"	7	-	- Petitions in the General Paper.
Wednesday,	"	8	-	- Motions.

AT THE ROLLS.

Thursday,	"	9	-	- Short Causes after swearing in Solicitors.
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Short and Consent Causes, and Consent Petitions, on Wednesday the 17th, Tuesday the 23rd, and Thursday the 30th of April, and on Thursday the 9th of May, and at the Sitting of the Court.

Tuesday,	April	16	-	- } Pleas, Demurrs, Exceptions, Causes, and Further directions.
Wednesday,	"	17	-	- Short Causes, unopposed Petitions, and ditto.
Thursday,	"	18	-	- }
Friday,	"	19	-	- Pleas, Demurrs, Exceptions, Causes, and Further directions.
Saturday,	"	20	-	- Motions.
Monday,	"	22	-	- }
Tuesday,	"	23	-	- Short Causes, unopposed Petitions, previous to General Paper.
Wednesday,	"	24	-	- }
Thursday,	"	25	-	- Pleas, Demurrs, Exceptions, Causes, and Further directions.
Friday,	"	26	-	- }
Saturday,	"	27	-	- }
Monday,	"	29	-	- }
Tuesday,	"	30	-	- }
Wednesday, May	1	-	- }	

Thursday,	May	2	-	Motions.
Friday,	"	3	-	Short Causes, unopposed Petitions, previous to the General Paper.
Saturday,	"	4	-	
Monday,	"	6	-	
Tuesday,	"	7	-	Pleas, Demurrs, Exceptions, Causes, and Further directions.
Wednesday,	"	8	-	Motions.

TO THE EDITOR OF THE "LEGAL GUIDE."

MASTERS' CLERKS.

SIR.—I write to you, "more in sorrow than in anger" to lay before you, and, through your valuable publication, before the public, a complaint which it would rather please me to detail than to characterise. I can readily conceive that you may hesitate before you subscribe to the propriety, as a general rule, of such communications appearing in your publication; but I will also, if you will permit me, estimate you so highly, as to conclude that you will consider this of sufficient importance to justify me in saying that it may well form an exception to such a rule. Indeed a grievance of a similar nature committed by a public officer in the face of the Public, may, it is hoped at all times, be publicly stated and appropriately strictured. Hence the salutary effect of such useful and excellent productions as the Legal Guide.

I had, as Solicitor for the plaintiffs, under a decree in a cause of "Netherton v. Thorne" completed the taxation of costs in Master Wingfield's office, and as is usual, left the bill of costs with the master's clerk, Mr. Edwards, for the master's certificate, my opponent and I having made our copies agree with the master's costs.

Upon receiving the master's certificate and the master's bill, I perceived that a sum of 1*l.* 2*s.* 6*d.* for conditional costs of subpoena, &c. had been struck out by some one, and that after excluding that sum from the total amount, it also appeared that a further sum of 1*l.* 1*s.* had been deducted from the amount of the bill. As to the former sum, one could easily imagine, as the decree directed the costs to be paid by the

defendant out of the testator's estate, that it might be open to doubt whether the costs were personal, and consequently, whether the charge were proper, although I do not understand the right of a master's clerk —after the bill had been taxed, been before the master several times on queried items, and in all respects completed,—to strike the item out of the bill. But more inexcusable and more unjust was it for him to do so when the only argument upon which it could be pretended to be an item which ought not to be allowed, viz. "that they were not *personal costs*," was incapable to be put forward, inasmuch as the master had upon the argument used before him by the defendant's solicitor, "that they were *personal costs*" disallowed about 10*l.* incurred in obtaining and serving the defendant with a writ of execution of an order. And upon this I made no comment whatever, but with reference to the 1*l.* 1*s.*, I stated to the master's clerk that he had made a mistake and inserted in the certificate this sum less than the proper amount after excluding the 1*l.* 2*s.* 6*d.* He replied, that he had given the certificate for the proper amount, adding in a most offensive tone, that he would not be interrupted in his business! I pointed out to him that clearly he had not done so, when after looking at the bill in the presence of another gentleman he made the following observation: "*The item of 1l. 1s. has been inserted in the bill since I prepared the certificate.*" Feeling indignant at such an unfounded imputation, at the same time being desirous to convince him, as well as the gentleman who was present that the assertion was groundless, I assured him that the item was in the hand-writing of my opponent, the solicitor on the other side, and that we had made our bills agree before

I left the master's bill with him (the master's clerk) to prepare the certificate, and that I had not afterwards until that moment seen such bill. He however persisted that such was the case, and added upon my again repeating my request to have the certificate altered "that he would not do so unless I obtained the initials of my clerk in court to the item."

I felt it my duty to state the facts to Master Wingfield, who, with those feelings of justice, condescension and graciousness for which he is so eminently distinguished, assured me that he would instantly speak to Mr. Edwards on the subject, and asked me to retire for a few minutes whilst he did so.

Whilst Mr. Edwards was before the master, I procured from Mr. Gill (whose manly and honourable repudiation of so scandalous a charge I cannot do otherwise than acknowledge) and to my overwhelming surprise, this gentleman, who had so unceremoniously and so wantonly made the accusation, had in this draft certificate *at first included the 1l. 1s.* and afterwards struck it out. I immediately shewed this draft certificate to the master and to Mr. Edwards, and upon my doing so, the latter stated to the master "that he must do me the justice to say that it was his blunder." He having gone no further than this, I asked him whether he did not desire to do me the further justice to retract his accusation, which he refused to do, when I stated to him that I would give publicity to the transaction, to which I received from him a reply that I might do so if I thought proper.

Now Sir, I am aware, after nine years' experience, that there are few public officers capable of such conduct; yet I cannot help saying that if a solicitor is to be subjected to such unprovoked and such unfounded aspersions upon his reputation, when upon that reputation he relies for success in his profession,—if he is to be subjected to such rude and insolent usage from an officer who considers himself by virtue of his office to be screened from punishment; then supposing him to possess honourable feelings, he must naturally refrain under many circumstances from seeking justice for his client,

or he must turn his back in disgust upon that profession, to become a member of which it has cost him so much time, labour, and expense.

I am, SIR,
Your very obedient Servant,
A SOLICITOR. (a)

(a) The name and address of this writer is at our office.

TO CORRESPONDENTS.

"B." A retainer is equally good as well before as after action, *if the barrister has accepted it.*

"AN ARTICLED CLERK." We believe not.

"H. D. M." His attention is directed to the letter from "C. B."

TO SUBSCRIBERS.

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ERRATA.

Page 339, second column, line 12 from the top, for "mortgagée," read "mortgagor."

Page 353, first column, line 4 from the commencement, "The like."

Page 356, first column, line 29 from the top, for "as the demise," read "the day of the demise in the declaration."

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Price 6*d.* Stamped Edition, 7*d.*

The Legal Guide.

No. 25.]

SATURDAY, APRIL 20, 1839.

MORTGAGORS AND MORTGAGEES.

AN ESSAY

*Upon the Character in which a MORTGAGOR
IN POSSESSION may be considered.*

(Continued from p. 373.)

MR. JUSTICE BULLER continued—

Whoever wishes to wade through the old books on this subject, will find a great collection of cases in Comyn's Digest, Tit. Estate l. H. But it is an Herculean labour; and with the opinion which I hold, namely, that this is not a mortgage, it would be quite useless and immaterial in the present case.

Whenever it is necessary to decide a similar question between the mortgagor and mortgagee, it seems to me that it will be quite sufficient to call them so without having recourse to any other description of men, or to what they are most like. But if a likeness must be found, I think, as it was put by Ashurst, J., in *Moss v. Gallimore*, a mortgagor is as much, if not more, *like a receiver, than a tenant at will*. *In truth he is not either.* He is *not* a tenant at will, because he is not entitled to the growing crops after the will is determined. He is *not* considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee; I mean in ejectments brought for the recovery of the mortgaged lands. If he were tenant at will, the demise could not be laid on a day antecedent to the determination of the will.

VOL. I.

But it is every day's practice to lay the demise on a day long before there has been any actual determination of the will; sometimes back to the time when the mortgage became forfeited, and no objection has ever been made on that account. He is *not a receiver*, for, if he were, he would be obliged to pay all the rents and profits to the mortgagee, which is not the case. Two things which differ from each other in any respect cannot be the same; therefore *he is neither tenant at will, nor receiver*. Nor is it necessary that he should be so, for a mortgagor and mortgagee are characters as well known, and their rights, powers, and interests as well settled as any in the law. The possession of the mortgagor is the possession of the mortgagee; and as to the inheritance they have but one title between them. The mortgagor has no power of making leases to bind the mortgagee. He cannot against the will of the mortgagee do any act to disseize him. Cro. Jac. 660. Cro. Car. 304. 3 Lev. 338. and Skin. 424. And the reason is because the mortgagee, so long as he receives his interest, is virtually and in the eye of the law in possession. The mortgagee has a right to the actual possession whenever he pleases; he may bring his ejectment at any moment that he will; and he is entitled to the estate as it is with all the crops growing on it. He is also entitled to all the rents which have become due since his mortgage, and which are unpaid; as was determined in *Moss v. Gallimore*, which case I hold to be sound law;

and I am desired by Lord Mansfield to declare, that on consideration, he is most perfectly satisfied with that decision.

"The case was, that one Harrison having demised an estate to the plaintiff for twenty years, afterwards mortgaged it to the defendant, who, without having ever been in the actual possession of the rents, distrained on the plaintiff for rent in arrear, and the distress was held lawful. The legality of the distress depended on the stat. 4 Ann. c. 16. Before that statute, if a reversion were granted over by deed which operated only as a common-law conveyance without attornment, the grant itself was void to all intents and purposes. But it was not so where the grant was by fine, or by deed of uses, on which the stat. 27 Hen. 8. operated: for in the case of a fine, the estate passed to the conusee and his heirs, and an attornment in that case was necessary only to make a privity between the tenant and the conusee; and, if made after the death of the conusee to his heirs, was sufficient. Where the reversion was conveyed by a deed of uses, the grantee might distrain without any attornment at all. Co. Lit. 309. 6 Co. 68. Cro. Jac. 192. The statute enacts that all grants or conveyances thereafter to be made by *fines*, or otherwise, of any manors, rents, reversions, or remainders shall be good and effectual to all intents and purposes, without any attornment of their tenants, *as if their attornment had been made*. This clause comprehends all grants and conveyances, and therefore whether it be a grant by way of mortgage, or of the fee simple, or only of the reversion for a term of years as the present case, it makes no difference. And the effect of the clause is, that it creates an immediate privity between the grantee and the tenant. It cannot be restrained merely to the making of the grant good as between the grantor and grantee: 1st, Because it expressly mentions grants by *fines*; and they were good to all purposes before without attornment, except as to creating such a privity as would enable the grantee to distrain; 2ndly, Because the statute says the conveyance shall have the same effect as if attornment had been made. Now if an attornment in

fact were made before the statute, there can be no doubt but the grantee was perfect landlord to the tenant, and entitled to all the rents accruing due from the time of the attornment; though according to Co. Lit. 310. b., it would not have entitled him to the rents which became due between the time of the grant and the time of the attornment, which is contrary to what the plaintiff's counsel (in this case) have contended on this point, namely, that the attornment would relate back to the time of the grant.

The legislature having gone the length of making the grantee a perfect landlord without the knowledge of the tenant, it occurred to them that mischief might ensue by leaving the tenant open to a distress, or action for the rent at the suit of a person whom he knew nothing of, and after he had paid his rent to his original landlord; and therefore they prudently added the proviso, that no person should be prejudiced by payment of rent to any grantor, or conusor, or by breach of any condition for non-payment of the rent before notice should be given to him of the grant by the conusee or grantee. I say they prudently added that proviso, because perhaps it was not absolutely necessary; for the wisdom, the benevolence, and the liberality of the common-law had made the same provision before.

"The case of Sir John Watts and others v. Ognell, Cro. Jac. 392. is a strong proof how much equity and good sense have always prevailed in the law. That case was debt for rent by the assignees of a reversion under a fine levied to their use. Several objections were made in arrest of judgment; one of which was that the declaration was not good, because it was not alleged that the lessee upon this grant by fine, attorned, nor that he had any notice of the use limited; and even if he might avow without attornment, yet notice ought to be given to the lessee, for otherwise he should be at mischief; for the use might be limited, and he not having conusance thereof, might pay his rent to his ancient lessor. Of this point the court doubted; but afterwards they held that the action was well brought, and that notice need not be alleged in the

declaration. But they agreed that the lessee is not bound to pay *without notice*; and if he hath paid it to his ancient lessor, it is a good excuse for him, and he may plead it. And if he hath not paid it, the action gives him notice to pay it to the grantee, and then he is chargeable for all which he has not paid. This case, though decided almost 100 years before the passing of the act of Queen Ann, where actual attornment was not necessary, established the same rule which the act professes to make. And it is a case well worthy of observation; for 1st, It shews how much the common-law regarded and required notice, where a person had not the means of knowing; for at that time there was no statute which required notice to be given. 2ndly, It shews that where attornment is dispensed with, or supplied by a statute, the grantee has as complete and perfect a title as if attornment had actually been made. 3rdly, This case fortifies an argument, which I relied much on in the case of Moss and Gallimore, drawn from the form of pleading, namely, that, since the statute, an attornment never is alleged either in a declaration in covenant, or in an avowry; which can only be because it is supplied by the statute, and therefore unnecessary. And 4thly, it proves that nothing can excuse the lessee from paying the rent to the assignee, but *actual payment* to the original lessor without notice of the grant; and, if that be his case, he may plead it.

"From hence I conclude that the plaintiff was the landlord of the defendant. He had a clear legal title, which he could support upon pleading, either in an action of covenant or an avowry; and the tenant was answerable to his action unless he could allege some legal bar in his defence, and which I think he could only do by shewing payment to the grantor before notice.

The first proposition that I laid down was, that the defendant under his first demise continued *rightful tenant to some one*, till the time that the ejectment was brought. And now I say that, *that some one* during all the time that the rent in arrear incurred was the plaintiff. Conse-

quently, the plaintiff is entitled to maintain an action for use and occupation against the defendant, for all that is due and *unpaid*, as rent during the time the plaintiff was landlord, and the defendant had the premises as his tenant.

But then another question remains to be considered, namely, down to what time the plaintiff is entitled to recover that rent in the present action?

For the plaintiff it was contended that he had a right to recover it down to the time of executing the writ of possession. And to establish this point four cases were quoted:—1st, *A nisi prius determination*, cited in Cowp. 246. There is no name to it; but it was tried at Launceston Assizes, when Gould, J. was at the bar; and there the lessor of the plaintiff in ejectment had likewise brought an action for use and occupation of the same premises, for rent which had accrued subsequent to the time of the demise. Both actions came on to be tried at the same assizes; and in the action for use and occupation, it was objected that it was an action founded on promises, and a supposed permission by the plaintiff to the defendant to occupy therefore an acknowledgment on the part of the plaintiff that he was tenant, and consequently a waiver of his notice. But the objection was overruled, and the plaintiff recovered, first in the ejectment, and afterwards in the action for use and occupation. This at best is but a *Nisi Prius* determination, and I can find no principle whatever on which to support it to the extent to which it goes. If the plaintiff recovered only in the action for use and occupation to the time of the demise in the ejectment, which he might do notwithstanding his declaration claimed the rent to a later period, I think the case is good law. But if he recovered rent due after the demise, I cannot give my assent to it. For the action for use and occupation is founded on *contract*; and unless there was a contract either express or implied, the action could not be maintained, as was held by Lord Mansfield in the case cited at the bar of Carmier v. Mercer, which was tried about twenty years ago. And if

there were a contract subsisting at the time of the demise, the ejectment could not be maintained.

Two other cases quoted were Hambly v. Trott, Cwcp. 371, and Goodtitle v. North and others, Doug. 562. But as those cases do not seem to me to apply to the present, I shall pass them over. They only relate to the questions, what actions may be maintained against an executor or a bankrupt, and what die with the person, or are barred by the certificate.

The last case quoted was Feltham v. Terry, (a) where an action for money had and received was brought against an overseer of the poor, to recover money in his hands, which had been levied on a conviction, but that conviction had afterwards been quashed: and the court held that the action was maintainable for the clear money in the defendant's hands, because the plaintiff might waive the tort and go for the clear money really due. I agree that he may do so; but in the present case the plaintiff has not waived the tort; he has brought his ejectment and obtained judgment on it, which is insisting on the tort, and he cannot be permitted to blow both hot and cold at the same time. The action for use and occupation, and the ejectment, when applied to the same time, are totally inconsistent; for, in one, the plaintiff says, the defendant is his tenant, and, therefore, he must pay him rent; in the other, he says, he is no longer his tenant, and, therefore, he must deliver up the possession. He cannot do both. The plaintiff's counsel admit that an action would lie for the mesne profits. It is, of course, after ejectment, and may be maintained without proving any title. The ejectment is the suit in which the defendant is considered as a trespasser; and unless the judgment in ejectment be laid out of the case, the tort is not waived. The defendant stands convicted on record by judgment as a trespasser from the 6th April, 1785.

Therefore, I am of opinion that the plaintiff is in this action entitled to recover the 81*l.* 15*s.* which remained unpaid as part of

the half year's rent due on the 22d of November, and also a proportional part of the rent up to the 6th of April, 1785; the defendant having continued tenant to the plaintiff up to that time, which is the day of the demise laid in the declaration in *ejectment*. But I think he is not entitled in this action to recover any rent subsequent to that day.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XXI.

What do Corporeal Hereditaments consist of?

THINGS real are usually said to consist in *lands*, *tenements*, or *hereditaments*. The signification of each is very extensive; *land*, comprehending all things of a permanent and substantial nature; *tenements*, every thing that may be holden, provided it be of a permanent nature, whether substantial or not; but the word *hereditament* has by far the greatest import, including not only the two former, but whatsoever may be inherited, whether corporeal or incorporeal, real, personal, or mixed; for instance, under its signification is comprised an heir-loom, which is a mere moveable, descending by custom with the house to the heir. *Hereditaments* are divided into two sorts or kinds; *corporeal* and *incorporeal*. The former, such as affect the senses, may be seen and handled by the body. The latter issuing from the former, are creatures of the mind, and exist only in contemplation. Bl. Com. ii. 2. Thus much for the derivation and most general signification of the *corporeal hereditament*. I will proceed to examine it abstractedly. It consists only of those things which are of a *permanent* and *substantial* nature, *all* which may pass under the *nomen generalissimum* of *land* only, by which everything terrestrial will pass. Co. Lit. 4. 5. 6. For by grant of the land or ground itself, all that is *super*, as houses, trees, and the like, is granted, for *cujus est solum ejus est usque ad coelum*;

(a) E. 13 Geo. 3. B. R. cited in Cwcp. 419.

also, all that is *infra*, as mines, earth, clay, quarries, and the like, (a) (unless there be a custom to the contrary). Shep. Touch. 90. Bl. Com. ii. 19; whereas by the name of a messuage, castle, or the like, nothing will pass but what falls with the utmost propriety under the term made use of, as for instance, the ground on which it stands. Shep. Touch. ibid. Water also will pass under the general appellation of land, though in contemplation of law it is *not* the water which is conveyed, *but the land which lies at the bottom*; for an action cannot be brought to recover possession of a pool, or other piece of water, by the name of *water* only, but as so much *land* covered with water; for it stands to reason that a moveable wandering thing, which may be here to-day and there to-morrow, can never be considered of itself as a *corporeal hereditament*, which it is absolutely necessary should be (as the land which the water covers is) *permanent, fixed, and immovable*.

H. D. M.

PROBLEM XXIV.

RENTS

AT COMMON LAW AND OF ASSIZE,
DESCRIBE THEM?

Imperial Parliament.

HOUSE OF COMMONS.

ENGLAND.

Act for abolishing Arrest for debt on Mesne Process, 1 & 2 Vict. c. 110.

The Attorney-General brought in his amend-

(a) See case of Corporation of Bath v. Pinch, reported in this Journal, p. 342, by which it appears, that a man has not the *absolutum dominium* over his own soil, from the heavens to the centre of the earth, which our old law writers would lead us to suppose; but that it is by the present case much qualified.

ment to this bill (b), after which the following petition was presented by Mr. B. Smith.

"TO THE HON. THE COMMONS OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, IN PARLIAMENT ASSEMBLED.

"The humble Petition of the undersigned Bankers, Merchants, Traders, and others, residing in the City of Norwich,

"Showeth,—That your petitioners are desirous of calling the attention of your hon. house to the present state of the law of debtor and creditor, developed as it is in actions for debt, and in the management of bankruptcies and insolvencies.

"That your petitioners assure your hon. house that the existing law operates very prejudicially to the mercantile classes, its expensive and tedious proceedings often obliging them to forego their just claims, rather than risk the increased amount to which they would be swelled by the costs of an action at law, and thus oftentimes enabling a dishonest debtor to effect his evil purposes with impunity and without exposure.

"That your petitioners are strongly of opinion, that the evils complained of would be effectually remedied by the establishment of competent local courts, having jurisdiction in all cases of debt, insolvency, and bankruptcy, and unfettered by the present costly and unnecessary requirements.

"Your petitioners, therefore, humbly pray your hon. house to revise the existing law, and to adopt such amendments as shall effectually remedy the grievances of which they complain.

"And your petitioners will ever pray, &c."

Law Reports.

COURT OF CHANCERY.—March 27.

PHILLIPS v. JONES.

Appeal from the VICE-CHANCELLOR.

LESSOR and LESSEE.—LEASE of COAL MINES.

—Liability of Lessee to pay a certain yearly rent, whether any coals should be dug or received out of the premises, or not, in the event of the mine proving a failure.

The Vice-Chancellor dissolved the injunction obtained by the plaintiffs in this cause (c) restraining the defendant, the lessor from proceeding in an action at law upon the covenant of the plaintiff, the lessee, for rent, and this was an appeal against that order, and the plaintiff now prayed that an action for further rent might be restrained and the lease cancelled, and that the sum paid might be computed in his favour, as purchase-money of all the

(b) See ante, p. 374.

(c) See the case reported, ante, p. 234.

coal in the nine acres. "Smith v. Morris," 2 Bro. 311, was cited in support of the prayer.

The LORD CHANCELLOR said "Smith v. Morris" did not apply, for here the plaintiff offered to pay for all the coal which could be got, out of the money of the defendant.

Dismissed, with costs.

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April 13.

WEBB v. THE MANCHESTER AND LEEDS RAILWAY COMPANY.

Appeal from the MASTER OF THE ROLLS.

Railway Companies.—Powers conferred upon Railway Companies will receive no extension from this Court.—Whether a Company can claim to take land not for the Railway to pass through, but for other distant purposes, though connected with the Railway.

This was an appeal from an Order of the Master of the Rolls, (a) dissolving an injunction which restrained the defendants from going before a jury to assess the value of a certain piece of land on the line of the railway, near Wakefield, and from taking possession of it. There had been no difference in this suit between the parties with respect to the land through which the railway passes; the value of that land had been ascertained by a jury. The question now was whether the defendants were entitled to take another piece of land from the plaintiffs, not for the railway to pass through, but for the purpose of digging for materials for the embankments of another part of the railway about one mile distant. The portion of the plaintiffs' land required for that purpose was about 3 rods and 23 perches. In the notice given to the plaintiffs the defendants did not state the object for which they wanted the land; but they afterwards sent out a precept for a jury, and then the plaintiffs filed this bill and got the injunction, which the Master of the Rolls dissolved, but the plaintiffs now sought to restore.

The LORD CHANCELLOR said he had looked at the affidavits in this case, but they did not afford him much assistance in coming to a satisfactory conclusion. The engineer of the company thought the piece of land in question necessary for the embankments, but the evidence did not support him in this opinion. The Act of Parliament did not appear to authorize the company to take possession of the land, and he should take care to keep them within its provinces. *The powers conferred on railway companies were so large, and so injurious to individuals, that they would receive no extension from him.* Perhaps some scientific person might be fixed upon on each side, who would examine the works, and report upon the necessity for taking the land, and counsel would inform the Court if this suggestion were acceded to on Monday.

(a) See the case reported, ante, p. 343.

April 17.

MURLEY v. GREENHAM.

Appeal from the VICE-CHANCELLOR.

Trustees' liability to Costs.

This was an appeal from an Order of the Vice-Chancellor, restraining execution against the plaintiff for costs upon a nonsuit.

The defendant, Mr. Greenham, was trustee and committee of a lunatic who died, and whose estate Mr. Murley claimed as heir-at-law. Mr. Greenham, on the other hand, alleged that the lunatic recovered his senses a short time before his death, and made a will devising the estate to himself. The plaintiff, however, commenced an action, the form of which was not such as to enable him to try the validity of the will, and he was accordingly nonsuited. His Honour granted an injunction restraining Mr. Greenham from levying his costs, on the ground that a suit was pending in equity impeaching the will, and in which Mr. Greenham might become liable to pay costs to Mr. Murley.

The LORD CHANCELLOR said the trustee must not be punished for defending himself, and the plaintiff ought to pay the costs of his ill-advised proceeding.

Order discharged and injunction dissolved.

VICE-CHANCELLOR'S COURT.

April 10.

DALTON v. HOBHOUSE & ANOTHER.

Trustees—Their liability for improper investment of a Testator's funds.

Mr. K. Bruce moved that the defendants the Right Hon. H. Hobhouse and the Rev. Mr. Serrell might be ordered, within ten days, to pay into court a sum of 3,774*l.* which was a portion of a fund of which they were the trustees; or that a receiver might be appointed, or a reference directed to the Master, to ascertain what should be done under the peculiar circumstances in which the trust-fund stood. The bill had been filed by the plaintiff against the defendants, to obtain payment of the greater portion of a trust fund, to which he was entitled under the will of a Miss Dalton. The defendants were the trustees under Miss Dalton's will, and the plaintiff had lately attained his majority, whereby he became entitled to be paid the greater portion of the trust fund. In February 1828, the trustees had, through the medium of a Mr. Messiter, their banker and solicitor, lent the sum in question to Mr. Robert Foster Grant Dalton, the plaintiff's father, by way of a third mortgage on his estate called Inglethorpe, in the county of Norfolk. There were two previous subsisting mortgages on the estate to the amount of 42,000*l.*; and the trustees stated that they were empowered under the will to lend the trust monies upon real securities, and that before they advanced the trust fund upon the mortgage, the estate in question had been

valued at the sum of 75,000*l.* and that beyond the payment of the interest upon the mortgage debts, the estate produced a surplus rental of 600*l.* per annum. It was admitted that the trust monies were lent for the purpose of paying off the balance of a banking account which existed between Mr. Dalton and Mr. Messiter. The interest upon the mortgages had been duly paid up to February, 1837. Under these circumstances it was that the plaintiff filed his bill to secure the payment to him of his share of the trust fund. Two years' interest had since accrued due, and the trustees admitted that the state of the security rendered it impossible to realise the amount without considerable difficulty, delay, and expense.

The VICE-CHANCELLOR said that where trustees lent trust money upon personal security, it was no security at all, and in such a case as that, this court would deal with the trustees as if they had the money actually in their own pockets. In the present case it appeared that the trustees had, *de facto*, lent the money upon mortgage. The trustees might ultimately be held liable for the repayment of the money, and, looking at the value of the estate and its rental, the repayment of the money might be safe. Under those circumstances, the court thought it ought not to treat the defendants precisely in the manner it would do had the money been laid out merely on personal security, and particularly upon an application to have the money paid into court in the first instance. He thought, therefore, that as against the defendants no order should now be made for the payment of the money into court, or that a receiver should be appointed; but he considered it a very proper case for a reference to the master, to see what was the best course, under the circumstances, to be pursued for the raising the money.

MACKELLAR v. MACKELLAR.

Practice—Irregularity of Service of an Order of the Court in a foreign Country, under 6 G. 4 and 1 & 2 W. 4.—What sufficient to discharge proceedings under it.

Mr. Jacob moved to discharge an order of the Court issued on the 2nd July, 1838, for irregularity, and to set aside all the proceedings that had been taken upon such order which included several writs of attachment directed to the sheriff, with the view that, that the plaintiff might have the bill taken *pro confesso*, and obtain a sequestration of the defendant's property, for the defendant had been living for several years at Boulogne. Under the 6 G. 4. and 1 & 2 W. 4., which provided for entering appearances to a suit where the parties were out of the jurisdiction of the court, an order had been made, that service upon the defendant at Boulogne, should be deemed good service, and that the service should be proved by an affidavit before any person authorized to administer an oath, and which should be sub-

sequently authenticated by the British Consul there, and the order sought to be discharged was granted on an affidavit, which was signed by a person describing himself as the deputy mayor of Boulogne. This was accompanied by a certificate that the individual so described was the deputy mayor, and was signed by some one else describing himself as the British Consul, whose signature was verified by an official authority in this country. No other evidence was given when the order of July was obtained, nor was there any notice that a clerk in court should enter an appearance for the defendant. The irregularity complained of was, that the instrument procured at Boulogne did not show on the face of it that the deputy mayor had authority to take an affidavit, that the consul was the only person who had power to authenticate the fact, and that notice should have been given of all the proceedings.

The VICE-CHANCELLOR considered the objection to the form of the affidavit by the person who served the subpoenas valid. He thought it absolutely necessary to show there had been good service when the Court acted upon it, and the time had gone by when that fact could be established by evidence. The meaning of the order was, that the Consul should give his testimony that the individual before whom the affidavit was sworn had power to administer an oath, and if the certificate had been right, the court would not have required any further affidavit. The order of July was therefore discharged as well as the attachments, with costs.

April 13.

MORSE v. TUCKER.

Creditor's Bill—Receiver—Whether the Court will, upon a Creditor merely filing a Bill upon which the Creditor's debt shall be admitted, appoint a Receiver in the first instance.

This was a creditor's suit brought by the plaintiff, a creditor, against the executors and devisees of the testator John Owen Edwards, deceased, to obtain payment out of his real estate of a sum of 2,270*l.* under the following circumstances:—By his will the testator devised his estates to his wife for life, and after her death to his daughters, and charged the property with the payment of his debts. The testator died in 1825, and in the year 1833, an action of ejectment was brought against a person named Adams, to whom Edwards had granted a lease in 1783, containing the usual covenant for quiet enjoyment, and he was turned out of possession. It was subsequently discovered that Edwards had no right originally to grant the lease, in consequence of his having neglected to exercise a power by which alone he could acquire the right, and an action was accordingly brought in 1836, by the representatives of the ejected tenant against the executors of Edwards, who pleaded that they had no assets. In this action damages to the amount of 2,200*l.* were

recovered, which, with the costs, were sought by the present bill to be enforced against the real estate, which the testator had charged with payment simply of "debts." The question was, whether the real estates of Edwards so devised were liable to the payment of a debt which arose out of the breach of a covenant which did not happen until several years after his death, and whether, before that point was decided, the Court could place a receiver over the estates upon the mere motion of a specialty creditor.

Mr. Jacob moved that a receiver be appointed of the real estates of the testator, and that the title deeds should be produced.

The VICE-CHANCELLOR was of opinion the plaintiff was entitled to a production of the documents, which showed a dealing with the estate subsequent to the testator's death. Upon the other point it appeared to him, that unless some special reason was shown for the interference of the Court, it was not the habit, merely on the filing a creditor's bill, and an admission of a debt in the first instance, to grant a receiver. It was not the rents and profits the Court ordinarily looked to for the payment of debts, but the corpus. If a case were shown in which the corpus was not sufficient, and it was necessary to resort to the rents and profits, that might be a reason for the Court to interfere; but he did not think, even admitting this to be a debt to which the real estate was liable, a sufficient case was made out for appointing a receiver. The motion, therefore, could only be granted so far as it referred to the production of documents.

ROLLS COURT—March 21.

HIGHINGTON v. GRANT AND OTHERS.

Practice.—Costs—Liability of Executors.

Mr. Pemberton stated this to be a petition of the defendant Grant, praying that the Master might be ordered to review his taxation of costs. The bill was to ascertain the clear residue of the effects of a testator who had appointed Mr. Grant and Mr. Gower his executors, and it prayed that Grant should be charged either with interest or balances retained in his hands, or with the profits he had made by their use. In June, 1832, a decree was made that the bill should be dismissed, as against Gower, with costs; but that it should be referred to the Master to take an account of the balance in the hands of Grant, and to compute interest at 5*l.* per cent. on such balances, making annual rests; and costs for that portion of the suit which related to the balances were awarded against Grant. The Master had taxed the plaintiff's costs of the whole suit, and had allowed one-half of them against Grant. This was proceeding upon a wrong principle, for the Master did not inquire what proportion of the costs had been incurred in consequence of the charge alleged in the bill respecting the balances, but his

reasoning was, that if the suit had been instituted for the sole purpose of charging interest on the balance, the whole costs would have fallen on Grant, and therefore he ought to pay one-half of the costs of a suit brought for a double purpose. The additional expenses of the suit occasioned by this inquiry would not have exceeded 5*l.*, and the learned counsel submitted it was not the intention of the Court to make Grant pay half the costs of each item in the bill of costs for carrying on the suit.

Mr. G. Richards said, the course the Master had adopted was regular, and had been in practice for upwards of thirty years. The bill was filed by persons entitled under the testator's will with a twofold object, to take the accounts of the testator's estate, and to make one personal representative personally liable for his default in respect to several balances in his hands; and the Master said, that for the second object it was necessary to prove the will. The practice in such cases was correctly stated in *Smith's Chancery Practice*, vol. ii. p. 639, which was in conformity with the Master's report. If the Court had intended that only the extra costs occasioned by the additional inquiry should have been paid by Grant, it would have expressed that intention in the decree. If the bill had been filed for the sole purpose of charging the defendant with interest on the balances in his hands, it must have been framed in the same way as the present bill, setting out the will of the testator, who died in 1804, and that the defendant had for thirteen years retained assets in his hands. A great part of the bill was applicable to the charge against the defendant. The costs were taxed upon the right principle, and the Court would not go into the minutiae of each item of the bill.

Lord LANGDALE said that it was a matter of great importance to the practice of the Court, and he would take care to inquire into it. The main question was, what was the precise meaning of the decree, "to tax the plaintiff's their costs as to so much in this suit as seeks to charge the defendant, the petitioner, with interest on the balances from time to time remaining in his hands." There was no case in which this matter had come before the Court at all. He would get what assistance he could from the officers of the Court.

COURT OF EXCHEQUER.

April 19.

CASE OF THE CANADIAN PRISONERS. (a)

The Lord Chief Baron, upon the application of Mr. Hill to know when it would be their Lordships' pleasure to hear the continuation of the arguments upon the writ of *habeas corpus*, said they could not hear the case until Thursday next. It might, there-

(a) See the Report, ante.

fore, at present stand for that day; and should it be found impracticable to proceed with it on that day, Mr. Hill should have notice.

April 16.

DOR DEM. THOMS v. CHAMBERLAIN.

Ejectment—The Character a PURCHASER in POSSESSION may be considered before completing his purchase, and paying interest upon his purchase-money,—whether only a tenant at will to the vendor, and as such liable to ejectment.

This cause was instituted to recover possession of some land in the occupation of the defendant; and upon the trial of the cause, it appeared that an agreement had been entered into between the lessor of the plaintiff and the defendant, for the sale of the land in question by the former to the latter. By the terms of that agreement a deposit was to be paid, which was done, and the remainder of the purchase-money was to be paid at the execution of the conveyance to the defendant. Interest at the rate of 5*l.* per cent. per annum was to be paid in the meanwhile, and the defendant to be at liberty to enter into possession at once. This he did, and commenced building. Difficulties having afterwards arisen between the parties, the purchase-money remaining unpaid, and the conveyance not having been executed, the lessor of the plaintiff demanded possession of the land, and brought the present ejectment.

A verdict having been found for the plaintiff, Mr. Serjeant Goulburn now moved on the part of the defendant, to set it aside and enter a nonsuit, on the ground that the interest agreed to be paid was in the nature of rent; and that the relation of landlord and tenant was created between the parties, and that such tenancy in point of law was a tenancy from year to year.

The Court, however, held that at the utmost a tenancy-at-will was created, which might be determined by a demand of possession.

Rule refused.

QUEEN'S BENCH.—April 16.

HOUNSTON v. COATES.

Act for Abolition of Arrest for Debt—whether a defendant may surrender himself in discharge of his bail.

The defendant had been arrested by the plaintiff for a considerable sum of money, but applied, under the recent act for the abolition of imprisonment for debt, to be discharged out of custody upon giving two sureties, according to the provisions of the act. Under the old law, these sureties would have been required to pay the debt; but under the recent act the party was enabled to render.

Mr. Cresswell now moved for a rule to show

cause why the defendant should not be permitted to surrender himself to the Queen's Bench prison in discharge of his bail.

Rule granted.

April 17.

Sittings in Banco.

HORNER v. KEPPEL.

Pleading—Practice.

Mr. Theobald moved for a rule to show cause why the plea in this case should not be set aside. It was an action brought by the endorsee of a bill of exchange against the endorser, and the plea was, that the plaintiff had not, before the time the bill became due, paid the value of the bill to the person who had endorsed it to him. There were many cases to show that such a plea was perfectly bad in fact and in law, but it was supposed the Court could not take it off the file, because it had not been pleaded by the defendant after a rule to plead issuably had been given.

The Court, not being satisfied that the circumstances of this case would justify such an interference, refused the rule, but observed at the same time, that whenever the circumstances of the case were such as to call for the interposition of the Court, there was no doubt the Court had the power and would exercise it.

In a case moved in a subsequent part of the day by Mr. Humfrey, on a somewhat similar point, the Court granted the rule.

REGINA v. THE LONDON AND BIRMINGHAM RAILWAY COMPANY.

Joint Stock Companies—Their liability to make good and sufficient new roads in the place of old roads they may destroy.

The issue joined in this case was upon a writ of *mandamus* commanding the defendants to make a sufficient road in lieu of one they had destroyed in the parish of Penrider, leading between Stanmore and Uxbridge. The defendants said they had done so, and it was tried last term before the Lord Chief Justice, and a Special Jury, when a verdict passed for the crown. (a)

Mr. Channell moved for a rule to show cause why this verdict should not be set aside and a new trial had.

The COURT took time to consider.

COMMON PLEAS.—April 16.

PAGET v. CHAMBERS.

ATTORNEYS.—An Attorney neglecting to take out his certificate, and applying to be re-admitted without giving the usual notice of his intention to do so. Whether he is to be struck off the Rolls.

Mr. Serjeant Wilde moved for a rule calling on an attorney to show cause why his name

(a) See the Case reported, ante p. 314.

should not be struck off the roll of attorneys of this court. It appeared that the gentleman in question was admitted in 1810, but he neglected to take out his certificate, and consequently he ceased to be an attorney. In 1823 he applied to be re-admitted, but again he omitted to take out his certificate until 1826, in which year he was re-admitted in this court. Upon searching at the office, however, it did not appear that he had given the usual notice of his intention to apply for re-admission; and, as he had been re-admitted in the other courts, it was evident that he must have passed off his admission to the King's Bench in 1810 or 1823 upon this court as a re-admission in 1826, and so induced the judges to dispense with the necessary notices and affidavits. This was such a fraud upon the court, as rendered his re-admission a nullity.

The object of the application was to enable the officer of the court to tax a bill of costs in this cause.

The Court granted a rule to show cause.

CENTRAL CRIMINAL COURT.

April 13.

Before Mr. Justice COLERIDGE, and Mr. Justice COLTMAN.

TRIAL OF FRANCIS HASTINGS MEDHURST.

The necessity for Justice visiting with heavy punishment all persons who violate the laws by using deadly weapons—the danger of possessing such weapons.

The clerk of the arraigns read the indictment, by which the prisoner was charged on the finding of the coroner's jury with the wilful murder of Joseph Alsop, and he was further charged upon the finding of the grand jury with manslaughter.

Sir F. Pollock appeared for the prosecution, which is familiar to all our readers. He adverted to the nature of the weapon employed on this occasion, and having showed the knife to the jury, he observed that it was much to be regretted that the law did not provide a punishment to prevent the sale of such weapons, and punish persons who should carry them. Looking, however, to the facts of this case, it was his duty to state, and he did so most willingly, that there were many circumstances connected with the transaction which ought to operate in favour of the prisoner, and although public justice, as well as justice to the memory of the deceased, demanded the inquiry, he did not think that the evidence was sufficient to sustain the charge of murder, although the facts would clearly establish a case of manslaughter.

Witnesses were called for the prosecution, who proved the fact of stabbing.

The Attorney-General appeared for the prisoner. He said, that he was most unexpectedly called upon to defend the prisoner from the crime of murder, for when he entered the

court that morning neither himself nor his learned friend, Mr. Phillips, had the slightest notion, after the grand jury had found a bill for manslaughter only, that they would be called upon to defend their unfortunate client from the more serious charge of murder. But it appeared that there were certain rules of law which rendered it necessary when a coroner's jury had found a verdict of murder that the prisoner must first be tried upon that finding, notwithstanding the fact of a grand jury having found a bill for the lesser offence. He, of course, bowed most respectfully to what he believed to be the law of the land upon the subject, although in this instance it certainly placed both his learned friend and himself in a most painful situation. At the same time it was far from his intention to throw any blame upon the manner in which the prosecution had been conducted. Indeed, his learned friend on the other side had done his duty most fairly and impartially, and with a feeling which did him infinite credit. He said that he had no wish to bias the minds of the jury, that the question was for them and the learned judges to decide, and with a full knowledge of all the facts of the case before him, he had said fairly and manfully, that in his opinion the offence did not amount to murder. Now, he (the Attorney-General) had a great respect for the ancient institution of a coroner's jury, but he could not allow his predilection in its favour to sway his judgment, and he could not help saying, that he had no very great respect for the decisions of coroners' juries, and he might mention as one reason for entertaining that opinion, that coroners' juries were often summoned upon some momentary impulse, at a time when great excitement prevailed with respect to the matter they were called upon to investigate, and that when so assembled they had no legal authority to preside over them to point out the nice and subtle distinctions of the law, and it was therefore impossible that, with all their feelings and prejudices acting upon them, they could ever arrive at a calm and dispassionate conclusion. It was true that coroners' juries were sometimes presided over by members of the legal profession, but that was not always the case; and even when it did occur, experience proved that even those gentlemen were incapable of directing the jury with that degree of legal advice which could alone lead them to a just and legal conclusion. Coroners' juries were generally selected from persons in the immediate vicinity of the place where the occurrence took place, and they were consequently liable to have their minds prejudiced and their feelings excited so far as to disqualify them from returning a safe and unprejudiced verdict. The very sight of the body of a deceased person who came to his death by force and violence would naturally create in their minds a degree of horror for the crime and a corresponding feeling of detestation against the party who was supposed to have committed the outrage. As a proof of the loose and unsatisfactory

manner in which proceedings before coroners were conducted, and the want of legal method in which those proceedings were subsequently drawn up, he would state from his own experience, which was now of some duration, that he never knew an instance in which a conviction followed upon the finding of a coroner's jury, but it invariably happened that, where objections were taken, the proceedings before the coroner were invariably set aside on the ground of irregularity and the want of legal knowledge. For that reason it was absolutely necessary that a further preliminary inquiry should take place before a jury composed of gentlemen of the county, who were persons of experience and information, and whose minds were not likely to be swayed by feeling or prejudice. The institution of a grand jury he had always respected and revered, and, whatever might be said against the utility of grand juries, he for one should always be prepared to defend them. Should it be said that any man, be his offence what it might, had a right to be placed as a criminal at the bar of justice without the intervention of a grand jury? It was said that magistrates were to have vested in them the same power which was given to grand juries—namely, that of preferring bills against persons charged with offences. Now, he had the highest respect for the magistracy of this county as a body, but, respectable and learned as they were, he would say that they should not be intrusted with such a power, for he was apprehensive that local circumstances, mistakes from ignorance, and, he was afraid, mistakes from design also, would be found to operate to the prejudice of justice by placing persons in jeopardy who ought not to run the hazard of a trial by the act of any one man. But where a body of gentlemen were assembled from the county and received their instructions from a judge upon the bench, to them he would say that the lives and liberties of Her Majesty's subjects might safely be intrusted. The learned gentleman then adverted to the case, and said, that as the grand jury had thrown out the bill for murder against the prisoner, and as his learned friend Sir F. Pollock had given it as his opinion that the offence amounted to manslaughter only, he thought he might safely put out of his consideration the graver charge, and confine his observations to the case of manslaughter. He then adverted to the facts as detailed in the evidence, and contended that the prisoner had acted upon the principle of self-defence; that, finding himself assailed by a man his superior in bodily strength, who was advancing to strike him down with a formidable weapon, and finding also that he had no means of avoiding the blow, and no opportunity of retreating, he had recourse to that deadly weapon the use of which could only be justified by supposing that his own life was in danger from the meditated blow. It was unfortunate, indeed, that the prisoner should have had in his possession so deadly a weapon, and it was equally to be lamented that the practice of

carrying such weapons had lately sprung up in this country. He should be glad if a law could be framed to prohibit and render penal the sale of such formidable instruments, and he would be most willing to unite with his learned friend (Sir F. Pollock) in the framing of such a law; but it was proved beyond all doubt that the prisoner had carried the knife about him for an innocent purpose, and he never attempted to use it against the deceased or any other person until he was threatened with a heavy blow, which might have proved fatal to him, and then only he had recourse to that fearful and deadly weapon, the use of which in this instance he must deplore to the latest hour of his existence. The learned gentleman then proceeded to argue upon the evidence, that the jury would be justified in finding a general verdict of acquittal; and adverting to the conduct of the Rev. Mr. Sturmer, he said it was deeply to be regretted that the rev. gentleman had not interfered. As a man, a Christian, and a Christian minister, and particularly as the tutor and instructor of these unhappy youths, it was his bounden duty to have interposed his authority at a time when his interference would have prevented the fatal result. That he was influenced by a feeling of timidity there could be little doubt. It was a want of presence of mind, but when the sound of his voice would have been sufficient to allay the angry feelings of the two young men, he must say that Mr. Sturmer was deeply to blame, and that his conduct was even more censurable than that of the unfortunate youth who now stood at the bar. The learned gentleman concluded a powerful and feeling address by an appeal to the Court and the jury on behalf of the prisoner, who, having atoned for the crime he had committed by his regret and penitence, awaited his fate with resignation, and was an object more to be pitied than blamed.

Several witnesses of the highest respectability were then called, and gave the prisoner a most excellent character for kindness and generosity of disposition, and great humanity.

The Jury acquitted the prisoner on the indictment for murder, and found him *Guilty of Manslaughter*.

Mr. Justice COLEBRIDGE passed judgment. He said—Francis Hastings Medhurst, you are now to receive the sentence of the Court for the crime of which you have been found guilty after a long and patient trial, and a most able defence by your counsel. You have had the advantage, too, of a patient and upright jury, who gave the fullest consideration to your case, and it is right for me to tell you from this place, that even at your tender years, and notwithstanding the respectable situation which you hold in society, it is right, I say, you should know, that the jury, patient and attentive as they have been, might have found you guilty of the crime of murder; and had that been the case, however painful it would be to those who sit here to administer the law, you would inevitably have passed from that bar to another world, by suffering a public and ignominious

death. However, from the character you have received—from the fact of the sudden quarrel in which you were engaged—from the absence of malice or premeditation on your part, and from the fact which I have ascertained, that from the moment you inflicted the fatal blow down to the present time your whole conduct has evinced more of sorrow for the crime you have committed than apprehension of its consequences to yourself—all these circumstances combined have induced the Court to deal mercifully by you. The verdict which the jury have just pronounced would render you liable to the severest punishment short of depriving you of life. You might be sent out of the country to live in a distant land, apart from your nearest and dearest friends, the associate of ill-educated and worse-conducted persons—convicted felons like yourself. But I am happy to say that it does not seem necessary to pass upon you so severe a sentence. I should be extremely sorry, however, if it should be supposed, that in passing upon you a lighter sentence than transportation the Court have forgot to take into consideration the deadly weapon which it appears you carried about you; and I trust that you and all those who hear me will feel that that circumstance weighs heavily against you, and that it has called for punishment against others as it must against you, and I trust that if there are any persons here or elsewhere who are in possession of such dangerous instruments, they will get rid of them as soon as possible, *for we see the danger of possessing such weapons, and the absolute necessity which exists, for those who administer public justice, to visit with heavy punishment any person who violates the law by using such instruments against the life of a fellow creature. But for the fact of your possessing that knife you would stand before the Court in a more favourable position than you now do.* With regard to Mr. Sturmer, the Court feels, that if he had done his duty as a man, a tutor, and, above all, a clergyman, instead of leaving the room as he did, the fearful catastrophe would have been prevented, and you would not now be standing at that bar convicted of having deprived another of his life. The sentence which the Court is about to pass upon you, young as you are, will be no inconsiderable deduction from the years of liberty you have yet to live, and I sincerely hope that the time which you will have to pass in prison, for it must be for a lengthened period, will be employed by you in a sincere endeavour to regulate your temper by recalling to your mind the proceedings of this day, and that by a sincere repentance for the great crime you have committed, you will try to make atonement to God and man for what has passed. The sentence of the Court upon you is, that you be imprisoned in Her Majesty's House of correction at Coldbath-fields for the space of three years.

SPRING ASSIZES.

NORTHERN CIRCUIT.

LIVERPOOL, April 8.

Before Mr. Baron ALDERSON.

WETHERALL AND ANOTHER v. LEES.

Stage Coaches—Whether the accounts between the parties running a Stage Coach, may be considered a partnership concern, so that one party cannot sue the other upon such accounts, at law.

This was an action in which the plaintiffs, Mr. John Wetherall and Mr. John Webster, coach-proprietors, of Manchester, sought to recover, from Mr. Thos. Lees, the defendant, the sum of 66*l.* 5*s.* 6*d.*

Mr. Cresswell stated that the action was brought by the plaintiffs to recover from the defendant the sum of 66*l.* and in it was involved a principle, the decision of which was of great consequence to stage-coach proprietors. If the defendant succeeded in resisting the action on what were the true grounds, coach-proprietors would be reduced to the lamentable necessity of settling all their disputed accounts by a Chancery suit. Railroads, as all persons well knew, had been extremely hurtful to the coach-proprietors; but even railways would not be more destructive to them, than the necessity of going to Chancery to settle their monthly accounts. No such necessity, however, in his opinion, existed; and the agreement which had taken place was sufficient to recover from Mr. Lees the sum mentioned. It would appear in evidence that, about ten or twelve years ago, a coach was started to run from Manchester to Preston; the coach was called "The Doctor," after the famous race-horse of that name. The mode of doing business in these cases was this:—A coach was hired from a coach-builder at a certain rate per mile; that is, those persons who engaged in the speculation of running the coach, paid to the builder of it, a certain mileage. The ground was then divided into portions, and the taker of each portion, provided horses for his particular part. Then, at the end of a stated period, say a month or six weeks, each party sent in an account of the money he had received for fares and parcels in the meantime, and also of the sums he had disbursed; not, however, the expense of providing horses to draw the coach, but toll-fares and other things of that description. This, therefore, varied very much from an ordinary partnership, and he doubted whether it was a partnership at all. There was no community of property, for the coach belonged to no particular person, neither did the horses or the harness, and the expense of providing for the horses, was never brought into the general account. What, then, was brought into the general account? Why, the money received for passengers, which the parties agreed to divide in proportion to the distance that each drew the coach. There was a way-bill at each

terminus, which, in the one case, was left at Preston, and, in the other, at Manchester. At the end of every month or six weeks, the accounts were settled at Manchester by a person in the employ of Messrs. Wetherall and Webster. Each person connected with "The Doctor," sent to Manchester an account of the money received, and of the disbursements made by him. The clerk to whom he had alluded, threw the whole receipts and disbursements into one general account, and then the money was to be divided, in proportion to the distance which each drew the coach. The amount which each party had received and disbursed was ascertained; and, if one had received more than his proportion, and another less, he who received more was ordered to pay over a certain sum to him who had received less, so that each might have his just proportion or share of the profits. In June, 1837, Lees, the defendant, came into the concern of "The Doctor," and continued in it till the summer of 1838, when, in consequence of the opening of the Bolton Railway, the plaintiffs, who hosed the coach to Bolton, withdrew. During the period referred to, Mr. Lees had paid several accounts, which had been made up in the way described; but one account, extending over the months of April, May, and June, still remained unsettled. It amounted to 66*l.* 5*s.* 4*d.*, which sum Mr. Lees had to pay to the plaintiffs, but which he had refused to pay, saying, that he had nothing to do with the account, or relying, no doubt, on the opinion that it was a partnership concern, with which a court of law could not interfere. With regard to one of the pleas entered by the defendant, that Johnstone, (the clerk who drew up the accounts,) was not a person authorised to do so, he referred to the case of Brierley and Cripps, (similar to the present one,) in which it was objected that the accounts could not be received as evidence, without being proved by the person who made them. The objection was over-ruled by Chief Justice Tindal. He himself, however, should not only produce the accounts, but the person who had made them.

Mr. Alexander stated that he was provided with evidence, to show that many of the charges made in the accounts were unreasonable and improbable, and he wanted to see, by reference to the bills themselves, whether the charges were right.

Mr. Cresswell said, that if the object was only to ascertain whether Johnstone (the clerk) had made out the accounts properly, he had no objection.

Mr. Alexander then proposed that, not to occupy the time of the court and jury, the case and all matters in dispute should be referred to some gentleman at the bar, who should raise the point of law for the consideration of the Court.

Mr. Cresswell was rather unwilling to take this course. The point of law might turn out to be a matter of fact, which it was better that the jury should decide.

ALEXANDER, B. proposed that they should try

the three first issues relating to the question of agreement, and the authority of Johnstone to make out the accounts, leaving the accounts to be settled by arbitration, and the case proceeded.

Thomas Johnstone, settling-clerk to Messrs. Wetherall and Webster, was called, and proved the facts of the case, as stated by counsel. He also proved that Mr. Lees had consented to the mode which was pursued in the drawing up of the accounts, and produced accounts in which he (defendant) had himself paid over his surplus receipts to parties pointed out by witness, on the face of the accounts, as having received less than their proportion.

The learned JUDGE observed, that there was certainly a preliminary point to be settled, with respect to the authority of Johnstone; but it would be very unreasonable to desire that he and the jury should go through the whole of the accounts. He thought that Johnstone's authority had been distinctly proved.

It was ultimately agreed, his lordship's opinion being known, that the accounts should be referred to arbitration.

The jury were then directed to return a verdict for the plaintiffs, damages 140*s.* subject to a reference.

LIVERPOOL.—March 4.

Before Mr. Baron ALDERSON.

DEARDEN v. EVANS.

COPYHOLDS.—Whether the Lord of the Manor or the Copyhold Tenant of the Manor has the right to loose stones scattered about the land of the Tenant, and not joined to the strata—whether they are mere chattels or part of the soil.—Defendant, the tenant of the manor, had sold the stones in question, and the present action was brought by the Lord of the Manor to recover their value.

It appeared that the plaintiff is lord of the manor of Rochdale, formerly the property of the late Lord Byron. The defendant is a copyhold tenant of the manor, in which he holds two closes, called Reddyshore Pasture and Steyner Bottom. The former is high land, and a precipitous cliff of rock runs along it. The latter is below it, having a great number of boulder stones scattered about it, not joined to the strata, but of a similar description to the stone of the cliff from which it is conjectured they were detached some time or other, and rolled by the force of their own weight in the descent, to Steyner Bottom. These stones, called by the country people "cobs," were of all sizes, from that of a man's fist to the weight of fifty tons or more. Since the Leeds and Manchester Railway has been in the course of constructing, these stones have been found convenient for making sleepers to fasten the rails upon, and the defendant had sold them for that purpose. The question was, whether he had a right to do so or not. It was contended for the plaintiff, that these stones formed part of the soil as

much as any other part of the surface, and that the copyholder could no more carry 100,000 tons of such stones away than he could carry away so much earth or soil; that the mere texture of the material, whether sand, clay, mould, or stone, could make no difference whatever; and witnesses were called, who proved that it never had been the custom to take such stones, except for the purpose of draining, building, or repairing on the copyhold land.

Mr. *Wightman*, for the defendant, said, he did not propose to alter the facts of the case, but he contended that these stones, having in all probability come from the cliffs, were not part of the land, but mere chattels severed by the act of God, which therefore the copyholder might take. "Suppose," said he, "a meteoric shower of stones fell from the moon on the copyhold, would he not have a right to take it up as soon as it fell? ("If he did take it," said the judge, "I think he would burn his fingers,") and if he could take it then, why not at any time afterwards while he continued in possession of the copyhold?

Mr. *Cresswell* replied, that most of the stones had probably lain there for a long time before manors were created, and that, therefore, the grant of the copyhold would include the stones, which, though the tenant might use, he could not carry away.

Verdict for the plaintiff, with liberty to move the court upon the question whether loose stones lying upon the ground were mere chattels, or part of the soil.

April 10.

This morning a motion accordingly was made to the court, and the result will be reported in our next.

NORWICH, FRIDAY, April 13.

Before Mr. Justice VAUGHAN.

Challenging Juries.—Power of the Crown to challenge a Juror without showing satisfactory cause.

Charles Daynes was arraigned upon an indictment, which charged him with having administered arsenic to his wife, Hannah Daynes, on the 11th of March, with intent of malice aforethought to murder her.

Mr. *Evans*, for the Crown, challenged one of the persons who served on the jury.

Mr. *S. Taylor*, for the accused, objected to the challenge; contending that the Crown had no power to challenge a juror without showing satisfactory cause. In support of his proposition, that the Crown had no right peremptorily to challenge a juror, he cited the 29th section of Sir Robert Peel's Jury Act, the 6th of George IV., c. 50. From that statute the accused may challenge twenty jurors without cause shown, but that if the Crown thought proper to object to any juror, it can only do so upon sufficient cause being alleged and proved.

Mr. Justice VAUGHAN, after consulting the Lord Chief Justice, said they were both clearly of opinion that the Crown had the

right of peremptory challenge. The course and practice were for the Crown to object to the jurors as they answered to their names; and if at the end of the panel a sufficient number of unchallenged jurors could not be found, the panel was to be again called over, and the Crown must then show cause of challenge to any to whom it objected. If ultimately a full jury could not be procured, a fresh jury would be instantly summoned by the Sheriff.

Mr. *S. Taylor* requested that the learned judge would take a note of his objection.

Mr. Justice VAUGHAN said he would certainly do so; the point was an important one, and Mr. *Taylor* did well to take it. But he had himself no doubt upon the law.

Mr. *Evans* then said he would withdraw his challenge.

The prisoner was found GUILTY, and subsequently made a full confession of his guilt.

April 15.

Mr. *S. Taylor* this morning resumed his objection, urging the stay of execution until the opinions of the fifteen judges had been taken.

Mr. Justice VAUGHAN, however, declined; but said he should meet all the judges on Monday, when he would mention the point to them. He desired, however, that the matter should not be mentioned to the prisoner, that he might not indulge in any vain expectation of escape from execution.

USURY LAWS—BILLS OF EXCHANGE.

We think it of some importance to direct the attention of the profession to the statute, 7 Wm. 4. & 1 Vict. cap. 80. entitled, "An Act to exempt certain Bills of Exchange and Promissory Notes from the operation of the Laws relating to Usury," by which it is enacted, that from and after the passing of the act (17th July, 1837,) and TILL THE 1st JANUARY, 1840, no bill of exchange or promissory note, made payable at or within twelve months after date, or not having more than twelve months to run, shall by reason of any interest taken thereon, or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than

the present rate of legal interest in Great Britain and Ireland respectively for the loan of money, on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture.

It will be therefore observed, that this statute will expire on the 1st day of January next.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR.—Allow me, through the medium of your valuable journal, to thank your correspondent "C. B." for having pointed out the recent alteration of the old established law of words of perpetuity being necessary to pass the fee in a devise. "C. B." says, "Had H. D. M. looked at the 28th sec. of the 1 Vic. c. 26., he would have seen," &c. &c. Now, in my humble opinion, this would have been better in the future, than in the past tense, for if "H. D. M." had known that the 28th sec. of the 1st Vic. c. 26. enacted that no words of perpetuity are necessary to pass the fee in a devise, I can answer for it, that he would have looked at it, before he sent his answer in; and would not have given "C. B." the opportunity of correcting him.

I have seen the act referred to, but my attention, at the time, was more especially directed to other parts of the same, and this clause must have entirely escaped my observation. Before answering your Problem XVI., I had read up the subject, as I thought, attentively; and in one work, with all the alterations effected by recent statutes as late as 1837: and as I have before stated, not knowing of clause 28 of the recent Wills Act, I considered myself safe. Nor am I aware that a new edition of any of the leading works which treat upon this subject, has appeared since this statute passed. Indeed, I think, I may say with truth, that it almost amounts to an impossibility, even for the most experienced, to keep up a knowledge of all the shoals of statutes, which year after year, are so rapidly accumulating upon the legal profession, making it more and more difficult for those, who (beginners like myself) may have launched their barks, upon its troubled waters, to steer clear

of the numerous eddies, rocks, and quick-sands, with which it so plentifully abounds; and upon which even the hardiest, and most experienced mariner, is apt to founder, and few there be, who reach the solitary lighthouse, the *beacon* in the distance; and those few, who, after long struggling with its adverse winds and waves, *at last* reach the wished-for haven, may well say with the words of Virgil—

Quæ vobis, quæ dignæ, viri, pro talibus ausis
Præmia posse rear solvi.

Trusting you will excuse this digression, I am, sir, in haste, your obedient and obliged servant,

H. D. M.

I suppose the word "*devise*" in the fifth line of C. B.'s letter is a misprint; it ought to be "*arise*."

D. D. M.

It is so.—Ed.

EXAMINATION OF ARTICLED CLERKS.

EASTER TERM, 1839.

Gentlemen intending to submit to the formality of an examination at the Hall of the Law Society, are required to have their documents on or before Monday the 22nd April.

The examination is fixed for Tuesday, April 30th, at 10 o'clock precisely.

The EXAMINERS named are

Mr. Walker—one of the Masters of the Court of Exchequer (Plea side).

Mr. White.

Mr. Holme.

Mr. Pickering.

Mr. Bayley.

Business of the Courts.

COURT OF CHANCERY.

In re Barham, lunatic petition—In re Bullock—at 10.

Appeal Motions—Woodruffe *v.* Daniel, part heard—In re Luke *v.* Pole.

Petitions—Rowley *v.* Adams—Swabey *v.* Dicken—Chamberlain *v.* Lee—Devaynes *v.* Noble—Hughes *v.* Wynne.

Appeals—Orme *v.* Wright—Sidebotham *v.* Barrington.

VICE-CHANCELLOR'S COURT.

Short Causes and Unopposed Petitions, after which

Adjudged Petitions—Morrison *v.* Morrison (3), part heard—Davies *v.* Clough (2)—Motyn

v. Champneys—*In re Phillips's Charity*—*Jones v. Creswicke* (2)—*Johnson v. Reynolds*—*Beadles v. Russell*—*Lethbridge v. Nyton*—*Naylor v. Wetherell*—*In re Jackson's Estates*—*Senior v. Mason*—*Brandon v. Brandon*.

ROLLS' COURT.

Paine v. Hawks, part heard—*Ellice v. Cave*, demurrer—*Reynolds v. James*—Attorney-General *v. Jones*—*Hargitt v. Bell*; exceptions, further directions and costs—*Pack v. Caldwell*—*Barrett v. Daffell*—*Holden v. Hearn*—*Bacon v. Spottiswoode*—*Bacon v. Jones*—*Turner v. Turner*—*Perre v. Delahay*.

COURT OF QUEEN'S BENCH.

Sittings in Banco.

Lord DENMAN stated, that if there was any time this day after going through the motions for new trials, the Court would take the peremptory paper. There are 55 cases set down to move for new trials.

BAIL COURT.

(Queen's Bench), Westminster—at 11.
Middlesex Common Juries—*Campbell v. Cox*—*Doe, dem. Daws v. Harland*—*Edwards and another v. Saunderson*—*Beetholme v. Laws*—*Grady v. Sugden*—*Stockley v. Sparks*—*Freeman v. Haynes*—*Lynch v. Neunden*—*Lewis v. Chatterton*—*Smith and others v. Reed*—*Doe, dem. Hodson, and another v. Glasscock*—*Genge v. Genge*—*Gaitakell v. Kelly*—*Milligan v. Wedge*—*Kilpack v. Burghart*—*Roberts v. Johnson*—*Pitcher v. King, Esq.*—*Levy v. Mowatt*—*Luckin v. Yeatman*—*Clark v. Gilder*—*Goring v. Birkitt*—*Brandon v. Penny*—*Gorden v. Proctor*—*Hows and others v. Lord Anderson*—*Drew v. Paine*—*Harrison*—*Simpson v. Daniel*—*Close v. Paten*—*Barrell v. Spillman*—*Davies v. White*—*Whitehead v. Taylor*—*Ford v. Lock*—*Gay v. Appleter*.

COURT OF COMMON PLEAS.

Sittings in Banco.

COURT OF EXCHEQUER.

Sittings in Banco.

TO CORRESPONDENTS.

"A Subscriber." See the Notice to Correspondents, p. 368.

"C. B." The remainder of your Answer to Problem XXII. is mislaid. Send another copy to our publishers, and it shall be completed.

"Answer to Problem XXIII." We cannot read the signature to the "first attempt." Try again.

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ERRATA.

Page 371, first column, 10th line from the top, for "agreed," read "argued."

Page 374, second column, 11th line from the top, for "desire," read "arise." Note (d), first line, for "notion" read "motion." Last line, instead of a "disgrace to government," read "a disgrace to the government."

Page 384, first column, 22nd line from the top, after the parenthesis add "the draft certificate in Mr. Edwards's hand writing" omitted.

Just Published, Price 2*s. 6d.*

PART V.

THE LEGAL GUIDE.

Nos. 18, 19, 20, 21, and 22.

CONTAINING an Original Essay upon the New Statute of Limitations relating to Real Property, illustrated by the Opinions of Conveyancers, and shewing in what manner the Courts are disposed to give effect to that Statute.—Also an Original Essay upon the present State of the Law governing the Liabilities of Legal and Equitable Mortgages, occasioned by *Flight v. Bentley*, being overruled.—The Practice of Solicitors "attesting Petitions" in Bankruptcy.—The Practice of instituting Suits by *Femes Covert*.—New Forms of Writs under 1 & 2 Vict. c. 110. s. 20.—Judgment of Sir H. Jenner in the Will case of James Wood, of Gloucester, Banker.—Important Decision upon Attorneys' Certificates.—New Sections of the Insolvent Act coming into Operation.—Law relating to the Brokers of London.—Reports of Practical Cases at the Assizes.—List of Sheriffs.—Legal Business in Parliament, and Index to the Part.

John Richards & Co., 194, Fleet Street.

Printed by ALEXANDER ELDER MURRAY, Printer, at his Printing-Office, Green Arbour-court, Old Bailey, in the Parish of St. Sepulchre, in the City of London; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunstan's-in-the-West, in the City of London. Saturday, 20th April, 1839.

Price 6*d.* Stamped Edition, 7*d.*

The Legal Guide.

No. 26.]

SATURDAY, APRIL 27, 1839.

MORTGAGORS AND MORTGAGEES.

AN ESSAY

*Upon the Character in which a MORTGAGOR
IN POSSESSION may be considered.*

(Continued from p. 388.)

WE have shewn the law in relation to the character of a mortgagor in possession, so elaborately laid down by Mr. Justice Buller, and the result does not give us *any circumstances* that shall give a mortgagor in possession or receipt of rent, any *defined character*. There is no sort of obscurity, (a) but there are many conflicting decisions and opinions; and to arrive at any settled conclusion, appears *impossible*. The writers we before alluded to, attempt to maintain that "if there be *no express agreement* originally, as to the period of possession, and the mortgagor being the occupant, remain in possession with the consent of the mortgagee, *in such case*, he ought to be considered strictly as *tenant at will*. (b) As a matter of fact, this is a true position; but how is that fact to be ascertained after the cases we have cited. What is to be considered a recognition of the mortgagor's possession by the mortgagee? The cases cited by these gentlemen are the very reverse from supporting such a position. In *Thunder dem. Weaver v. Belcher*, (c) Lord Ellenborough held

that a mortgagor is no more than a *tenant at sufferance*, not entitled to any notice to quit; and one tenant at sufferance cannot make another. This is also the doctrine held by Lord Hale, (d) who says, "if tenant for years surrenders and still continues possession, he is tenant at sufferance or disseizor at election. Chief Justice Holt held that a mortgagor, upon executing the mortgage deed, in which the mortgagee enters into a covenant that the mortgagor shall *quietly enjoy* until some default made in payment of principal or interest, becomes *tenant at will* to the mortgagee, and *this* does seem the most sensible construction that can be put upon the character of a mortgagor in possession. He has parted with his estate subject to a condition upon the performance of which it is to be restored to him, and in the mean time, the mortgagee engages that the mortgagor shall hold the possession. The relation of landlord and tenant instantly ensues, and the latter becomes strictly tenant to the mortgagee for the time limited for payment of the money, liable to ejectment in the same manner as tenants at will. This construction does not require the aid of invention to support it—it is plain matter of fact, which can be taken by a jury, but if there be no such covenant, or express agreement for the possession, the mortgagor may be *called* (for the sake of calling names) *tenant at sufferance*, for he has *no right whatever*

(a) See ante, p. 353.

(b) Coots and Morley, n. to Watkins's Conveyancing, p. 14.

(c) 3 East, 450.

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(d) MSS. n. 5.

upon the premises until his condition be performed.

This is, after all, but our humble opinion —there is no direct judicial determination to support it, except *Wilkinson v. Hale* (e) may be termed such. In that case there was a proviso in the mortgage deed, that *the mortgagee should not call in his money* for a period of seven years, and a covenant by the mortgagee, that upon due payment of interest, the mortgagor should quietly enjoy, and receive the rents and profits for his own use, although the time limited by the proviso for redemption, expired at a much *earlier* period; and CHIEF JUSTICE TINDAL said, that the proviso for payment on such earlier day was altered by the mortgagee's subsequent covenant, not to call in the money till the expiration of the seven years; and the powers conferred on the mortgagor, (the last mentioned covenant, and that for quiet enjoyment,) *vested in him a leasehold estate for seven years*, and that this would not be an injury to the mortgagee, nor in any way impair his security, because the latter was still empowered, if the interest was unpaid, to enter on the premises, and compel payment of principal and interest; and that such an instrument therefore fell within the principle laid down in *Bacon's Abridgment*, tit. Leases, K. (supposed to be the production of Chief Baron Gilbert,) "that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it, for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose." His Lordship added, that in the case we are citing, there *was* an estate vested in the mortgagor by *re-demise*, and in the same case, *Vaughan J.* said, that in modern times it has been usual to insert these *special* provisoes in mortgage deeds, and the effect of them is, to give the mortgagor com-

plete control over the property, as *tenant for years to the mortgagee*.

This opinion of Chief Justice Tindal, that the covenant by the mortgagee for quiet enjoyment by the mortgagor until default, in construction of law amounts to a lease, supported as it is by that of the late Chief Baron Gilbert, is also founded upon the following decisions upon that subject: *Evans v. Thomas*, Cro. Jac. 172.; *Powseley v. Blackman*, id. 659.; *Richards v. Sely*, 2 Mod. 80.; and *Jemmot v. Cooly*, 1 Lev. 170.; but if we look at this position seriously, such a construction is of a very negative quality, because if the mortgagor does make default, the covenant is gone—the lease by construction becomes no longer a lease, and the mortgagor is liable to eviction by the mortgagee as a tenant at will, (f) and yet Lord MANSFIELD said, (g) "he is not properly tenant at will to the mortgagee, because he is not to pay him rent. He is only so *quodam modo*. Nothing is more apt to confound than a simile. When the Court calls a mortgagor a tenant at will, it is barely a comparison; he is *like* a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagor may put an end to this agreement when he pleases." It may be well to explain here why a mortgagor is also called *a receiver*, this can happen (it should seem) only, in cases, where the mortgagor has not the actual possession, but it is enjoyed by a tenant. The mortgagor in such cases, is only considered as a receiver of the rent for the mortgagee, who may at any time countermand the implied authority, by giving notice not to pay the rent to him any longer. The leading case upon this position is *Moss v. Gallimore*, (h) which decided that a mortgagee after giving notice of his mortgage to a *tenant in possession* under a lease made *prior* to the mortgage, is entitled to the *rent in arrear* at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice without mentioning in

(e) 3 Bing. N. C. 308. decided H. T. 1837. C. P.

(g) Doug. 279.

(h) Doug. 279.

the notice for a sale of the distress when the rent fell due, and the *tenant* being thus liable to the mortgagee, he is proportionably exonerated from liability to the mortgagor, who cannot maintain an action of ejectment against him for forfeiture. (a)

As the mortgagor ceases to be entitled to the rents upon the mortgagee's giving the tenant notice, it follows that the mortgagor cannot afterwards maintain any action for use and occupation against him, either for rent which accrued due after the notice, or for rent which accrued due before the notice, but was unpaid at the time when the notice was given. But there is a difference between the modes in which the tenant must plead in the former and in the latter case. In the former case he should plead *non assumpit*, and will be allowed to give the mortgage and notice in evidence; for when the mortgagee gave notice that the future rent was to be paid to him, it follows that the defendant ceased to occupy by the permission of the mortgagor, but still held by permission of the mortgagee; and, of course, such a defence amounts to a denial of the contract alleged in the declaration, which avers the defendant to have used and occupied the land, by the permission of the plaintiff, the mortgagor. But in the latter case, viz., where the rent became due *before* notice, but was unpaid at the time of notice, the tenant must plead his defence specially, for the mortgagor had a right of action against the defendant up to the time when the notice was given, and before the mortgagee required the rent to be paid to him; so that the tenant, by setting up this defence, confesses that the right of action, stated in the declaration, once existed, but avoids it by matter *ex post facto*, viz., by the subsequent notice from the mortgagee. (b)—*To be continued.*

TO THE EDITOR OF THE LEGAL GUIDE.
ANSWER TO PROBLEM XXIV.
Rents—at Common Law, and of Assize—describe them?

THE word *rent*, in Latin *redditus*, is defined to be a certain profit issuing yearly out of

lands and tenements corporeal; and may be regarded as of a twofold kind: first, as of something issuing out of the land, as a compensation for the possession during the term; and secondly, as an acknowledgement made by the tenant to the lord of his fealty or tenure, (2 Black. Com. 41. Co. Litt. 142 a.) Rent must be always a profit; yet there is no occasion for it to be, as it usually is, a sum of money. Horsa, capons, &c. may be rendered by way of rent: it may also consist in services and manual operations, as to plough, &c. which services in the eye of the law are profits. *At common law* there are three sorts of rents; *rent-service*, *rent-charge*, and *rent-seck*. *Rent-service* is so named, because it hath some corporeal service incident to it, as at least fealty. The copyhold rents paid by the tenants of a manor to their lord, for their lands and tenements holden by copy of court roll, having fealty incident to them, are in their very nature rent-service, (Laugher v. Humphrey, Cro. Eliz. 524.) (1) A *rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed makes over to others his whole estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or a special clause of distress, that if the rent be in arrear, or behind, it shall be lawful to distrain for the same; in this case the land is liable to the distress not of common law right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it. (2) It is to be remarked that this species of rent is extremely common in the town of Manchester; (3) they were originally introduced to enable a person to build, who possessed no capital for that purpose: it is said to have introduced great confusion in the titles to property, and the evil is only now beginning to be felt. A *fee-farm rent* is a *rent-charge* or *rent-service*, which is reserved on a grant in fee; the name is founded on the perpetuity of the rent or service, and not on the amount, (Woodf. Land. & Tent. p. 263.) (4) *RENT-SECK*—*reditus sicca*, or *barren rent*, is in effect nothing more than a rent reserved by a deed, but without any

(a) See *Dive dem. Marriott v. Edwards*, 5 Barn. and Adolp. 1065.

(b) See *Waddilove v. Barnett*, 4 Dowl. p. 347.

clause of distress, (2 Black. Com. 41, 42.) I now proceed to describe *rents of assize*, which are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be parted from or varied. Those of the freeholders are frequently called *chief rents, redditus capitales*; and both sorts are indifferently denominated *quit rents, quieti redditus*, because thereby the tenant goes quit and free of all other services, (2 Black. Com. 42.) (5) *Rack-rent* is a rent of the full value of the tenement or near it. (6)

By the statute 4 Geo. 2. c. 28. the difference (in respect of the remedy for recovering rents) is abolished, as all persons may have the same remedy by distress for *rents-seek, rents of assize*, and *chief rents*, that is, for such as had been paid for three years (within twenty years before the passing that act, or for such as have been since created,) as in rents reserved upon lease, (2 Black. Com. 43.) (7)

ADOLPHUS.

(1) See Litt. s. 215; Wade v. Marsh, Latch. 211.—ED.

(2) See Bradbury v. Wright, 2 Doug. 628.—ED.

(3) And in other parts of Lancashire.—ED.

(4) We find on reference to Woodfall's *Landlord and Tenant*, by Harrison, 3rd edition, p. 263. the following note:—"This species of rent is extremely common in the town of *Manchester*; indeed, it might almost be said that nearly the whole of the land in that town is held subject to the payment of one or more such charges, which are there called *chief rents*. As they were originally introduced there—somewhat less than a century ago, at the time the town first began to make those rapid advances towards riches, which it has subsequently attained—for the purpose of enabling persons to build who did not possess any capital for that purpose; and as land became more valuable, the same system was pursued, it follows that there are in many instances now three or four chief rents charged upon the same land, and sometimes even more. It is difficult to conceive the confusion which has thus been introduced into the titles to property; in-

deed, the evil is only now beginning to be felt." We, in the course of our practice, have had titles before us relating even to *copyhold* lands in the same county, upon which similar rents have been charged in *perpetuity*, the land being surrendered to the lord to the use of the tenant, subject to the lord's chief rent and service, and upon the trusts of a deed by which the power of distress is given.—ED.

(5) See Bouverie v. Prentice, 1 Bro. C. C. 200; North v. Earl of Stratford, 3 P. Wins. 149; Brockman v. Honeywood, 1 id. 328; Esdale v. Stephenson, 1 Sim. & Stu. 122.—ED.

(6) Also, *Fee farm rents*, or rents issuing out of an estate in fee of at least one-fourth of the value of the land at the time of the reservation. See Co. Litt. 143; but where there is *tenure in fee farm* the rent is rent-service. See Bradbury v. Wright, ante, n. (b)—ED.

(7) By the statute here referred to, a *rent-seek* will arise from a devise of lands, "subject to" or "charged with," or "upon condition to pay," a certain annual sum without any claim of distress. See Sawood v. Anstey, 2 Bing. 519; Buttery v. Robinson, 3 Bing. 392. So a rent may be granted charged upon an estate for years.—ED.

PROBLEM XXV.

TRESPASS.—*Quare, Clavum Fregit.*

Describe this action—who may bring it—and for what inquiry or wrong it may be brought.

Imperial Parliament.

LEGAL BUSINESS.

HOUSE OF LORDS.

April 23.

APPEAL

From the Court of Session, Scotland.
MONTGOMERY v. SIR JAMES BOSWELL.
What degree of interference will constitute a vicious intromission in Scotland, and whether the Court of Session can alter a decision of the Lord Ordinary which refers a case to be tried by a jury.

In this case it appeared that the appellant

proceeded against the respondent for a large sum of money, for which he sought to hold him liable, as having improperly interfered with the property of his father, Sir Alexander Boswell. The case having come before the Lord Ordinary, he referred it to be tried by a jury. Against this order the respondent appealed to the Court of Session, which sent it back with instructions to the Lord Ordinary to consider whether it was a fit case for jury trial. The Lord Ordinary adhering to his former opinion, the respondent again appealed to the Court of Session, which then remitted the case back to the Lord Ordinary, with orders to transmit it to the session-roll, and not to the trial by jury. Against this order the present appeal was brought.

The Lord CHANCELLOR said, two questions had been discussed at the bar—first, as to whether the Court of Session would alter a decision of the Lord Ordinary, which referred a case to be tried by a jury; and secondly, whether, if such a power existed, it had been properly exercised in this instance. He would address himself to the latter point, as, if it should appear that the power was not properly exercised, it would not be necessary to discuss whether it really existed. He thought that the case was one fit for a jury. The case was this:—The appellant said that the respondent had viciously intromitted, or dealt with, the property of his father, and thereby made himself responsible for all his father's debts. This responsibility obviously depended on the fact as to whether he had interfered. In this country there were every day claims against men as executors *de son tort*, which were almost uniformly the subject of actions triable by a jury. The law was not the same in both countries, but in both the responsibility depended on the fact whether a party had or had not interfered. It was true that questions of law might arise as to what degree of interference would make a party liable as executor *de son tort* in this country, and would constitute a vicious intromission in Scotland. But the circumstances connected with these, and on which those questions of law might arise, were matters of fact properly cognizable by a jury. It had been said, that on account of the great mass of documentary evidence produced on both sides, the case was not fit for a jury; but many of the documents produced were unnecessary to the proof on either side, and he thought that a jury was the most likely tribunal to come to a satisfactory conclusion on their import, particularly when connected with parol evidence, as to whether the respondent had or had not interfered with the property. From the allegations in the pleadings it appeared that the entire dispute turned on matters of fact, and he was therefore of opinion that the Lord Ordinary was right in referring it to the trial by jury. It would not, therefore, be necessary to come to any decision on the first point, if their Lordships should agree with him on this. His Lordship, after expressing his opinion as to the superiority of the trial by jury to that of

taking evidence by interrogatories on commission, and a disposition not to encourage any attempts to set aside by strained constructions the several acts for introducing the trial by jury into Scotland, concluded with affirming the interlocutory decree of the Lord Ordinary and reversing the order of the Court of Session, without costs.

COURT OF CHANCERY.

ORDER.

EXAMINERS OF SOLICITORS.

Monday the 15th day of April, 1839.

I do hereby order and appoint, that Richard Mills, Samuel Hautayne Lewin, George Gatty, and John Wainewright, sworn clerks in Chancery, together with Samuel Amory, Benjamin Michael Austen, Clayton, Edward Foss, Richard Harrison, Philip Martineau, Thomas Metcalfe, Charles Ranken, Charles Shadwell, Sam. White Sweet, John Teesdale, and Edw. Archer Wilde, Solicitors of the Court of Chancery, be Examiners until the last day of Easter Term, 1840, to examine every person (not having been previously admitted an Attorney of the Courts of Queen's Bench, Common Pleas, and Exchequer, or one of them) who shall apply to be admitted a Solicitor of the said Court of Chancery, touching his fitness and capacity to act as a Solicitor of the said Court: And I do hereby direct that the said Examiners shall conduct the examination of every such applicant, as aforesaid, in the manner and to the extent pointed out by the Order of the 27th day of July, 1836, and the regulations approved by me in reference thereto, and in no other manner, and to no further extent.

LANGDALE, M. R.

Law Reports.

VICE CHANCELLOR'S COURT.

April 23.

HYDE v. GREAT WESTERN RAILWAY COMPANY.

Joint Stock Companies—Injunction—Right of these Companies to take possession of land and commence their works, without previous tender of purchase-money and notice.

Mr. Renshaw moved *ex parte* for an injunction to restrain the defendants from proceeding with their works upon the property of the plaintiff until they had paid him a sum agreed upon for the purchase of an estate which was required for the railway. The plaintiff had entered into a contract with the Great Western Railway Company for the sale of a freehold estate for £1,000. The agreement was made with the agents of the company on the 6th of the present month, and on the 16th they en-

tered on the premises, and commenced their works, without any previous tender of payment of the purchase-money, or notice to the plaintiff.

Injunction granted.

RANDALL v. COMMERCIAL RAILWAY COMPANY.

Joint Stock Companies—Injunction—Practice—Established Doctrine—After Appearance to Bill for an Injunction the Court has power to issue an Injunction in urgent Cases of Waste.

An injunction had been granted *ex parte* against the defendants, and Mr. Jacob now moved to discharge the order on the ground of irregularity. The bill was filed by the plaintiff, who was the lessee of five houses in Randall-street, Limehouse, and on the line selected for the railway between the Minories and Blackwall. In August, 1838, the plaintiff received a notice from the company these houses were required for the purposes of the railway, and an agreement was concluded, after some negotiation, that the company should purchase them for 900*l.* The abstract of title had been approved by the company, and returned to the plaintiff on the 9th instant; but without making any tender of payment, or giving the least intimation to him, the company commenced pulling down the houses while the plaintiff was from home, and had demolished two of them before he could reach town. The injunction issued under these circumstances to restrain the proceedings of the company until payment had been made, but it was not stated to the Court when the application was made *ex parte* that the company had entered an appearance to the bill, and this was the irregularity on which it was now sought to discharge the order made by the Court. The motion was supported by the affidavit of Mr. Berry, who was the clerk of Mr. Baines, the clerk in court for both plaintiff and defendants, which stated that several months ago Mr. Baines received general directions from the solicitor of the company to enter, or cause to be entered, an appearance to any bill against the company as soon as they could discover it had been filed, and without waiting for instructions. On filing the bill on the 16th instant, he considered it his duty to enter an appearance *instanter*, and he accordingly caused it to be done, and having immediately on receiving the engrossment taken it to the Six Clerks-office to be filed, and obtained his certificate, he returned to the clerk of the plaintiff's solicitor, from whom he had received the bill, and at the same time informed him an appearance was entered thereto for the defendants, and requested him to take with him the usual note thereof, but that he declined, stating he was in a hurry, and requested it might be sent to his office, which was accordingly done, by the two-penny post. The affidavit of the clerk of the plaintiff's solicitor stated, that he only considered this a friendly intimation an appearance would be entered, and that he

did not think it necessary to communicate it to counsel.

The VICE-CHANCELLOR was of opinion, the observations of Lord Eldon in "Allard *v.* Jones," 15 Ves., 605 (*a*) and the subsequent decision in "Harrison *v.* Cockerell," 3 Mer. 1, sufficiently established the general doctrine, that even after appearance to the bill, the Court had power to issue an injunction in urgent cases of waste, and it was clear, if it were otherwise, in many cases the order of the Court would be a nullity; as if, for instance, the waste was occurring in Northumberland, it would all have been committed before the Court could make its interposition available. In the present case it all turned upon the question whether the appearance was actually entered when the application *ex parte* was made, on which nothing was mentioned to the Court about appearance. On this point the affidavit of Mr. Berry was most singular and indefinite. He said, on filing the bill, he considered it his duty to enter an appearance, and caused it to be done, but he nowhere stated that he did it. Indeed, the not entering any appearance was quite consistent with what he said. And then it came to this, that there was some conversation with the clerk of the defendant's solicitor, in which it not being said that any appearance had been actually filed, he came to the court and instructed counsel to move without saying anything about it. As it had been admitted the appearance was entered, the order could not be sustained. If the plaintiff took the chances, he must do so for better or worse. If appearance was not entered till after the order was made, the order would be good; but if he chose to run the chance, he might get a bad one. The matter, however, being so undefined in Mr. Berry's affidavit, any one might have acted as the plaintiff's solicitor had done. He should, therefore, discharge the order without costs.

ROLLS COURT—April 17.

WORDSWORTH *v.* WOOD.

Will—Construction of the words "in trust at his (the testator's) wife's death for his surviving Children," whether it applied to the issue of a Child who had died in the life-time of her Mother.

Mr. Joseph Wood by his will gave and bequeathed to his wife certain property in trust for her life, and then he proceeded—"I also give to my dear wife all my capital in trade, with the three-quarters of the profits arising therefrom, for her life, but nevertheless in trust at her death for my then surviving children, share and share alike, independent of the rental of my said freehold and leasehold estates, which I give to my surviving female children." The plaintiffs were the children of Mrs. Georgiana Wordsworth, deceased, the

(*a*) An appearance the day before motion will not suffice in cases of waste.—*Eb.*

daughter of the testator. Mrs. Wordsworth died in the lifetime of her mother, the testator's wife, and the question was, whether the gift of the testator by his will extended to the issue of Mrs. Wordsworth.

Lord LANGDALE said, the testator had expressed himself in a confused and imperfect manner, for he made a bequest in trust for his wife for life, and then in a distinct sentence he gave her all his capital in trade with the three-quarters of the profits for her life, and then proceeds in trust at her death for "my then surviving children." If the will had stopped there, it could only have been for such children as were living at the wife's death; but it goes on, "independent of the rental of his freehold and leasehold estates, which he gave to his surviving female children." From this it appeared that he excluded the rental of his estate from this particular disposition, but the capital in trade he gave at his wife's death to her then surviving children, with this exception, that it was not to proceed to the rental of the estate. It showed the extreme confusion of mind in which the testator wrote the will; but he could not construe the words "in trust at her death for my then surviving children" to mean any other children than those who survived the testator's wife. He very much regretted this construction, and did not think the testator intended such a disposition. The testator's mind had not reached to all the varieties of events that might happen, and he had not included the event which did happen. His lordship thought, therefore, that it applied only to the benefit of the children who were surviving at the death of the tenant for life, and consequently the demurser must be allowed, but he did not think it a proper case for costs.

April 19.

HARGITT v. BELL AND OTHERS.

Executors' Liabilities—Whether they can discharge themselves by their own Books and Affidavits without other evidence—Rule for Allowance of Payments by the Master without Vouchers—Exceptions to Master's Report.

It appeared that John Bagley, by his will, dated the 12th of May, 1812, gave to his executors, Messrs. Bell, Ponsonby, and Wilson, his estates, real and personal, in trust, to sell as much as was necessary to pay debts, funeral expenses, and legacies, and subject thereto in trust for his wife (now Mrs. Hargitt) for life, and then in trust for his son, John Bagley, his heirs, and assigns. The bill was filed by the testator's widow, and the son, John Bagley, an infant, to administer the trusts of the will. In 1828, a decree was made for the usual account of the testator's estate, and of what had come into the hands of the trustees and executors. The Master, by his report, found that certain sums had been received and paid by the executors, and that there was a balance in their hands. John Bagley, the son, took ex-

ceptions to this report, because, when the executors brought in their discharge, the Master allowed certain sums above 2*l.* paid by Mr. Bell without the production of any vouchers other than the executors' own book, in which the payments were entered, and Mr. Bell's own affidavit. One of the items so allowed was for a memorial stone, 6*l.* 6*s.*

Mr. G. Richards submitted, that without vouchers these payments could not be allowed, the general rule for such allowances being confined to payments under 2*l.*

Mr. Kinderley, contra. The book of entries was verified, and the widow of the testator, Mrs. Hargitt, was the daughter of Mr. Bell, and Mr. Bagley, who took the exceptions, was his grandson. Bell, as trustee, carried on the testator's farm after his death, and in consequence the items he had charged were so numerous as to occupy 67 brief sheets. In the schedule to his answer of his receipts and payments there was a copy of this book. The great mass of the accounts were vouched in the usual way, by the production of receipts, but for some of the items, such as labourers' wages, it was impossible to suppose he could have vouchers, and after the great length of time some of the vouchers had been lost. The bill was filed in 1817, and it was not to be wondered at if in the course of such an immense mass of receipts some were missing. The defendant was in fact charged for his receipts by this book, for the schedule to his answer of his receipts was a copy of the book. He was now dead, and it was not just that his estate should be charged with these items, when all the items of account against him were allowed. Mrs. Hargitt lived with him, and had herself, in her own writing, entered accounts in this book. Although there no receipts, there was evidence applicable to all the items, and Bell had been charged with receipts of thousands of pounds by this book. It was not disputed that the monumental stone was put up, but it was merely said the payment of the 6*l.* 6*s.* for it had not been vouched.

Lord LANGDALE said the Master had decided erroneously; the general rule was to allow payments under 40*s.* without vouchers, but not above that amount. The report must be referred back to the Master to review it.—*Exceptions allowed.*

COURT OF EXCHEQUER.

April 17.

(*Sittings in Banco, before Lord ABINGER.*)
PITCHFORD v. DAVIS.

Joint Stock Companies—Liabilities of Shareholders and Directors.

Mr. Erle moved the Court to set aside a verdict obtained by the defendant in this cause, which was tried at the last sittings at Guildhall, upon an action tried before Lord Abinger, brought against the defendant as a shareholder in a company called the Beet-root

Sugar Company, to recover the value of a large quantity of charcoal and alum supplied by the plaintiff at the works of the company at Pimlico, on the ground of a misdirection of the learned judge. It appeared that the company was formed on the basis of 10,000 shares of 25*l.*, upon which undertaking the defendant had become a shareholder to a large extent. The directors, however, began their operations at Pimlico at a time when a very small portion of the shares were sold, and for this reason, inasmuch as no evidence was adduced to show the defendant's concurrence in this plan of the directors, Lord Abinger had ruled that he was not liable. Mr. Erie, however, contended that, as the defendant had been seen at the works, and at the offices of the directory, sufficient ground had been laid to charge him with a knowledge of, and concurrence in, the proceedings of the company.

The Court, however, unanimously assented to the law as laid down by the noble Chief Baron, it being most clearly laid down by them, that, as the contract of partnership entered into by the defendant with the directors had been altogether set aside by the latter, he (the defendant) could not be made liable for the goods supplied to them on the order of their secretary by virtue of his being merely a shareholder under the original prospectus of the company. The bargain of the defendant was to make himself liable on a capital of 250,000*l.* But if the directors began on 12,000*l.*, he must be shown by the plaintiff to have assented expressly thereto, or he was not to be made liable for goods supplied not on his credit. The directors, under such circumstances, were the persons primarily liable, and to them the plaintiff must look.

Rule refused.

April 18.

DEARDEN v. EVANS.

COPYHOLDS—*Whether the Lord of the Manor or the Copyhold Tenant, has the right to loose stones scattered about the land of the Tenant, and not joined to the Strata—Whether they are mere chattels or part of the soil (a)*

Mr. Wightman moved for a new trial in this case, which was one of trover, and was brought by the plaintiff, as lord of manor, to try the question whether the tenants of that manor had a right to remove certain stones called "cobs" therefrom; in other words, whether these stones, which were stated and admitted to have fallen by operation of time and accidents of the elements from a large quarry in the neighbourhood, and had become strewn in large quantities and various sizes over the adjacent closes, were to be looked upon as attached to the soil, or as loose chattels encumbering the estate, and liable to be removed by the copyhold tenant. It appeared that no possible certainty could be fixed as to the time at which the stones removed by the defendant

had fallen, though it was clear that there had not been any disruption from the mass for about thirty years, a period long antecedent to the commencement of the defendant's interest in the close in question.

The lord of the manor contended that he had a right to these stones as part of the soil; but that could not be so, as the stones were lying upon and encumbering the soil, and though the tenant had no right to open mines, or to remove stones from a new quarry, yet he had a right to work old mines, and to remove all loose chattels. Many of these stones were quite exposed, and were as small as a man's hand, while others certainly were of a very large size indeed. Their size, however, did not affect the point at all, which was one of principle, involving a new question altogether. If the lord had a right to one he had to all, and so had the tenant.

Lord Abinger.—If it was necessary to decide the right of the tenant to remove stones fallen lately on his soil, or large stones encumbering it, I should listen to the present motion, but this is quite a different case. It is not attempted to be shown when these stones first fell; indeed, it seems to be admitted and found by the jury that they may have been in the close in question ever since the deluge. Certainly they have not fallen there within 30 years, and the defendant's tenancy has commenced within that period, so that he took the soil from the lord with these stones on it. I think that the ruling of my brother Alderson was quite correct, as was the finding of the jury, for the stones must be clearly taken to belong to the lord of the manor under the circumstances of the case. The rule, therefore, must be refused.

Mr. Baron Parkes concurred, and the rule was accordingly refused.

April 23.

Sittings in Banco.

WALLER v. SMITH.

Costs—Practice—*What scale of Costs the Master is to adopt in taxing, when the sum recovered shall be less than 20*l.*, and the cause had been brought in a superior Court.*

Mr. B. Andrews moved for a rule nisi for the purpose of directing the Master to tax the costs of the plaintiff's attorney on the larger scale. The action brought was on a money account, to which the defendant had pleaded a set off to a very large amount, and paid into court 2*l.* When the case came on for trial, the matter was referred to an arbitrator, who eventually found for the plaintiff, to whom he awarded 10*l.* beyond the sum of 2*l.* already paid into court. Shortly after this the plaintiff becoming a bankrupt, it was necessary for his attorney to have his bill of costs taxed, in order to prove for them under the fiat. The bill was accordingly submitted to the Master, when that officer conceived that the lower scale ought to be adopted, because the sum

(a) See this case reported, ante, p. 397.

recovered had been less than 20*l.*, the cause having been brought in a superior court. Under these circumstances, it was submitted that the costs ought to follow the larger scale; the sum for which the action had been brought was a very large one, and it could not have been anticipated that so small a sum as 10*l.* would be recovered. This moreover was not a case within the rule laid down on this subject, for it had reference to taxation between party and party; here, however, it was a question in fact between attorney and client, and it had never been held that the attorney was within the rule.

Mr. Baron PARKE—The rule certainly is “between party and party,” but I think that, by inference from it, the attorney ought not to be allowed to subject his client to the payment of unnecessary extra costs by bringing an action for him in a court where he knows he cannot recover full costs from the adversary. The case, however, is new, and therefore the Master may exercise a sound discretion upon the subject, and if he sees that the attorney was not guilty of any neglect in not inserting in the order of reference a power to the arbitrator to certify for costs on the larger scale, as the judge would have had, he very likely will allow the superior scale.

Mr. Baron ALDERSON—I am of the same opinion: it is a case in which the matter may well be referred back to the Master, who will, I dare say, exercise a sound and a more liberal discretion than he would in a future one of a similar nature.

Rule nisi granted.

COMMON LAW COURTS.

ORDER. LAW EXAMINERS.

Easter Term, 1839.

It is ordered, that the several Masters for the time being of the Courts of Queen's Bench, Common Pleas, and Exchequer, respectively, together with Samuel Amory, Benj. Austen, Michael Clayton, Edward Foss, Richard Harrison, Philip Martineau, Thos. Metcalfe, Chas. Ranken, Chas. Shadwell, Samuel White Sweet, John Teesdale, and Edward Archer Wilde, Gentlemen, Attorneys, be, and the same are hereby appointed Examiners, for one year now next ensuing, to examine all such persons as shall desire to be admitted Attorneys of all or either of the said Courts; and that any five of the said Examiners (one of them being one of the said Masters) shall be competent to conduct the said examination, in pursuance of, and subject to, the provisions of the Rule of all the courts made in this behalf in Hilary Term, 1836.

QUEEN'S BENCH.—April 18.

KING v. BURRELL.

Municipal Reform Act.—Liability of Overseers to penalties for neglecting to make out list of Burgesses to vote in the election of Councillors.

The Municipal Reform Act requires that “the overseers of every parish” in certain boroughs shall yearly “make out, sign, and deliver” to the town-clerk annually, a list of all persons entitled to vote in the election of members of the town-council; and by the 48th section it is provided, that if “any overseer” shall neglect or refuse to make out, sign, and deliver such list, he shall forfeit 50*l.*

The present action was brought under that section to recover a penalty of 50*l.*, alleged to have been incurred by the defendant by a neglect to make out and deliver, as one of the overseers of Lynn, the list of burgesses entitled to vote in the election of councillors for that borough, and was tried at the last assizes for Norwich, before the Lord Chief Justice Tindal, at which it appeared, that for the last 100 years the town of Lynn has, for parochial purposes, been divided into nine wards, and by an act of the 48th George 3, the justices are required to appoint yearly one person for each of the wards to be overseers of the poor, and the nine persons, when elected, are to be called “the nine overseers of the parish of St. Margaret.” The defendant is the overseer appointed for “Sedgeford-lane ward.” In September last these nine overseers, instead of making out and signing one joint list of the voters in the whole parish, made out nine separate lists, being one for each of the several wards. Each of eight of these lists was signed by the overseer who had made it out, but the defendant had wholly forgotten to sign his; he, however, delivered it personally to the clerk of the town-clerk, and upon being told that he had omitted the name of another of the clerks, he immediately supplied the omission in his own handwriting in the office of the town-clerk. This neglect to sign his list was perceived by the clerk to whom it was delivered, but no notice of the omission was notified in any manner to the defendant. The lists so delivered in were duly published by the town-clerk, revised, and made the ground-work of a “burgess roll,” from which the electors voted at the subsequent election.

For the defendant, it was contended that the plaintiff must be nonsuited. That no corruption had been shown, and the act must be taken to contemplate only a wilful and corrupt neglect of duty, and not a mere accidental omission, where no improper motive was attempted to be shown. The statute was intended to apply only to cases in which the overseers had totally abandoned their duty. The lists of the several overseers in this parish comprised the whole of the burgesses entitled to vote, and as eight of them were signed by the several overseers who made them, the majority of the parish officers might well be

said to have signed the list intended by the statute. But it was not necessary that they should be signed, if they were duly made out and delivered; for the signature was only necessary for the purpose of authentication, and in order to authorise the town-clerk to publish them as required by the Act of Parliament.

The LORD CHIEF JUSTICE was of opinion, that the defendant was liable to the penalty imposed by the act, and directed a verdict for the plaintiff, for the amount sought to be recovered, with liberty for the defendant to move to enter a non-suit.

This day the Attorney-General moved accordingly for a rule to show cause why the verdict should not be set aside and a nonsuit entered, or, if there should be any doubt as to the leave reserved, why the judgment should not be arrested on account of the insufficiency of the declaration. He stated, that by the 15th section the overseers of every parish were directed to make out an alphabetical list of all persons entitled to be on the burgess roll, and the 48th section directed, that for every offence against the statute the party incurred a penalty of 50*l.* This was one of nine actions brought against the overseers of the parish of St. Margaret's Lynn. By a private Act of Parliament for regulating that parish, there being nine wards within the parish, there was to be an overseer appointed every year for each ward. Ever since the Municipal Corporation Act had passed, each of the nine overseers had made out an alphabetical list of the parties entitled to be on the burgess roll, within his own ward, had handed it to the town-clerk who had packed all the lists together, and had published those as the list regularly obtained from the parish, and that list had then been revised by the mayor and assessors, and this course was adopted on the occasion which had given rise to the present action. The list had been revised, and no inconvenience had arisen from any supposed irregularity in making out the list, and it was not alleged that any person had been disfranchised, or any one prevented from being on the roll. In spite of this, no doubt from political motives, nine actions had been brought. The defendant had carried in his list, but had not signed it, but, to show that he had adopted it, he made an alteration in it at the very moment when it was handed in. He (the learned counsel) apprehended that where there were nine overseers it could not be necessary for the list to be signed by all the nine. It was to be considered as one list signed by a majority of the overseers; if this were not the case a most important question would arise, that where there was any inaccuracy, any departure from what the statute directed to be done, without any ill intention whatever, the party would have incurred the penalty.

Lord DENMAN.—The Corporation Act differs from the Reform Act; it drops the word "wilfully," and gives the penalty for any omission or inaccuracy.

The Attorney-General said such was the case. Then, with regard to the ground which he should urge in arrest of judgment, the declaration did not negative that a proper list had been handed in by the other overseers of the parish.

Rule granted.

BAIL COURT. April 15.

RE MARSHALL.

ATTORNEYS.

Whether Attorneys practising in the Courts of COMMON PLEAS at LANCASTER may be admitted to practise in the superior Courts at Westminster upon payment of the difference of duties upon their Articles WITHOUT GOING THROUGH AN EXAMINATION before the Examiners at the Law Society.

Mr. Knowles applied to the Court for a rule to show cause why a gentleman named Marshall should not be admitted an attorney of this court without submitting himself to the examination. It appeared, that the applicant had been for the last seven years an attorney practising in the Court of Common Pleas of the County Palatine of Lancaster, and had given the notices necessary to his being admitted to practise in the superior courts of Westminster. By the 9th of George IV., any attorney of the courts of the County Palatine at Lancaster may be admitted into the courts at Westminster-hall upon payment of the difference between the amount of stamp duty required by the different indentures. But the rules of court published upon the subject by all the judges in Hilary Term, 6th William 4, directed that nobody should be admitted an attorney without a certificate of his capacity and fitness, to be signed by the examiners or the major part of them. This last regulation Mr. Knowles contended to be only applicable to the case of persons who sought to be admitted into the superior courts without having ever been in the profession before, as it would be a manifest absurdity to call upon an attorney who had been in actual practice for many years in one court to submit to an examination before he could be admitted to another.

WILLIAMS, J. thought, that the best plan for the applicant would be to go before the examiners in the first instance. If he should happen to be "plucked" at the examination, he could afterwards come to the Court for assistance.

Mr. Knowles said there could be no danger of "plucking" in such a case.

Rule granted.

SPRING ASSIZES.

NORTHERN CIRCUIT.

LIVERPOOL.—*March 4.*

Before Mr. Baron ALDERSON.

HALL AND OTHERS ASSIGNEES, v. ROUSE AND OTHERS.

Trover.—The right of Assignees to goods delivered by a Trader, after he has committed an Act of Bankruptcy.

This was an action in trover, by which the plaintiffs, assignees to George Law, a bankrupt, sought to recover from the defendant, William Rouse, £20*l.* the value of goods alleged to have been fraudulently delivered to him, after an act of bankruptcy had been committed by George Law, who was a woolstapler in the neighbourhood of Rochdale, and became embarrassed in the year 1837. He had dealings with the defendants, who were woolstaplers at Rochdale and Bradford. The terms of dealing between them was one month's credit with two months' discount. In the month of January, Law purchased a quantity of goods on those terms, and on the 25th of February some more goods, and these goods were not demandable in money till the month of March, and then subject to a discount of two months. But early in February George Law became embarrassed, and had forwarded to the defendants certain articles of wool and flannel, to the injury, as it was said, of his other creditors, and to the amount sought to be recovered. Before the date of the transaction referred to, there had been an act of bankruptcy committed by Law, and it was argued that if there had been an act of bankruptcy antecedent to the transaction, there was no doubt to whom the property belonged. But if the transaction on the 25th February was a fraudulent transfer, then it was immaterial whether there had been a previous act of bankruptcy or not.

The fiat of bankruptcy, dated the 4th of March, 1837, was put in, together with the appointment of the assignees (Rd. Wall, John Butterworth, the younger, and John Mills) on the 25th March.

Evidence of Law having been indebted in a sum of £100*l.*, was produced, and one witness was brought to prove that an act of bankruptcy had been committed. Other witnesses stated that after this act of bankruptcy, Longbottom had been closeted with Law, and that afterwards, a quantity of wool and flannel had been delivered to the defendants, Rouse and Son, in part satisfaction of a debt due to them.

For the defendants, it was contended that the evidence did not establish the necessary extent of debt (£100*l.*); that the proof of an act of bankruptcy rested on the equivocal evidence of one individual; and that the transfer of goods was not an act of fraudulent preference, but the voluntary payment of a debt by a man on the verge of bankruptcy, when

urgently pressed for payment by Longbottom, the agent for Messrs. Rouse. That Edmund Law had, previous to the transactions in February, been admitted into partnership with his brother George; that the invoices had been made out in both their names; that the wools claimed had been delivered up to the defendants in consequence of an order to that effect signed by both Edmund and George Law; and that, as an act of bankruptcy had only been proved against the latter, the goods could not be claimed by the plaintiffs, as the assignees of George Law.

William Longbottom, the agent of Messrs. Rouse and Son, stated that goods had been sold to George Law on several occasions by his employers. On the 8th and 14th of February, two parcels of wool and flannel were sold to him, value £14*l.*. Witness, having afterwards heard that Law was embarrassed, and the sum of about £20*l.* being owing to his master, previous to the last sales, he waited upon Law, and asked for money. No money being obtainable, he pressed for goods, and at length Law agreed to deliver up the wool which had been sold to him in February. That was accordingly done. At the request of George Law, the invoices had been altered, he stating that his brother had been taken into partnership with him. The invoices accordingly stood in the names of George Law and Edmund Law.

ALDERSON, B., said that the question for the consideration of the jury would be, first, whether an act of bankruptcy had taken place by George Law, on the 15th of February, by his endeavouring to avoid a creditor, as stated by one witness, because, if such was the case, then Law was utterly incapable of carrying into effect any transference of property. The second question would be whether that transaction (of the 25th of February,) was in itself an act of bankruptcy, or a fraudulent delivery of goods, by which preference was given to one creditor over the others; and, in the third place, whether Edmund Law must be considered a partner of his brother. If they believed the evidence of Cross, a clear act of bankruptcy had been committed on the 15th, and they would find for the plaintiff; but if they were of opinion that such was not the case, and that the transaction was a *bona fide* one on the part of Law, arising from the pressure of Longbottom, they would have a clear and definite rule to go by.

Verdict for the plaintiff. Damages £14*l.*.

REVIEW OF NEW BOOKS.

IMPEY'S GENERAL STAMP ACT, 55 Geo. 3. c. 184., and the Statutes 3 Geo. 4. c. 117., 3 Geo. 4. c. 117., 5 Geo. 4. c. 41., 9 Geo. 4. c. 15., 3 & 4 Wil. 4. c. 23., 3 & 4 Wil. 4. c. 97., 1 & 2 Vict. c. 35., 1 & 2 Vict., c. 85. Altering and amending the same. To which are added, Notes

of Cases Decided on the Stamp Laws in General; with References to the Statutes 44 Geo. 3. c. 98., and 48 Geo. 3. c. 149; Shewing the present and prior Duties, together with full Practical Instructions, and Forms of Affidavits, and Instructions for passing Accounts through the Legacy Duty Office, in all Transactions at the Stamp Office. Forms of Affidavits and Practical Instruction for obtaining a return of Duty on Probates and Letters of Administration, and for passing the Accounts, with Forms. With a Digested Index. The Fourth Edition, with large Additions. London : John Richards & Co., 194, Fleet Street, Law Booksellers and Publishers, 1839.

This is a very useful little volume, which no attorneys' office should be without—every practical man feels the many difficulties that surround the Stamp Acts, occasioned by the various constructions that have been put upon many of their clauses. Here we find at once all the cases that bear upon the different heads, as for instance, TRANSFER OF MORTGAGES.

The transfer duty on a mortgage is imposed only where no further sum is advanced. Doe, d. Bartley v. Grey, 4 Nev. & M. 317.; 3 Adol. & Ellis, 89.; 1 Har. & Woll. 235. (a)

Where an additional sum is advanced, it is sufficient to pay the *ad valorem* on the sum advanced. Id.

So where the original mortgage is assigned, to secure the mortgage money. Id.

A mortgage for years was given before the passing of the 3 Geo. 4. c. 117. to secure the payment of 150*l.* After the passing of that act, the mortgagor and mortgagee joined in a conveyance in fee to a new mortgagee for 350*l.*; the latter deed consisted of four skins, and had a 1*l.* 15*s.* stamp on the first, with an *ad valorem* stamp of 2*l.* and 1*l.* on the 2d, 3d, and 4th: held that these stamps were sufficient.

Such a mortgage is a transfer of the old mortgage, as to the original sum, and a new mortgage, as to the further sum advanced, within the meaning of 3 Geo. 4. c. 117. Quære, whether a common deed stamp was necessary. *Sembly*, a mortgage to secure a principal sum, and also the costs of the trustees, and a reasonable sum by way of compensation to them for their trouble, requires only a stamp of such an amount as will cover the principal sum. Paddon v. Bartlett, 4 Nev. & M. 1; 2 Adol. & Ellis, 9.

Where 400*l.* was due upon a mortgage, and the mortgagee advanced a further sum of 1000*l.* and by a mortgage deed a further security was given to secure the whole of the principal sum of 1,600*l.*;—Held that an *ad valorem* stamp on the 1000*l.* and a 35*s.* deed stamp was necessary. Lamb v. Pearce, 1 Will. Woll. & Hodges, 271.

A, having entered into a contract with B, for the purchase of an estate, by an ante nuptial settlement, reciting such contract, covenanted if B should be enabled to convey the estate to him, that he would convey the same to the trustees under the settlement; provided, that if B should not be able to convey, A should be under no obligation to procure a conveyance from any other party, or to pay its value to the trustees: nor should A be precluded from purchasing the estate for his own benefit. B was not able to convey; and A, after his marriage, purchased the estate from the owner, and then conveyed it to the trustees under the marriage settlement; he afterwards mortgaged the estate to C, in fee for 10,000*l.*: subsequently the mortgage was transferred to D, the deed stating the consideration to be 10,000*l.* paid to C, and 400*l.* paid to A; the payment of the former sum was proved, but not that of the latter. D mortgaged to the plaintiff:—Held *first* that the *post* nuptial settlement, was voluntary, and consequently, void as against a purchaser for a valuable consideration; *secondly*, that there was sufficient proof of a valuable consideration for the transfer to D; *thirdly*, that an *ad valorem* stamp in respect of 4000*l.* was sufficient upon the mortgage to D. Doe d. Barnes v. Roe, 1 Arnold, 279.

Where a mortgagor covenanted expressly to obtain a renewal of the lease of the premises mortgaged, and to assign it to the mortgagee:—Held that the mortgage deed did not require a 2*5s.* stamp. Doe d. Jarman v. Larder, 2 Hodges, 186.

In ejectment by the assignee of a mortgagee, against the tenant of the mortgagor, the lessor of the plaintiff proved a deed of assignment which recited a mortgage of certain premises for 900 years, as a security for 1,500*l.* and it was witnessed, that in consideration of 1,500*l.*, paid to the mortgagor, he transferred the mortgaged premises to the lessor of the plaintiff, and the mortgagor, in consideration of 10*s.* assigned, ratified and confirmed the same: held, that a stamp of 35*s.* was sufficient, the seizin of the mortgagor having been proved. Doe d. Brame v. Maple, 3 Hodges, 213.

By a deed of assignment, five persons conveyed all their crops, goods, and effects, to trustees in trust to sell, and with the proceeds of such sale to discharge, first, debts due to the trustees, with interest from the date of the deed, then debts due to other creditors, and a resulting trust as to the residue of the parties conveying: held, that such deed did not require an *ad valorem* stamp, as upon a "conveyance" or "mortgage" under the statute 55 Geo. 3. c. 184. Sched. p. 1, as the former clause operates only on actual sales between

(a) See ante, p. 198.

vendor and vendee; and that it fell within the exception of the latter, viz., where such conveyance shall be made for the benefit of creditors generally; and therefore that a common deed stamp was sufficient. *Coats v. Perry*, 6 Moore, 183.; 3 B. & B. 48.; *Whitwell v. Dimidale, Peake*, 168.

We can recommend this book to the notice of our Subscribers, as well deserving their attention.

ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNEYS *In Trinity Term, 1839.*

QUEEN'S BENCH.

<i>Clerk's Name and Residence.</i>	<i>To whom articled, assigned, &c.</i>
Ash, William, Bristol.	Cooke, George, Bristol.
Ans dell, Josias Thomas, Saint Helen's; and Liverpool.	Ans dell, John, St. Helen's; assigned to Foster, Marmaduke, late of Liverpool; assigned to Lucon, Joseph, late of Liverpool.
Allee, Lawrence Turton, Rookley; and 2, Wilson-street.	Ralfe, James, Winchester.
Brooks, James Willis, 29, John-street, Bedford-row.	Cooper, Thomas, John-street; assigned to Brooks, James Sheffield, John-street.
Benn, John Higginson, 9, Featherstone-buildings; and Rugby.	Wise, William, Rugby.
Busfield, Curter, Manchester.	Hampson, John, Manchester.
Busfield, Johnson Atkinson, Bradford.	Wells, William, Bradford.
Bird, Henry, 47, Lower Stamford-street, Blackfriars; 24, Arundel-street, Strand; and 1, Sussex-place, Islington.	Cole, John, Odiham and Basingstoke.
Bennett, William Wooley Leigh, 20, Judd-place, West; and Buckingham.	Hearn, Thomas, Buckingham.
Bentley, Henry William, 5, Lloyd-square; and 6, Great Marlborough-street.	Abraham, George Frederick, Marlborough-street.
Bradley, Edward Gould, 7, Castle-street, Bloomsbury; Bath; and Reading.	Clarke, Robert, Bath.
Barton, Richard Carrol, 7, Cheltenham-place, Lambeth.	Mayhe, Joshua, 26, Carey-street.
Ball, Charles Sutton, 42, Brompton-square.	Harrison, Charles, 14, Southampton-buildings.
Bryant, Isaac, Wimborne Minster.	Rowden, Henry, Wimborne Minster.
Briggs, William Sturges, Lincoln's Inn Fields.	Briggs, Thomas, Lincoln's Inn Fields.
Braburne, Edmund, 42, Dorset-street; and 97, Milton-street.	Gabb, Baker, and Secretan, William Woodhouse, Abergavenny.
Barlow, John, Sharples, near Bolton-le-Moors.	Winder, James, Bolton-le-Moors.
Birch, Thomas, Huntley-street, Bedford-sq.	Briggs, Thomas, Lincoln's Inn Fields.
Blake, Charles, 29, Clifton-street, Finsbury-square; and 32, Finsbury-circus.	Bridger, Charles, Winchester.
Bartlett, Robert Henry William, 50, Southampton-row; Shepton Mallett; 41, Southampton-row; and 27, New Millman-street.	Craddock, Samuel, Shepton Mallett; assigned to Michell, Edward, Shepton Mallett.
Bowlby, Thomas William, 109, Upper Seymour-street, Euston-square; and Bishop Wearmouth.	Bowlby, Russell, Bishop Wearmouth.
*Bond, Edgar, late of Norwich; 42, Spencer street, Northampton-square; now of 75, Judd-street.	Winter, James, Norwich.
Coppin, John Frederick Augustus, 8, South Molton-street; and 71, Albany-street.	Pinniger, Broome, Newbury; assigned to Beavan, John Phillips, 30, Sackville-street.
Clayton, Sykes, Sherburn, near Ferry-bridge; Strand on the Green; and Kippax, near Pontefract.	Brock, Beauvoir, Loughborough.
Campbell, William Knight, Nottingham.	Wadsworth, John, Nottingham.
Clegg, John, Bradford.	Morris, Joseph, Bradford.
Cooper, Samuel Nicholas, 111, Crawford-street; and 70, Margaret-street, Cavendish-square.	King, William Read, Serjeant's Inn, Fleet-street.
Coles, Henry Thomas, 3, Mecklenburgh-st.; and 6, Raymond-buildings, Gray's Inn.	Lewis, William, 6, Raymond-buildings.
Crabbe, Fredrick, Devizes.	Bayley, John, Devizes.

* This is the only one in the Common Pleas.

- Carter, William, 6, South-square, Gray's Inn.
 Champney, Henry Nelson, 6, Old Bond-st.; and York.
 Chalmers, Charles Boorn, 4, Warwick-court; and Great Torrington.
 Downing, Francis, 16, Southampton-street.
 Dunsford, Walter Comyns, Puriton and Ashley Court.
 Davis, Michael, Usk.
 Dyson, Matthew Henry Moorhouse, William-street, Hampstead Road; and Holmfirth.
 Edgell, Alexander, 4, Verulam Buildings.
 Edmunds, John, 17, Upper N. Place, Gray's Inn Road; and Worthing.
 Eagleheart, Wm. Hayley, Park House, Blackheath.
 Ebden, John 7, New Norfolk-street, Commercial Road, and Freisingfield.
 Fellowes, Thos. Abdy, 82, Margaret-street; and Leigh House near Bradford, Wilts.
 Few, Charles the Younger, 3, Henrietta-street, Covent Garden.
 Filliter, Henry, 13, Harper-street; 67, Lamb's Conduit-street; and Wareham.
 Grubb, Wm. Dawson, 14, Bank Buildings; and Lower Mitcham.
 Gibson, George 14, Milman-street, Newcastle-upon-Tyne; Calthorpe-street, Middlesex; and Upper Hall, Lincoln.
 Graham, Thos. Hedges, 90, Upper Stamford-street, Blackfriars; Abingdon; and Kensington.
 Gilham, John, 112, Fetter Lane; and Wincanton Place.
 Glynn, Edw. 12, Argyle-street, New Road; Marchmont-street; and Arundel-st. Strand.
 Gwynne, Sampson 3, Grosvenor Terrace, Camberwell.
 Goulden, Wm. Whitelegg, Chorlton-upon-Medlock; and Strangeways.
 Halton, Henry James, Carlisle.
 Hamlin, Thos. Wrington.
 Hillier, Henry Jenner, 16, Southampton-st.; and Marlborough.
 Harris, Thos. the Younger, 4, Queen's Row, Camberwell; Kingsbridge; and Warwick Court.
 Hurley, Wm. Frederic, 16, Alfred Place; and 8, Easton Place.
 Humphry, Wm. James, 10, Milman-street; and 2, Norfolk-street, Strand.
 Houchen, John, 6, Charles-street, Soho-square; and Great Yarmouth.
 Hills, Thos. 11, Essex-street; and Chatham.
 Hawkins, Hen. Edw. Newport.
 Hanbury, Thos. James, 69, Lamb's Conduit-street; and 5, John-street.
 Carter, John Richard, Spalding; assigned to Willis, Richard, 6, Tokenhouse-yard.
 Gray, Jonathan, York; assigned to Gray, William, the younger, York.
 Carter, Charles, Barnstable; assigned to Price, William Evan, Great Torrington.
 Merriman, Thomas Hardwicke, Great Torrington. Assigned to Smith, Wm. Wyke, Southampton-street.
 Broadmead, Nicholas, Southampton-street. Assigned to Crosse, Richard Reader, Longport.
 Mostyn, Henry, Puriton.
 Kidd, Martin, Usk, Holmfirth.
 Markland, James, Heywood.
 Edmunds, Richard, Inner Temple.
 Jenings, Charles, Worthing.
 Hazard, Wm. Elm Court, Temple.
 Merriman, Wm. Clark, Redenhall with Harleston. Assigned to Hillier Edward, Marlborough.
 Few, Robert, 30, Cumming-st., Pentonville.
 Filliter, George, Henrietta-street.
 Heald, Henry, Wareham.
 Willis, Joseph, 16, Austin Friars, Gateshead, Durham.
 Graham, William.
 Shearman, John, Abingdon.
 Clayton, Matthew, Bartlett's-buildings.
 Gwynne, Samuel, Newcastle-upon-Tyne. Assigned to Wright, John, Grosvenor-sq.
 Poole, Charles, 6, Hart-street, Bloomsbury. Assigned to Potter, Thos. Altringham.
 Dobinson, William, Manchester.
 Baker, John, Carlisle.
 Halcombe, John, Aldwick, Somerset.
 Harris, Thos. the Elder, Marlborough.
 Griffith, John Rod, Kingsbridge. Assigned to Bridges, John, Chipping Campden.
 Price, John, 23, Red Lion-square.
 Lucas Geo, Chichester.
 Hills, Walter, Great Yarmouth.
 M'Donnell, Fras. Chatham.
 Sewell, Thos. Usk. Assigned to Foster, Robert Carr, Newport.

To be continued.

CAUSE LISTS.—EASTER TERM, 1839.—QUEEN'S BENCH.

NEW TRIALS.

Newton v. The Liverpool and Manchester Railway Company.

Evans v. Tomlinson

Faulkner v. Chevell

Ducura v. Flitton

The King v. Legh and others

Wilson v. Ray

Doe d. Carter v. James

Wilson, Bart. v. Hoare & others

Gregg v. Wells

Uther v. Chichester

Davies v. Wilkinson

Bentall, Esq., one &c. v. Sydney, Knight.

Phillips v. Cole

Cooke v. Gravatt and others

Goodman v. Ford

Phelps and others v. Lyle

Coles & others, executors, &c. v. Bank of England

Sowerby v. Lockerby

Doe, several demises, Filmer, Bart. & ors. v. Bradley, Esq.

Dobson, Knt. & ors. v. Denne & others

De Gondonni v. Lewis & an.

Down v. Hatcher and Wife

Magor & ors. v. Chadwick & others

Ellison v. Iles

Strange and another v. Price

Doe several demises of Graves & an. v. Wells and Trowbridge

Doe d. Littlejohn v. Willisford

Doe d. Lloyd and Wife v. Bennett

Green v. Cresswell

Fludyer, exor. &c. v. Jeffrey

PEREMPTORY RULES.

[In Banc.]

Wilton, Gent., one &c., v. Chambers

Evans v. Whittingham

The Queen v. The Mayor of Bridgnorth

Doe d. Mayhew v. Asby

Ex parte G. Burnham, in the matter of W. Dryden, Gent. one, &c.

The Queen v. The Justices of Chichester

Same v. John Copeland

In the matter of arbitration between J. Waddell and ano. Same

The Queen v. Benjn. Jackson and another

Same v. The Churchwardens of Windsor

SPECIAL CASES.

**Archbishop of York and others v. Trafford and others*

Stockdale, a pauper, v. Hansard and others

**Barry v. Arnand*

**Doe d. Tremewen v. Parmewan and another*

Wentworth & another v. Cock

Mattock exor. v. Kinglake

**Doe d. Evans v. Evans*

+*Cully, Esq. v. Doe d. Taylorson*

Peace v. Eastwood

Jackson v. Hill

Burder v. Veley and another

Ramsay v. Nornahell, In rep.

Bryan v. Sir G. Arthur

Griffin v. Ellis and another

COMMON PLEAS.

Manifold & another v. Morris

Ward v. Suffield

Boys v. Ancell

Moved Trinity Term last.

Hartshorne v. Watson

James v. Lingham

Taverner v. Little

Hannay v. Herapath & anor.

Fendall v. Nokes

CURIA ADV. VULT.

Devaux v. Janson

Musket v. Hill

Toplis & anor. v. Grane

Izon v. Gorton & another

Wilmhurst & anor. v. Bowker

Wrightup v. Chamberlain

DEMURRELS.

Williams & ors. v. Green & an.

Jackson v. Nicholl.

Edwards v. Bishop of Exeter & others.

Devaux & anor. v. Steele

Hilton v. Swan

Redford v. Newman

Samuel v. Rawson & anor.

Gas & Coke Company v. Turner

(*Exchequer in our next.*)

Benjamin v. Belcher

**Doe d. Riddell v. Gwynnill*

**Barry v. Boyd*

Hill v. Leach

Cunderwood v. Johnson

Calvert v. Moggs

Swann v. Sutton

Uhaffers v. Wilson

Guardians of the Banbury Union v. Robinson

Lloyd v. Peirce and ors., In rep. Drewe v. Lawson, Esq. and another, late sheriff of Middlesex

Thomson v. Lanyon

Saunders v. Morgan

Hutton v. Parker

**Doe d. Park & wife v. Kirby*

Walmsley & another v. Cooper

Tindall v. Hepton and wife, extrix. &c.

**Doe d. Blight v. Pett*

The Guardians of the Poor of the Banbury Union v. Robinson

CROWN CASES.

The Queen v. Henry Spencer

Inhabitants of

Saint Lawrence, Ludlow

Guardians of

Wallingford Union

William Darlington

Webb and another

Lord and Steward

of the manor of Old Hall in East Bergholt

Churchwardens

&c. of Bradford

Inhabitants of

Draughton

Sanderson & ors. v. Piper & others.

Stert & another, executor v. Platel.

Mills v. Fowkes

Davis v. Chapman

Estrine v. Laws

Whiskin v. Braddon

Lackington & others, assignees, v. Combes

Jolley v. Birmin

Knokers v. Banbury & ors.

REMANETS.

Raleigh & others v. Atkinson

* Lovatt & others v. Hamilton

* Tobin v. Crawford

Evans v. Jones

Pennefather v. Lock

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Price 6*d.* Stamped Edition, 7*d.*

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 11th May, 1839.

THE
LEGAL GUIDE.

VOL. II.

FROM MAY 3, 1839, TO OCTOBER 26, INCLUSIVE.

LONDON:

PUBLISHED FOR THE PROPRIETORS, BY

JOHN RICHARDS & CO.

LAW BOOKSELLERS AND PUBLISHERS, 194, FLEET STREET.

1839.

G. NORMAN, PRINTER, MAIDEN LANE, COVENT GARDEN.

The Legal Guide.

VOL. II.]

SATURDAY, MAY 4, 1839.

[No. I,

MORTGAGORS AND MORTGAGEES.

AN ESSAY

*Upon the Character in which a MORTGAGOR
IN POSSESSION may be considered,*
(Continued from Vol. I. p. 403.)

THIS uncertain character underwent very full discussion in the Court of Queen's Bench, in Hilary Term, 1829, in the case of Pope and another assignees of Garbet *v.* Biggs, (a) which was tried before Gaselee, J. at the Summer Assizes for Berks, 1828. The facts of which case were, that Garbet the bankrupt had mortgaged several houses, and *after* making the mortgages, had let them to various tenants. The defendant Biggs was one of such tenants, and also agent and receiver of rents for the bankrupt, which he had applied in payment of the interest due on the mortgages, and had rendered his accounts to the bankrupt. After the *bankruptcy*, the mortgagees gave notice to the tenants, and required them, to pay the amount of interest in part of rent, and similar sums out of future rents, until further notice. At the time of such notice, there was *rent in arrear*, and other *rent* subsequently became due, all of which had been received by the defendant Biggs, and by him, had been applied in payment of the mortgage interest monies, with the exception

of his own rent, and of a small sum, which together, were not more than sufficient to meet the next interest payment. These monies, the assignees brought the action to recover, and it was contended, for the plaintiffs, that the defendant could not avail himself of any of these payments; because, if the mortgagor had brought an action against the tenants themselves, they could not have pleaded that the mortgagor *nil habuit in tene-
mentis*, and consequently, could not have denied his right to recover the rent; and *se-
condly*, assuming that the tenants would have been justified in paying to the mortgagees the rents which became due *after* the notice, they were, at all events, liable to pay to the mortgagor, the rents which had accrued due before the notice; and *thirdly*, that the defendant, having received the rents in the character of agent for the bankrupt, could not set up the rights of any other person, to discharge himself. The JUDGE was of opinion, that the defendant, had rightly made all the payments, and was entitled, to retain the residue of the rents, to counteract the accruing arrears of interest, and consequently, that the plaintiffs, were not entitled to recover. A rule *nisi* was obtained for entering a verdict for the plaintiffs, when the following judgment was pronounced by the Court:—

BAYLEY, J. said, I have no doubt, that in point of law, a tenant who comes into pos-

(a) See 9 Barn. and Cress. 245.

session under a demise from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord so long as mortgagee allows the mortgagor to continue in possession and receive the rents; and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. *But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant,* and entitle himself to receive the rents. It is undoubtedly a well established rule, that a lessee cannot dispute the title of his lessor at the time of the lease, but he is at full liberty to shew that the lessor's title has been put an end to. There is another rule of law, (viz.) that the mortgagor cannot dispute the title of the mortgagee. When the mortgagor occupies the premises, he holds under the mortgagee, who may put an end to the rights of the mortgagor.—*Keech v. Hall* (*b*) shews, that where a lease has been granted by a mortgagor *after* the mortgage, and the mortgagee has suffered the mortgagor to continue in possession, though the lessee is not entitled to say that the mortgagor never had interest in the premises, he may say that he had a defeasible title, and that that title has since been defeated, or in other words, that he had such a title only as a mortgagor may have. It is clear, that the mortgagee in this case might have maintained an ejectment against the tenant of the mortgagor, and evicted him, and that such eviction by title paramount would be an answer to an action for rent; and that being so, it seems to follow that it was not necessary for him to go through the form of an ejectment, if the tenants were willing to attorn and pay their rents to him. It was sufficient for him to do any act which put an end to the title of the mortgagor.—Here the mortgagee, by giving notice of the mortgage to the tenants, has put an end to the right of the mortgagor to receive the

rents. At common law, the attornment of the tenant would have been necessary to entitle the mortgagee to the rents; but the effect of the Statute 4 Anne, c. 16, SS. 9, 10, is to place a tenant, as soon as he has notice of the mortgage deed, in the same situation as if he attorned to the mortgagee, with this exception, that he is not to be prejudiced by any act done by him as holding under the grantor, until he has had notice of the mortgage deed. That being so, as the attornment at common law would have related back to the time of the grant, it follows that all the rents due from the tenant (not actually paid over to the mortgagor), belong of right to the mortgagee. Here the defendant claims to retain the rents which were actually due from the tenants at the time when they had notice of the mortgage, as well as rents which became due afterwards. As the tenants were bound by law (after notice) to pay to the mortgagee all the rents not actually paid over to the mortgagor, I think the defendant is entitled to retain those rents in respect of which he made payments to the mortgagees, and that he is entitled also to retain the other sums, in order to meet the arrears of interest which will next become due. He held those sums for the persons entitled by law to receive them, and the mortgagees are those persons. The plaintiffs therefore are not entitled to recover.

LITTLEDALE, J.—I am of the same opinion. *Moss v. Gallimore* (*c*) is not precisely in point, because, there the lease under which the tenant held was granted prior to the mortgage. We must consider in this case how the law is, where the lease under which the tenant holds has been granted by the mortgagor, subsequently to the mortgage. It has been said that a mortgagor who is in actual occupation, is in the nature of a tenant at will, or by sufferance to the mortgagee.—He bears a greater resemblance to a tenant by sufferance than to a tenant at will, but it

(b) *Ante*, vol. i. p. 354.

(c) *Ante*, vol. i. p. 402, id. 385.

is wholly immaterial in this case whether he be one or the other. There is at all events a peculiar relation existing between the mortgagor and mortgagee. *When a mortgage is executed, the mortgagee becomes the legal owner of the land, is entitled to immediate possession, or to the rents and profits.* Any lease granted by the mortgagor (after the mortgage) is void as against the mortgagee. In *Keech v. Hall*, Lord Mansfield says—“When the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense; and, therefore, no notice is ever given to him to quit, and he is not even entitled to reap the crop as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power express or implied, to let leases not subject to every circumstance of the mortgage.” The mortgagor, therefore, has no right to do anything without the consent of the mortgagee. And the latter, although he may suffer the mortgagor to receive the rents for a time, may give notice to the several tenants not to pay them to the mortgagor, and thereby determine the authority of the latter to receive them; and any tenant who pays rent to him after that notice, does so at his peril. It is said that this may be true as to future rents, but that it is not so as to by-gone rents. The same principle, however, applies to both.—The mortgagee cannot, indeed, distrain or maintain an action for the by-gone rents which accrued due before he gave notice to the tenants, because, before that time, there was no privity between him and the tenants. But the notice, by force of Stat. 4 Ann. c. 16, operates as an attornment of the tenants, and when they attorn they become tenants to the mortgagee, and at common law that attornment would have related back to the grant so as to entitle the mortgagee to all the rents from the time when the deed was executed. A new tenancy is then created as between

mortgagor and mortgagee, the latter becomes entitled to all the by-gone rents. All those who come in under the mortgagor are, strictly speaking, trespassers. In ejectment, the plaintiff might declare on the demise of the mortgagee, and the accruing rents being in the nature of mesne profits, might be recovered by the mortgagee from the day when he gave notice of the mortgage to the tenants. And if the mortgagee might, after bringing an ejectment, recover those rents in an action for mesne profits, it is perfectly clear that he is entitled at law to receive them without bringing any ejectment. Here the defendant received them from the tenants, and had not paid them over to the mortgagor when the tenants had notice of the mortgage from the mortgagee. The mortgagee is not entitled to recover qua mesne profits, the by-gone rents actually paid over to the mortgagor, because he suffered the mortgagor to remain in possession and to receive the rents; but as to those not actually paid over, he is entitled to recover them. As to them he may say, that the tenant is not justified in paying them over to the mortgagor, and that the latter has no authority to receive them. And as to the accruing rents, there has been in this case that which is equivalent to an eviction by title paramount before those rents became due, and that will be an answer to any action for rent by the mortgagor. It seems to me, therefore, that the mortgagees, by giving notice of the mortgages to the tenants, entitled themselves to receive the by-gone as well as the future rents. The rule for entering a verdict for the plaintiffs must, therefore, be discharged.

PARKE, J.—I agree that this rule ought to be discharged. The question presented for our consideration is, whether the plaintiffs ought to recover rents due before, and since the notice by the mortgagees; the defendant having either received, or being, as tenant, liable to pay such rents to some person. It is contended, that the defence

amounts to a plea of *nil habuit in tenementis*, of which the defendant cannot avail himself as to the house of which he is tenant, nor can he be in a better situation as to the others. It is undoubtedly true that a plea of *nil habuit in tenementis* is no answer to an action against the tenant at the suit of his landlord; but eviction by title paramount is a good plea to an action for rent which accrued due subsequently to such eviction, and the defence in this case bears more resemblance to the latter plea. That which has been done by the mortgagee is rather in the nature of an eviction by title paramount. *Sapsford v. Fletcher* (*a*), and *Taylor v. Zamira* (*b*), are cases very like the present. In the first mentioned case it was held, that it was a good plea to an action for rent, that before the rent became due the ground landlord threatened to distrain for rent due from the lessor, and that the under tenant paid him the rent to save his own goods. This was considered to be a payment by compulsion, though there was no actual distress. In *Taylor v. Zamira* it was held, that to an avowry for rent the plaintiff in replevin may plead payment of an annuity, secured out of the lands demised previously to the demise, for the arrears of which the grantee had threatened to distrain. Gibbs, C. J. there seems to have considered what had taken place as equivalent to an eviction. He says, "In every plea of eviction there is an averment that the lessor had not a perfect title when he demised, but that fact alone will not suffice; to constitute a plea, to it must be added the fact that the lessee was in consequence *evicted*; the whole is a defence. The plaintiff's counsel argues that because *nil habuit in tenementis* alone is not a defence, therefore it cannot be part of any other defence. The question is, whether the fact that the tenant was called *on by the annuitant, under a threat of distress, to pay off*

the arrears of the annuity, and did pay them off accordingly, being added to the other fact of the lessor's defect of title, be not a good plea." The Court decided that it was a good plea. Upon the same principle, in this case, the fact that the tenant was called on by the mortgagee to pay the interest of the mortgage, under a threat that he would put the law in force, and did pay it accordingly, being added to the other fact of the mortgagor's defect of title, seems to be a good plea to an action by the mortgagor for so much rent as the tenant was bound so to apply; the fact of the mortgagee being entitled to the possession would not. Now the tenant was bound to apply all the rents in arrear at the time of notice, as well as that due afterwards (as long as the interest was unpaid); for by an ejectment against him, and a subsequent action for mesne profits, the mortgagees might certainly have recovered those rents from the tenants; and it cannot be necessary, and it would be dangerous to the interests of the mortgagees and tenants, to hold that the former are bound to take those expensive steps, when the latter is willing to pay without. A complete and satisfactory answer to this action is, however, to be found in the peculiar relation of mortgagor and mortgagee. In *Moss v. Gallimore*, Lord Mansfield says, "A mortgagor is not, strictly speaking, a tenant at will to the mortgagee, for he is not to pay him rent. He is only *quodam modo*. Nothing is more apt to confound than a simile. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee; but the mortgagee may put an end to this agreement when he pleases." The mortgagor may be considered as acting in the nature of a bailiff or agent for the mortgagee: his receipt of rent will, therefore, be good until the mortgagee interferes, and he may recover on the contracts he has himself entered into, in his own name, with

(a) 4 T. R. 511.

(b) 6 Taunt. 527.

the tenant. But where the mortgagee determines the implied authority by a notice to the tenants to pay their rents to him, the mortgagor can no longer receive or recover any unpaid rent, whether already paid or not. On this ground I am of opinion that this action, which is in effect brought by the mortgagor, cannot be supported. Since the notice the plaintiffs have ceased to have a right to receive any of the rents. The case of *Alchorne v. Gonune (d)* is *an authority the other way*; but the pleadings in that case do not, perhaps, sufficiently raise the question now under consideration; and by the form of those pleadings the attention of the Court seems to have been principally directed to the consideration of the effect of the alleged attornment, by the tenant to the mortgagee, which, in the view I have taken of the subject in this case, appears to me to be immaterial, the notice given by the mortgagee being sufficient to determine the authority of the mortgagor, and to determine the mortgagee to receive, whether the tenant attorned or not. I think, therefore, the mortgagor was not, and his assignees, the plaintiffs, are not entitled to any unpaid rents (at least until the interest due to the mortgagee is paid), and the tenant may keep the accruing rent for the purpose of paying the accruing interest, consequently the plaintiffs cannot recover; and the rule was discharged.

(To be continued.)

PROBLEM I.

VOL. 2.

—
WAYS.

What is the remedy for injuries to, or disturbance of, a Right of Way?

(d) 2 Bing. 54.

Imperial Parliament.

ENGLAND.

HOUSE OF COMMONS,
April 25.

ABOLITION OF THE INFERIOR ECCLESIASTICAL COURTS.

Mr. HAWES moved for the abolition of the Jurisdiction of all inferior Ecclesiastical Courts, and in doing so, he detailed the case of a poor man then confined in Carmarthen gaol, in consequence of the decree of one of those Courts, who had petitioned the House on the subject, on the 20th February last, which it is unnecessary for us to go into in our limited space. We think it sufficient to say that the petitioner, David Jones, lived in the village of Llanon, and was elected to fill the office of churchwarden conjointly with Mr. Rhys Goring Thomas. The petitioner stated that Mr. Thomas had never discharged any of the duties of churchwarden, and had never on that account been cited, like the petitioner, to appear before an Ecclesiastical Court for neglect of duty. It appeared that in the performance of his duty, as churchwarden, David Jones called a vestry meeting, and asked for a church-rate. About 25 persons attended the meeting, where the question of adjournment was moved and successfully carried. Mr. Ebenezer Morris, the Vicar of the parish, sent the petitioner a written notice on the 25th of May last, to the effect that he must provide bread and wine for the sacrament by the 11th of June, to which notice the petitioner replied, that he had no funds for the purpose, and that he was too poor to provide them at his own cost. The petitioner was thereupon cited to the Consistorial Court of the Bishop of St. David's, and proceedings were commenced against him, and he was condemned for contumacy, and, on a process issuing from the Court of Queen's Bench, arrested and incarcerated in gaol, where he was still confined. Mr. Hawes hoped that the house would consider the injustice that had been perpetrated, and moved, "that in conformity with the recommendation of the Commissioners on Ecclesiastical Courts in England and Wales, the jurisdiction of all the inferior Ecclesiastical Courts should be abolished without delay."

Dr. LUSHINGTON addressed the house, and said that before he proceeded to the facts of the case he must show what had been done by the Ecclesiastical Commissioners, and what was the reason of the delay which had taken place. It had been recommended by that commission that the whole of the jurisdiction possessed by the Ecclesiastical Courts which was of a criminal nature should be utterly and altogether abolished. If that proposition had been carried into more speedy execu-

tion, the house would have had the good fortune to escape the present discussion. The object of the Ecclesiastical Commission was to take away from these courts all jurisdiction except in civil matters, and to leave them jurisdiction in civil matters only, so far as related to marriages and wills. In addition to this, seeing that there existed at this present moment 360 courts exercising various degrees of jurisdiction, it was proposed and agreed that all those courts should be abolished, with the single exception of the Prerogative Court of Canterbury. He found, however, that an objection was raised to this part of the plan by the Member for the town of Cambridge. He differed from his hon. and learned friend upon this part of the question, for it was his opinion that that abolition would not have entailed an additional six-pence upon the country. The report of the commission was presented in 1832, but nothing was done in that year, as the Reform Bill fully occupied the attention of Parliament. In 1834 a message founded upon the report of the commission was introduced into the house, but could not be carried through it, owing to the violent opposition with which it was received. In 1835, when Sir R. Peel was in office, he introduced a bill with very slight alterations from the measure which had been brought forward by the former Government, but he did not remain long enough in office to carry it through the House. Now, he was certainly very anxious that the recommendations of the Ecclesiastical Commissioners should pass into a law, and finding that it would be difficult to introduce a measure founded upon them into the House of Commons, it was determined to send it to the House of Lords, who, in the year 1836, declined to pass any such measure. In 1837 the bill was again introduced in the Lords by the Lord Chancellor; the measure was referred to a select committee, which sat for ten weeks, and considerable difference of opinion prevailed among its members. It was however understood, that the bill had received the concurrence of the select committee, subject to certain alterations. Those alterations might be for the better or for the worse, but the measure, he understood, made provision for the two cases which had been referred to, and he had been informed that it was the intention of Her Majesty's Government to bring it in, but that it was deemed expedient that the Clergy Discipline Bill should be passed first. The Clergy Discipline Bill was thrown out last session, but that bill had been again introduced in the Lords, with some modifications, and was now pending there. As soon as that measure was sufficiently far advanced to afford a prospect of its passing into law, it was the intention of Government to introduce an Ecclesiastical Courts Bill. He would now proceed to the circumstances of the case which had

caused the present motion to be made. He would take the facts as they had been represented on the one side and on the other, and he would state to the House candidly what his opinion was. It appeared that the person whose imprisonment was the subject of complaint had been elected churchwarden. He was a Dissenter, but he had a perfect right to serve that office. It had been alleged, that there was no excuse for his conduct, as he might have served by deputy; but that ground of inculpation was insufficient, because, frequently, a deputy was only to be had by payment. He must, however, say that he thought there ought to be no compulsion upon any Dissenter to serve. It appeared, further, that this person was called upon to furnish the sacred elements for the communion table. Now, if he possessed adequate funds, it was his duty to furnish them; nay, he was bound to do more, he was bound to take all legal methods to put himself in possession of adequate funds. He must, however, observe, that the statement which had been put into his hands by the Hon. Member for Carmarthenshire and the proceedings did not agree. There was a great difference between the statement made by the Hon. Gentleman in that House and the proceedings in Court. What the Hon. Gentleman had stated might be very true, and Mr. Ebenezer Morris might be perfectly justified in what he had done, but on the face of the proceedings that did not appear. He had perused the opinions of Dr. Addams and Dr. Haggard on the subject. In those opinions he concurred. But the great evil was this, that the proceedings taken were not according to law. If they had been instituted before Sir H. Jenner in the shape and manner in which they had been conducted in the inferior court, they must have been set aside, and the defendant would have been let off with costs. The great evil was, that these courts were presided over by clergymen, who knew nothing of law, and nothing of the subject matter of the causes which came before them, and consequently for all the purposes of justice these courts were utterly and altogether inoperative. He agreed in the present motion, for when he saw the mistakes made, and saw that in consequence of those mistakes a man had been incarcerated who ought never to have had any punishment whatever,—when he saw practitioners so shamefully ignorant, and yet that there lay no appeal from these courts, and, consequently, that a party wronged was barred of all remedy, he was heartily desirous of abolishing courts which were the instruments of such great and grievous injustice. He entreated the House to reform them, first, for the sake of justice; secondly, for the sake of their own characters; and lastly, for an object which he had nearly and dearly at heart, in order to remove all occasion for that bitterness

of spirit which disgraced and debased religious differences in this country.

Mr. RICE said, in his opinion it was simply nothing more than an affirmation of the resolution of the Ecclesiastical Commissioners. The delay which had taken place in carrying that resolution had been fully explained by his right honourable and learned friend, and it was therefore unnecessary for him to offer any defence on the part of Government. However, after the statement which had been made by his right honourable friend as to the proceedings which were necessary to carry into effect the views of the Ecclesiastical Commissioners, he trusted the honourable Member for Lambeth would consent to omit the two last words of his motion, namely, "without delay." He asked for that omission, not on account of the Government, but merely with a view to the convenience of the House. It would be useless to retain those words, unless the honourable Member was prepared to bring in a bill at once. No one agreed more heartily than he did in the opinion, and he was led to the conclusion, by all the information that he had obtained on this subject, that the whole question of ecclesiastical jurisdiction stood in need of a thorough reform. There were two great motives for this reform; one was an amendment of the whole of the ecclesiastical judicature, and the other the taking away of the causes of dissension between Churchmen and Dissenters, which were productive not merely of inconvenience to the Church, but of inconvenience and prejudice to Dissenters. He was convinced that the duties of both clergymen of the Establishment and Dissenting ministers would be better discharged if they were left to pursue their respective avocations in peace, and if the causes of the present heartburnings and contentions between them were removed. On these grounds, on Church grounds, as well as more general grounds, he should give his hearty concurrence to the motion of the honourable Member.

The question was then put, and the motion, as amended by the Chancellor of the Exchequer, was agreed to.

Law Reports.

COURT OF CHANCERY.—April 26.

HOWARD v. PRINCE.

APPEAL.

Practice—New Rules.

This was an Appeal against an Order of the Vice-Chancellor which involved a question of practice arising upon the new rules. The bill was filed in October, 1836, and an answer put in December following. In June, 1837, the defendant made a motion to dismiss the bill as

against him, when the plaintiff undertook to speed the cause. Nothing further was done until February, 1839, when the Vice-Chancellor granted a commission to examine witnesses, this the defendant contended was irregular.

The LORD CHANCELLOR said one defendant had nothing to do with the other, if the case was complete against him; and directed the order to be discharged.

VICE-CHANCELLOR'S COURT.—April 29.

HYDE v. GREAT WESTERN RAILWAY COMPANY.

Joint-Stock Companies—Purchase money may be paid into Court notwithstanding the Act directs that it should be paid into the Exchequer.

Mr. Knight Bruce moved to dissolve an injunction, obtained on the 23rd of April (a), restraining the defendants from proceeding with their works on an estate belonging to the plaintiff at Hyde-End, in Berkshire, until they had paid a sum of 1000*l.*, for which they had contracted to purchase the land. The main ground on which it was now sought to dissolve the injunction was, that at the time it was granted the Court had not been informed that the Company had made an application to the plaintiff for an abstract of the title, but that it had not then been delivered. An affidavit by one of the agents of the Company was also read to the Court, in which it was stated the Company had agreed to give so large a sum as 1000*l.* for the property, on condition of immediate possession being given them. The Company had, however, no objection to pay the money into Court at once, and have a reference to the Master on the subject of title.

Mr. Richards supported the injunction. The Company had, in violation of their Act of Parliament, taken possession of Mr. Hyde's land, and were proceeding to cut it to pieces and render it valueless, without making any payment or even tender of the purchase-money for which they had stipulated. The agreement did not contain one word about taking immediate possession; and if the Court would give time to answer the affidavit of the defendants' agent, who stated such was the understanding, it would receive a most unqualified contradiction. The agreement was made on the 6th of the present month, on the 15th the Company asked for an inspection of title, and, without waiting for any answer, on the 17th they took possession, and began laying waste the estate. The very taking possession was an acceptance of title, if such a frivolous objection required any answer at all. The Com-

(a) See ante, vol. i. p. 405.

pany said they had no objection to pay the money into Court, but by the regulation prescribed by the Act they knew it would be several years before the plaintiff could get it out.

The VICE-CHANCELLOR said, had he known at the time the *ex parte* application was made that the abstract of title had been applied for by the Company, and not delivered to them, he did not think he should have granted the injunction. The act certainly required the money should be paid into the Exchequer in cases where the title was not shown to the satisfaction of the Company; but he could not see that it would not be equally secure in this Court. On payment, therefore, of the purchase-money into this Court he ordered the injunction to be dissolved.

ROLLS COURT.—April 27.

PRITCHARD v. FOULKES. Practice—Interrogatories.

Mr. Cooper moved that the depositions of Lewis and Bowen, two witnesses sworn to cross interrogatories, might be suppressed for the want of the signature of counsel to those interrogatories. It had been suggested that great inconveniences might arise from requiring cross interrogatories on examinations in the country to be so signed, as, to procure the signature, it would often render an adjournment necessary, and there might not be time for it. The answer to this suggestion was, that consistently with the oath of the commissioners there could be no communication between them and the parties respecting the examination, and a fresh interrogatory could not be found necessary, in consequence of the depositions which were kept secret, but only in consequence of some omission in the original interrogatory. In "Andrews v. Brown," Precedents in Chancery, p. 385, one of the points decided was, that where interrogatories were exhibited in the Examiner's Office, either party might exhibit additional interrogatories, but on the contrary, where there was a commission, no new interrogatories could be exhibited without leave of the Court on motion. The reason of the distinction was that the examiner was the sworn permanent officer, and therefore confided in by the Court as impartial, and not likely to expose the depositions or to have communications with the parties respecting them; but the Court did not place the same confidence in the commissioners, although they were sworn not to divulge the depositions before publication, and would not permit fresh interrogatories to be furnished to them without special leave. The practice was stated in "Hinde's Chancery Practice," p. 345. Lord Coke, in his 4th Institute, p. 278, says, "Neither commissioner nor examiner ought to discover any of the depositions before publication, nor after examination begun to confer with

either party, or to take new instructions." He submitted that the depositions should be suppressed, and the costs of the application granted.

Lord LANGDALE.—The interrogatories were used without having been signed by counsel?

Mr. Cooper.—Yes; they were prepared by the defendants on the spot in the country.

Mr. Pemberton.—There was an old rule, giving the party opportunity to correct the irregularity, by application to the Clerk in Court without coming to the Court at all.

Mr. Cooper.—The Clerk in Court had no authority to suppress the depositions.

Lord LANGDALE granted the order with costs.

ATTORNEY-GENERAL v. MAYOR OF NEWBURY.

Sequestration—Practice.

Mr. Cooper, for the relators, moved that the sequestrators under a writ of sequestration might sell by auction the goods and chattels they had taken of the defendants under the writ, and pay the proceeds into the Bank, in the name of the Accountant General, to the credit of the cause. It was decided by Lord Thurlow, in "Cavil v. Smith," 3 Brown, 362, that sequestrators had liberty to sell the personal property of a Corporation seized by them. It did not appear in that case whether there was or was not notice. In "Mitchell v. Draper," in 9 Vesey, jun. 208, Lord Eldon directed a similar motion to stand over for notice. Here notice of the application had been given, and there was an affidavit of the sequestrators that they had seized some of the effects of the Corporation, such as the picture of Jack of Newbury, and other pictures in their council-chamber, but not enough to pay 900*l.*, the sum ordered to be levied.

Order granted.

QUEEN'S BENCH.—April 23.

Sittings in Banco.

STOCKDALE v. HANSARD.

Libel.—*Breach of Privilege—Whether the House of Commons may order the publication of their proceedings, which contains matter of Libel against individuals, and that it is a high breach of privilege to bring such Libel in question before any Court of Judicature.*

We find the following observations upon this highly important case in WESTERN's COMMENTARIES, p. 329.

"The publication of any matter tending to disturb the public peace, is a criminal offence, even should the matter relate to foreign governments and magistrates; because, nations at peace with each other may be provoked to actual hostilities

by the conduct of a subject of one nation, who, by his publications, defames another nation, or its government or magistrates. This was determined by Lord Ellenborough in the case of Pelletier, who was tried in the Court of King's Bench for a libel on Napoleon Buonaparte, in which his Lordship held, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and be treated as a libel; and particularly where it has a tendency to interrupt the amity and peace between the two countries. It was (as the author assumes) upon this principle, of preserving the public peace, and as a part of the common law of the land, that the present Lord Chief Justice of the Court of Queen's Bench ruled, in the recent action brought against the printers of the Reports of the House of Commons, for an alleged libel (contained in those Reports), that no man is privileged to publish, and offer for general sale, matter which is libellous, notwithstanding such matter be printed for a Report to the House of Commons. Upon this decision, the House of Commons instituted a Committee of Privileges, who made a Report, confirming the right of the House of Commons to authorise a general publication of its Reports (a).

It has always hitherto been held, that it is *not* a libel to publish a correct copy of the Reports or Resolutions of the two Houses of Parliament, or a true account of the proceedings of a Court of Justice. "For though," as Mr. Justice Lawrence observed (b), "the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public, that the proceedings of Courts of Justice should be immediately known. The general advantage to the country, in having these proceedings made public, more than counterbalances the inconvenience to the private person, whose conduct may be the subject of such proceedings."

The plaintiff brought an action against the defendants, who are the publishers to the House of Commons, for a libel reflecting on his character. The libel was contained in the reply of the Inspectors of Prisons and the Report of the Committee of the House of Commons. The defendants pleaded that they had published the documents by the command of the House of Commons.

Mr. Curwood thus addressed the Court for the plaintiff. My Lords, I do not approach the

case without great apprehension and agitated feelings, because I feel it is a case that may involve the liberties and property of the subject to a great extent. The question is, whether the imperial majesty of the law shall bow to the decision of the House of Commons—that, my Lords, is the real question. The case came before your Lordships in the shape of an action for a libel, which libel is contained in a report presented to the House of Commons, and published by the authority of the House. To this there is a plea, stating an Act of Parliament, which refers the inspection of prisons to certain commissioners, who were to make their report to her Majesty's Secretary of State, to be laid before the House of Commons. It further states that the House of Commons may order that any of those proceedings which they think necessary for public inspection shall be published and circulated for the use of the public in general, and upon these grounds they justify the publication of the libel in question, and when the action is brought they state that they are sole judges of their privileges, of their nature, and their extent, and that it is a high breach of privilege to bring them in question before any court of judicature.

Lord DENMAN.—That does not appear in the plea.

Mr. Curwood.—My Lords, I am now stating what the observations of the House of Commons were which form the justification set forth in that plea. That is the question now to be tried, because to that plea there is a demurrer, which amounts to this, that the House of Commons had no authority to order the publication of the libel. Now, my Lords, that being the case, I apprehend we have to consider three questions. First, whether a party is guilty of any offence, or has not a right to bring an action at law to redress any injury he supposes he may have sustained? Secondly, If he has that right, whether there is any power in the country, except the legislature, that can abridge him of that right. And, thirdly, whether the House of Commons can maintain that assertion of theirs, that they themselves are the sole judges of the extent of their own privileges, and that a court of law cannot take cognizance of them. My Lords, we must first look at their own report to see upon what they found this assumption, and here I would take leave to say, that with respect to their resolutions at various times, what they have assumed to be their privileges is revolting to common sense and common justice, and never can be supported in any court of common law where law has any power whatever.

They allude to what is called the law of Parliament, and say, that as Parliament is superior to any other court, no inferior court can judge of their case. I take leave to say that there lies the great fallacy. Though by common parlance the

(a) See *Burdett v. Abbott*, 14 East, Rep. 1, the judgment in which case was affirmed, see 4 Taun. 401; and in the House of Lords, 5 Don. 165; also the case of *Burdett v. Coleman*, 14 East Rep. 165, by the power assumed by the House of Commons.—*Com.*

(b) *Rex v. Wright*, 8 Term Rep. 203.—*Com.*

privileges of the House of Commons are called the law of Parliament, yet they are not the law of Parliament in the sense in which the words were used in the case on which they found their right. They cite from Lord Coke, in the case of "Thorpe," where the question was put to the judge, what was the law of Parliament? The judges answered, that the law of Parliament was above them; they were not wont to give answers to those questions, because that which was not law they might make law, and that which was law they might make no law. That is very correct when applied to Parliament, but it is not correct when applied to any superior branch of the Legislature. Anciently the whole Parliament—King, Lords, and Commons—were a court of justice, of appeal in the last resort, and no court when they sat could controul them; and the dicta of the judges were, that what was law they could make no law, and that what was not law they could make law. But the case is far different now. Is it now to be said that any house can make laws of itself, or that the King can make laws of himself; and the very foundation upon which the House of Commons ground their assumption must fail them? Both houses consider their privileges as the law of Parliament, and this will follow as a matter of course. One house may declare that to be the law of Parliament which the other house may declare not to be so. When I say they may do so, they have done it, in the case of "The Queen v. Patey," where a court of law and the House of Lords said the subject had a right to bring a writ of error. The House of Commons said they had no such right. The next question is, whether that right can be questioned in this court when it comes before it. In considering this point, I shall not go through many of the cases, because I am ready to admit that many of them are pointless. My friend may attempt to ground his right on the several resolutions of the House of Commons, but I say they cannot make law for themselves, and cannot withdraw from the jurisdiction of the superior court; and if they could, the mischief would follow that they would soon absorb the whole of the legislature in their own hands. That the courts of law on several occasions have used language renouncing their rights, I am sorry to confess. My Lords, most of the cases are collected in Mr. Pemberton's book. The privilege of the House of Commons was as much the common law of the land as any other law, and the judges of the land are to pronounce upon that law as well as upon any other. In the case of "Barnardiston v. Somers," a court of law decided against the claim of privilege set up by the House of Commons. The plaintiff had brought an action for a false return in Cromwell's Parliament, and Lord Hale decided that the Court had the power to enter into the question, and he used

these particular words—"He thanked his God that he had not left his cushion (as the bench was called in those days) before he had an opportunity of declaring his mind on the subject." In the case of "Benyon v. Evelyn," an action was brought, to which the defendant pleaded the Statute of Limitations. The replication was, that he could not have brought his action sooner, because the defendant was a member of Parliament, and therefore he could not sue him; but it was determined that the plea was bad, because, although a member of Parliament could not be arrested, yet he might be sued. The report of the committee states an authority as making for them in the case of "The King v. Wright," 8 T. R., and gives a dictum of Lord Kenyon, which Lord Ellenborough subsequently calls an extravagant ruling. The report of the House of Commons, known as the green bag report, had been published by Wright. Horne Tooke moved for a criminal information; the defence was, that it had been published by order of the House of Commons. Upon showing cause, Lord Kenyon said, that what was published by the House of Commons, could never have been considered as a libel. He certainly was a great lawyer, but Lord Kenyon had not the statesmanlike mind of Lord Mansfield, or the enlightened knowledge of Lord Ellenborough, who called it an extravagant dictum, and said he should be ready to examine the pretensions of the House of Commons, if they came before him judicially. These are the instances in which courts of law had taken upon themselves to probe and examine how far the privileges of the House of Commons shall extend; but I have no doubt my learned friend will produce other instances. There is one case, my Lords, which I have not mentioned, because my friend will attack it. It is the case of Sir W. Williams: he was the Speaker of the House of Commons, and by his order Dangefield's narrative was printed. An information was filed against him, and a fine of £10,000 was put upon him. That was in a time of confusion, of discord, and of civil war; but when the Revolution took place, that judgment was reversed, and the Attorney-General, who filed the information, was ordered to pay the £10,000. My Lords, I admit that precedents of those times are not worth one farthing. "The King v. Thorpe" is another case. Thorpe was Speaker of the Lancastrian Parliament, and he fined the Duke of York £1,000., and that was reversed when the York party were in the ascendancy; and the judges of those days, if they valued their heads, did wisely in not giving their opinion on such a subject. One faction was triumphant one day, and the other party the next. My Lords, with respect to the proposition that any person had a right to bring an action for redress of a grievance, I apprehend I need not argue that for a

moment. Then, if he has a right, has the House of Commons, by their sole power, a right to take it away? The right to bring an action was discussed very much in the Aylesbury case, where the House of Commons, with much more show of reason, put forth the claim that they have put forth in this case, because they said,—“We have the sole right of judging of elections;” but though, says Lord Holt, they have that right, yet the right of the elector to vote is a franchise belonging to his freehold, and that is a question to be decided at law. At law that question was decided; but, as your Lordships will recollect, eleven judges were against the opinion of Lord Holt. The House of Lords was appealed to as the *dernier ressort*, and that House decided in favour of Lord Holt. Supposing that the courts of law have a right to take cognizance as to the extent of the privileges of Parliament, the question will be, does such a privilege exist as is put forth? Has the House of Commons the privilege to permit others to publish whatever they please for general circulation, and for money? Can they authorize this to be done with impunity? They have attempted to claim this as an ancient and known privilege of the House of Commons. Looking at their report they begin this claim of privilege in 1641. It was a well known historical fact, that about that time Charles I. and his Parliament began the dispute, which brought on a civil war, and which ended in the death of that monarch. There is nothing so likely to corrupt the human mind as uncontrolled power—that uncontrolled power ended in a more dreadful tyranny than had been overthrown. This was the period at which that privilege begins, and it was the practice then to appeal to the physical force instead of the sense of the nation. At that moment, of course, when the popular fervour ran high, there would be a large party in favour of Parliament. Many other claims have been set up with the Parliament as privileges, some of which are perfectly ridiculous, some notoriously against law, some greatly tyrannical; and yet if they are to be the sole judges of the extent of their own privileges, every one of those privileges was well established. My Lords, I am sorry I am not able to read to you, but if your Lordships will permit my friend, Mr. Carrington, to read the cases to your Lordships, they will shew what then took place.

(To be continued.)

*April 27.
Sittings in Banco.*

REGINA v. LUMSDAINE.

Poor Rate.—Whether “Stock in Trade, yielding a Profit,” is liable to be assessed.
This was a Special Case, sent by the justices of the Dorsetshire Sessions to this court, in order to

obtain the opinion of the judges upon the question, whether “Stock in trade, yielding a profit,” was liable to be assessed to the Poor-rate. The rate had been made for the parish of Wimborne Minster, in Dorsetshire; no general practice had been adopted, but sometimes stock in trade had been included, and at other times the rate had been made without it; but in the last instance the rate had included it. A rule had been obtained to shew cause why the rate should not be quashed.

The Attorney-General shewed cause, and contended that this last rate was good. They admitted that under the old law stock in trade was liable to be rated, but that the statute of the 6th and 7th William IV., c. 96, had exempted stock in trade, and had, in fact, repealed the statute of the 43rd Elizabeth.

The COURT, however, could not consider that it was the intention of the Legislature to repeal an act of Parliament without using express words to that effect. By expressing that opinion at the earliest period, it gave the Legislature an opportunity of altering the law, if such had been their intention; and Mr. Justice Coleridge said, that if the framer of the act had intended directly to do that which he would not risk the passing of the bill by expressly stating, the Court would not render him any assistance. The rule for quashing the rate must be made absolute.

COURT OF BANKRUPTCY.—April 27.

*CASE OF JOHN SEBASTIAN RENNICK.
Abolition of Imprisonment for Debt Bill.
Sec. 8.*

Bankruptcy Bail Bond. (a)

Mr. Clarkson applied, under the 8th Sec. of the 1 and 2 Vict. c. 110, on the behalf of Messrs. Coster and Co. of Guildhall-yard, who were creditors of one John Sebastian Rennick, a trader within the operation of the bankrupt laws. The statute to which he referred was that of the “Abolishment of Imprisonment for Debt,” and which set forth the mode of declaration of bankruptcy. That clause enacted, “that if any single creditor, or any two or more creditors, being partners, whose debts shall amount to £100 or upwards, or any two creditors whose debts shall amount to £150 or upwards, or any three or more creditors whose debts shall amount to £200 or upwards—if any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in Her Majesty’s Courts of Bankruptcy, that such debt or debts is, or are, justly due to him or them respectively, and that such debtor as he or they verily believe

(a) See James Cathie’s case, ante Vol. 1. p. 152.—See also 2 Hall, id. p. 92.

is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts, and if such trader shall not, within 21 days after the personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond in such sums and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such actions shall have been or may be brought according to the practice of such court, or within such time or in such manner as the said Court or any judge shall direct, after judgment shall have been recovered in such action,—every such trader shall be deemed to have committed an act of bankruptcy on the 22nd day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise.” In the case to which he called his Honour’s attention, the affidavit required by the act had been made, and in pursuance of the affidavit they had received a notice from Messrs. Mitchell and Hill, representing themselves as the solicitors for the trader within the meaning of the act, which set forth that Robert Passenger, of 95, Union-street in the borough of Southwark, potter and glass manufacturer, and Thomas Upton, of Islington, gentleman, with Rennick, the trader, would appear before Mr. Commissioner Fane, or other commissioner, on this, the 27th day of April, and enter into a bond to pay such sum as had been recovered under the action brought by Messrs. Coster and Co., and that they would attend at 22 o’clock to justify the bail. He attended on the behalf of Messrs. Coster to oppose the justification, and in accordance with the rule, as he understood, of the court, he had waited the usual half-hour. It was now half-past 12, and the parties had not presented themselves. He understood his Honour was the only commissioner in attendance. He had now, therefore, to appeal to his Honour as to the necessity of the creditors doing more than they had already done. To-morrow would be the 22nd day after the filing of the affidavit, and the parties who represented the trader would not then be in a condition to justify the trader to enable him to escape from the operation of the bankrupt law.

Mr. Commissioner HOLROYD was not aware of any specified practice as to the half hour alluded to by the learned counsel.

Mr. Clarkson said they had in their notice appointed 12 o’clock.

Mr. Commissioner HOLROYD said he was sorry to make any man a bankrupt. The latest moment should be given. The parties might accidentally be absent.

Mr. Clarkson.—Then in that case the attorney is accidentally absent, and his clerks also, so we have no communication on the subject. I wish to know the course that is to be adopted, as it is of importance to my creditors as part of the public.

Mr. Commissioner HOLROYD asked where the solicitor lived?

It was said in London-street, Fenchurch-street.

Mr. Clarkson.—Why, that’s close by; so there is less excuse for their stopping away.

A communication was then made with the solicitors, and it was stated that the debt would be paid during the day.

BAIL COURT.—April 29.

REGINA v. JONES.

Writ de Contumace Capiendo.—Whether the Surrogate of a Vicar General has authority to execute it.

Mr. Chilton moved, on behalf of the defendant (*a*), who was imprisoned some time past by a process from the Ecclesiastical Court of the diocese of St. David’s, for having refused in his character of churchwarden, to supply the necessary materials for celebrating divine service in the church of Llanellan, of which the Rev. Ebenezer Morris was rector, for a rule to show cause why the writ *de contumace capiendo*, on which he was committed, and all the subsequent proceedings, should not be set aside, and the Rev. E. Morris compelled to pay all the costs. The writ had been issued upon a *significavit* made by the clerk, surrogate, and representative of the vicar-general, and official of the Bishop of St. David’s. Among the objections to the proceedings under the writ, the principal were, that the *significavit* did not set forth distinctly enough the ground of committal, and that though the vicar-general might make it, yet he should do it in the name of the bishop, and that the surrogate of the vicar-general had no authority whatever to execute such a document.—Rule granted.

COURT OF REVIEW—Westminster, Apr. 7.

Ex parte Terrenest, in Re Poynter, a Bankrupt—Judgment.

Usury Laws—Purposes of the Stat. 3 & 4 W. 4. c. 98.—What is usury upon three months’ bills?

The COURT said, this was an application to

(a) See our Parliamentary Report, “Ecclesiastical Courts.”

prove a debt of £1600. and the question for consideration was, whether or not the transaction was tainted by usury. The bankrupt proposed to borrow a sum by mortgage on an estate. A negotiation took place, and it was arranged that the advance should be made on a promissory note for three months, to be renewable during a period of not more than 18 months, and on payment of interest at 10½ per cent. This was supposed to be sheltered under the 7th section of the 3rd and 4th of Wm. IV. chap. 98, allowing unrestricted interest on bills payable within three months. The facts and contrivance were admitted. The money was advanced on the 9th July, 1835, when a sum of £42. was returned for three months' interest. This first bill was not renewed until three weeks after it became due. Five successive renewals took place, and on the fifth promissory note the present claim was made. The petitioner candidly admitted the facts, alleging it to be a loan on a three months' note. The objection urged by the respondents were—first, that the note was not within the terms of the Act; and, secondly, that if within the act, it was a mere shift to avoid the laws against usury. The purpose of the Act was to allow parties to effect loans on short bills, which was not the object in the present instance. The fifth note was in consideration of a debt bearing interest at 10½ per cent. The notes were framed to enable the party to charge a higher rate of interest than five per cent. The Court was of opinion, it being confessedly a contrivance, that it was usurious, though literally correct. It was an attempt by shift and contrivance to take advantage of an Act of Parliament. The petitioner was not entitled to prove, or to take any benefit from a lien claimed by him, and his petition must be dismissed with costs.

INSOLVENT DEBTORS' COURT—April 26.

JOHN WILLIAMS'S CASE.

*Abolition of Imprisonment for Debt Bill.
As to discharging a Prisoner out of Custody
while his Petition was on the file of the
Court.*

This was an application on the part of the Insolvent, for to be discharged from custody on mesne process, which order could not be made while his petition remained on the file of the Court. He had been a prisoner since 1828, and his case had been adjourned for him to obtain the consent of three-fourths of his creditors to his discharge under the old act. He had been in the rules, but had got out of custody: he then applied to have his petition dismissed, but his application was refused. He then went into custody

again, and applied to be discharged under the new act, but being in custody on mesne process, his application was not granted.

The COURT, after some observations on the peculiarity of the case, granted a rule *nisi* to dismiss the petition, and ordered the creditors to be served with notice.

REVIEW OF NEW BOOKS.

THE MONTHLY LAW MAGAZINE AND POLITICAL REVIEW, Vol. 4, No. 16, May 1839. London : J. Richards and Co. 194, Fleet Street.

We have selected this Number from among other "Mags." for the present month, as the most interesting to our readers; indeed, we were before so well satisfied with the reports given in this work, that we have quoted it as an authority, and we were the more inclined to this, from the fact, that Sir H. JENNER, in alluding to the judgment of the Judicial Committee of the Privy Council, given by the late Mr. BARON PARKE, in the case of *Barry v. Butlin*, reported in the Monthly Law Magazine, observed that the Court was ready to believe *the Report did contain the true and exact substance and effect of the judgment which was delivered, if not in the very words in which it was delivered, and therefore the Court would read it as reported in that book.* Having said thus much in praise of the character of this Magazine, we will turn our attention to the Number before us. POLITICS we eschew, and with every good feeling we could wish that the Editor of this publication would do the same, and instead of the "House of Commons," and the "Police," give his readers something of a quality more suited to *their* taste, and more adapted to the title of his Magazine. There are many pretenders to a knowledge of the *Science of Politics*, while but few, there are who understand it, and those who really do, turn from it, with aversion—nay, with disgust. The knowledge of man, on which such a science, with its preliminary *axioms* and *definitions* is to be grounded, has

hitherto remained surprisingly imperfect; man is very little known to himself. Law and politics seldom agree well together.

In the present number, we observe an article "on Sheriff's Poundage, and the Law of Costs, touching Writs of Execution issued against the Person," which merits attention. Also, an article, "on Degrees in Secondary Evidence, or a Discussion of the Question, whether there are any, and what, Degrees of Secondary Evidence recognised by Law;" in which the writer makes the following enquiry.

Is a party, who has been pronounced by the judge entitled to give secondary evidence, to be allowed to have recourse to any sort of evidence he may think proper; or are some kinds entitled to so much more credit than others, that the party shall not be permitted to resort to the latter, unless unable to produce the former?

The information to be gathered on this subject from the text writers, and early cases, is scanty and far from satisfactory,—although some of them seem to take for granted the existence of a classification of secondary evidence into degrees. Mr. Starkie, for instance, thus expresses himself (Stark. Ev. 341. 2d ed.), "after proof of the due execution of the original, the contents of the instrument should be proved by means of a counterpart—if there be one, for *this is the next best evidence*, and it seems that no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced." (R. v. Castleton, 6 T. R. 236. Thurston v. Delahay, Hereford Assizes, 1744. Bull. N. P. 254. Semb. R. v. Kirkby Stephen Burr. S. C. 664. Villiers v. Villiers, 2 Atk. 71. Fisher v. Samuda, 1 Camp. 192. Waller v. Horsfall, ib. 501. Leibman v. Pooley, 1 Stark. R. 167. Doxon v. Haigh, 1 Esp. 409.) even though such counterpart were not stamped. (Munn v. Godbold, 3 Bing. 292.) If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy, from having compared it with the original. (Doxon v. Haigh, Eden v. Chalkhill, 1 Kel. 117.) If there be no copy, the party may produce an abstract, or give in evidence a deed executed by the adversary, in which the instrument to be proved is cited, (Burnett v. Lynch, 5 B. and C. 601. Com. Dig. Ev. B. 5. Skipworth v. Shirley, 11 Ves. 64.) or even give parole evidence of the contents of a deed. (Sir E. Seymour's Case, 10 Mod. 8. R. v. Metheringham, 6 T. R. 556.) Phillips, in the 8th ed. of his able work on Evidence (pp. 681. 445.) speaks thus on the

subject—"It has been said that there are no degrees in secondary evidence, (Per Parke B. in Browne v. Woodman, see *infra*, p. 279.) but this doctrine does not appear to be completely settled."

There is other useful matter in the work for the lawyer, and we can recommend it to the notice of the profession.

I N D I A.

NEW WILL ACT. 1 VICT. CAP. 26.

We direct the attention of the profession connected with the East Indies (or rather with persons resident in those possessions of the Crown) to an Act that passed the Council of India on the 8th October last (No. 25 of 1838), whereby this English Statute was also enacted for the future law that should govern the wills of persons dying there, and which came into operation on the 1st February last, with the following variations.

After the 2nd sec. of the Statute is the following clause.

II. This Act shall only extend to the wills of persons whose personal property cannot, by the law of England, pass to their representatives, without probate or letters of administration obtained in one of Her Majesty's supreme courts of judicature; and that the statutes and parts of statutes aforesaid, are only repealed as far as they relate to the succession to the property of such persons.

The passage in the 3rd sec. of the Statute, relating to real estate, of the nature of customary freehold or tenant right, or customary copyhold, is omitted; so are also ss. 4, 5 and 6, as not applying to the country; and also ss. 11 and 12, relating to soldiers and mariners; also s. 26, and the parenthesis in s. 30. After s. 33 the following clauses are added.

XXIX. And it is hereby enacted, that notwithstanding any thing in this Act contained, any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the making of this Act.

XXX. And it is hereby enacted, that nothing in this Act contained shall be construed to repeal the provisions of Act No. 20 of 1837, whereby immoveable property situate within the jurisdiction of the Court of Judicature of Prince of Wales's Island, Singapore, and Malacca,

transmitted by the last will of any person having a beneficial interest in the same, is taken to be and to have been of the nature of chattels real and not of freehold, as regards such transmission, provided that such will shall be executed and

construed as a will of chattels real, is to be executed and construed by virtue of this Act.

The Act does not extend to any will made before the 1st February, 1839, and of course the two last sections of the English Statute are omitted.

TO ARTICLED CLERKS.

LAW EXAMINATION IN TRINITY TERM 1839.

Gentlemen intending to be examined at the Law Society next Term, must observe that their Notices should be given on Wednesday the 15th May; Monday, and Tuesday, in Whitsun week, falling immediately before Trinity Term.

ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNIES

In Trinity Term, 1839.

[Continued from Vol. 1. p. 414.]

QUEEN'S BENCH.

Clerk's Name and Residence.	To whom articled, assigned, &c.
Irwin, Anthony Wellington, 10, Howard-street, Strand; Bristol; and Stafford-place.	Clarke, Charles Stewart, Bristol.
Jervis, George Matthewman, Sheffield; 34, Claremont-square, Pentonville.	Vickers, Henry, Sheffield.
Jones, John William, 8, Barnsbury-place, Islington; and Bengeworth.	Workman, Benjamin, Evesham.
Kingdom, Richard, Holsworthy.	Kingdom, Charles, Holsworthy.
Kirsopp, William, 12, Great Castle-street; and Hexham.	Ruddock, Nicholas, Hexham.
Lyne, William John, Woodhouse, near Whitehaven.	Perry, Wilson, Whitehaven.
Levy, Lewis, 32, Brompton-square.	Drew, George, 185, Bermondsey-street.
Lewellen, Daniel, 30, Edward-street, Hampstead-road.	Gore, John Brownrigg, Rolls Chambers.
Lightfoot, Rook Tiffen, 9, Staple Inn; and Wigton.	Lightfoot, John, Wigton.
Langhorne, John Bailey, 29, Arundel-street, Strand; 26, Arundel-street; 12, Argyle-street, New-road; and 31, Marchmont-street.	Stable, George Waugh, Newcastle-upon-Tyne.
Lowry, Joseph Stamper, 60, Poland-street; 3, George-terrace, Bermondsey; and Crosby-upon-Eden.	Jackson, Henry, Kirby Stephen; assigned to Carrick, William, Brampton.
Lowe, Richard, Uttoxeter; and Sleaford.	Flint, Abraham, Uttoxeter; assigned to Blagg, Francis, Uttoxeter.
Lightfoot, Henry Wellesley, 10, Old Burlington-street.	Robson, John, 36, Castle-street, Leicester-square.
Mends, Herbert Archibald Gibson, Plymouth.	Moore, Robert Edward, Plymouth.
Marshall, John Edwin, Framwellgate, near Durham.	Marshall, Henry, Durham.
Marshall, William, Claypath, near Durham.	Marshall, Henry, Durham.
Margeets, Henry Clarke, 3, William-street, Regent's-park; St. Ives; and 63, Chancery-Lane.	Lawrence, John, St. Ives.
Mortimer, William, the younger, 24, New Mill-man-street; and Wareham.	Bartlett, Thomas, and Bartlett, Oldfield, Wareham; assigned to Tilson, Oxley, 29, Coleman-street.
Mules, Henry Charles, 38, Madox-street; and Honiton.	Mules, Philip, Honiton.
Marsh, John, 114, Stamford-street; and Frederick-street, Gray's-inn-road.	Marsh, Thomas Edmund, Llanidloes; assigned to Yates, Thomas, Welchpool; assigned to Cross, James, Staple Inn.

(To be continued.)

Business of the Courts.**COURT OF CHANCERY.**

In re Lubbock, Lunatic Petition. *In re Sutton*, do.

The Queen v. Baron de Bode, part heard—*Cooke v. Beetham*, two appeal motions—*Devayne v. Noble*, petition by order—*Hughes v. Wynne*, petition by order—*Orme v. Wright*, appeal.

VICE-CHANCELLOR'S COURT.*Short Causes and Unopposed Petitions.*

After the Petitions—*Richton v. Cobb*, to be spoke to—*Lowry v. Fulton*, cause, part heard.

ROLLS COURT.

Bacon v. Spottiswoode, part heard—*Bacon v. Jones*—*Price v. Sproule*, further directions and costs and two petitions—*Turner v. Turner*—*Perry v. Delahay*—*Jacob v. Lucas*—*Blommaert v. Player*, further directions and costs—*Sainsbury v. Jones*—*Marr v. Ricketts*, exceptions—*Poole v. Pass*—*Bridge v. Rancliffe*, further directions and costs—*Hawkes v. Baldwin*, exceptions.

COURT OF QUEEN'S BENCH.*Sittings in Banco.***COURT OF COMMON PLEAS.***Sittings in Banco.***COURT OF COMMON PLEAS.**

London Common Juries—*Pooley v. Hope*—*Wood v. Hall*—*Richardson v. Baker*—*Hope v. Pooley*—*Wheeler v. Binckes*—*Wilde v. Halcombe*—*Sheppard v. Chalmers*—*Hamilton v. Monatt*—*Chapman v. Geary*—*Young v. Gilson*.

COURT OF EXCHEQUER.*Sittings in Banco.***EQUITY EXCHEQUER.**

Glenny v. Innay, demurrer, by order.

Petitions.

Re Charing-Cross Act, petition of Howard, to be spoke to—Re Hon. W. F. Ponsonby—Re Lancaster and Preston Railway, petition of Thompson—Re Commercial Railway, petition of Stevens—Re Oliver—Re Spoor and the Act 1 & 2 Victoria, cap. 117—Re Eastern Counties Railway, petition of Petley—*Bellamy v. Hill*. After the Petitions—Motions.

NOTICE TO CORRESPONDENTS.

A. "Clerk to B., a Solicitor and Clerk to a Public Body."—Certainly not.

Adolphus.—Your answer to Problem XXIII. was insufficient.—Try again.

Ex parte Terwest in *Re Poynder*, a bankrupt—Court of Review.—We thank a Correspondent for the judgment in this case.

Answers to Problems.—We have not room this week to insert one.

Philo.—Our Subscribers are not aware of the disadvantages we have been labouring under, and which we have determined shall end, as far as we can provide a remedy.—*Nous verrons*.

H. D. M.—But for our resolve, we would insert your letter, because we so fully agree with every line it contains. We have made inquiry of our Reporter, and are quite satisfied with our REPORT of the case. The Report in the Periodical alluded to by H. D. M. is in effect the same as our own,—but the observations of H. D. M. apply most forcibly to the title or head of the former Report, to which he alludes, which is not only inconsistent with the Report itself, but is calculated to mislead the profession.

TO SUBSCRIBERS.

The Index and Title-page for Vol. I. will be published with No. 2, next Saturday, Price 6d.

This Paper will be forwarded, postage free, to any part of the United Kingdom, to Annual Subscribers. Subscriptions, £1. 10s. for the year, to be paid in advance.

ERRATA.

Problem 25, vol. 1. p. 404—for "INQUIRY," read "INJURY."

P. 398, 2 col. line 21—instead of "after a rule to plead issuably had been given," read, "after an order to plead issuably."

P. 399, col. 2, line 26—for "have," read "leave."

Preparing for Publication.**PART I.**

PRECEDENTS in CONVEYANCING, adapted to the present State of the Law, with Practical Notes. By THOMAS GEORGE WESTERN, Esq. F.R.A.S., of the Middle Temple, Author of the Commentaries on the Constitution and Laws of England, dedicated, by special command, to Her Majesty; intended as a continuation of PRECEDENTS IN CONVEYANCING, by N. VALLIS BONE, Esq. of Lincoln's Inn, Barrister-at-Law.

This Part will contain
CONDITIONS OF SALE AND CONTRACTS.

JOHN RICHARDS and Co. Law Booksellers and Publishers, 194, Fleet Street.

The Subscribers to "Bone's Precedents in Conveyancing," and the Profession, are respectfully informed by Messrs. JOHN RICHARDS and Co. that no unnecessary delay shall take place in completing this work.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 4th May, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, MAY 11, 1839.

[No. 2.

MORTGAGORS AND MORTGAGEES.

AN ESSAY

*Upon the Character in which a MORTGAGOR
IN POSSESSION may be considered.*

(Concluded from Vol. II. p. 5.)

THE view which was taken in the case last cited, (a) by PARKE, J., who held, that a mortgagor may be considered as acting in the nature of a *bailiff* or *agent* for the mortgagee, and that, *as such*, his receipt for rent will be good, until the mortgagee interferes, was also subsequently recognised in the Court of Common Pleas, in a case, not between mortgagor and mortgagee, but between a trustee and *cestui que trust*, (b) in an action for injury to the reversion, in which TINDAL, C. J. observed, "inasmuch as the plaintiff has brought an action, and has alleged, that Pell was a tenant to him, that is a sufficient adoption of her as tenant; and there has been no failure in the proof of the allegation on record. Even in the case of mortgagor and mortgagee, whose interests are adverse, acts of the mortgagor assented to by the mortgagee, are considered as acts of the mortgagee; and yet, notwithstanding the full discussion of the question, in Pope and another v. Biggs, and the adoption of the doctrine, ruled in that case by the Court of

Common Pleas, it has since, in effect, been overruled. We would inquire, where are the general principles of law to be found? (c) Can there be any greater *obscurity* than we have shewn to exist upon this subject? and must not such *obscurity*,—such ruling and overruling be of the most material consequence to unfortunate suitors, who may happen to get bewildered in the *mist*? The case of Pope and another v. Biggs was decided in the Court of King's Bench, in Hilary Term, 1829. The Judges were Bayley, Littledale, and Parke. We have only to travel on a very few years—to 1835, and in Partington v. Woodcock, (d) argued in the same Court, upon special demurrer, before different Judges, except one (Mr. Justice Littledale), and we find the same Court overruling, in effect, its doctrine given but six years before. In the case just named, the plaintiff was an insolvent debtor, had been discharged under the Insolvent Act, and his estate vested in the usual manner, in one Ebanks his assignee. After his discharge, the plaintiff, with the permission of his assignee, remained in the possession and management of his house and premises, and afterwards, with the like permission, he demised them to the defendant; but before any rent became due, the defendant received notice from the assignee to pay him rent, as

(a) Pope and another v. Biggs, ante p. 3.

(b) Vallance v. Savage, 7 Bing. 595.

VOL. II.

(c) See ante Vol. 1. p. 353.

(d) 3 Nev. and Man. 672.

such assignee. The *plaintiff* brought an action against the defendant for the rent, and it was held that *he might recover, notwithstanding the notice from the assignee*.—Cause was shewn against this decision—that the plea was double, in that it indirectly denied that the plaintiff had any thing in the premises during the period in respect whereof the rent was claimed, and also affirmed an eviction by the assignee; that it was argumentative, in that it indirectly and argumentatively denied that the plaintiff demised, that the plaintiff had any thing in the premises; and indirectly alleged an eviction by the assignee; and also that it did not specifically deny any fact alleged in the declaration, or plead in confession and avoidance, and also that the plea attempted to deny the title of the plaintiff, whereas the defendant was estopped to deny the same, it appearing, by the declaration, that the defendant enjoyed the same by virtue of the demise by the plaintiff, in the declaration mentioned.

In support of the demurrer, it was contended, that the plea, supposing it to be good in point of *form*, was substantially a plea of *nil habuit in tenementis*. The defendant admitted that he held under the demise by the plaintiff, but attempted to deny that the plaintiff had any thing in the premises.—To this COLERIDGE, J. said, “Is not *nil habuit in tenementis* a good answer, when the demise is not by indenture? In a note to DUPPA v. MAYOW (b) by MR. SERJEANT WILLIAMS, it is said that, in an action for rent, upon a demise not stated to be by indenture, *nil habuit in tenementis* is *prima facie*, a good plea, because no estoppel appears upon the record.” It was then contended that whether the

action be debt on a demise by deed, or assumpsit for use and occupation, the tenant was equally estopped from denying his landlord’s title at the time of the demise; that in the former case there was a strict estoppel upon the record: in the latter, the case was not one of *strict estoppel*, but *was in the nature of estoppel*, the tenant being prevented by the rules of law from disputing the lessor’s title to maintain, which WILKINS v. WINGATE (c), DOE DEM BRISTOW v. PEGGE (d) were cited; but LORD DENMAN, C. J. said, that had been *overruled* by POPE v. BIGGS. LITTLEDALE, J. referred to MOSS v. GALLIMORE (e), but LORD DENMAN said, that case was distinguishable; as *there*, at the time of demise, the mortgagor had a good title, the mortgage being *subsequent* to the demise. LITTLEDALE, J. said, “You admit a demise by the plaintiff, but shew a title in another party, and state that the *demise was by his permission*;” and LORD DENMAN added—If the assignee authorized the plaintiff to demise, he also authorized him to receive rent? In support of this plea, it was not contended that *nil habuit in tenementis* was a good plea, but that the plea was intended merely as a denial of the right of the plaintiff to recover the rent, and the argument was founded entirely on the *analogy between the case and that of a demise by a mortgagor*, and that, according to POPE v. BIGGS, the plea was an answer to the plaintiff’s demand; but PATTISON, J. said, “I never could understand how the notice to the mortgagee could make the lessee tenant to him at the reserved rent. If the tenant, in consequence of such notice, pays him the rent, I can understand that the relation of landlord and tenant has been created” (f); and LITTLEDALE, J. enquired, if the tenant refuses to pay, *can the mort-*

(b) 1 WMS. SAUNDERS, 276, see WILKINS v. WINGATE, 6, TERM REP. 62, as to the distinction between estoppel by indenture, which continues as long as the indenture is in force, and estoppel by accepting possession, which continues whilst that possession continues; see also DOE DEM BULLEN v. MILLS, 4 NEV. AND MAN, 29 n.; FLEMING v. GOODING; 10 BING. 549.; 4 MOORE & S. 455.

(c) ANTE.

(d) 1 T. R. 758, n.

(e) ANTE, VOL. I. p. 402, ID. 385.

(f) See ante, Vol. I. p. 402.

gagee bring any thing else than ejectment? Lord DENMAN said, the mortgagee might go and say to the tenant, "I am entitled under this mortgage, and will turn you out, or bring ejectment, unless you pay me rent;" and if the tenant, in consequence, paid rent, the mortgagee would be thenceforward entitled to recover for use and occupation. To this PATTERSON, J. replied, I can easily understand *that*. It would be the creation of a new tenancy. Lord DENMAN continued, and said it was clear the judgment in Pope v. Biggs assumed an eviction or attorneyment (*g*).

PATTERSON, J. observed, that throughout the plea, the demise by the plaintiff was treated as a subsisting demise. It seemed to him impossible when the demise was made by the insolvent in his own name, after his insolvency, for the assignee to come and claim rent, unless he puts an end to the demise, and creates a new tenancy.

We will now only direct the reader's attention to Co. Litt. 416, n. 237, id. 556, n. 372-3; Smith v. Targett, 2 Anstr. 529; Johnson v. Atkinson, 3 id. 798; Balls v. Westwood, 2 Camp. 11; and as to the *old established law*, that a tenant cannot deny that his lessor, at the time of the demise, had some legal interest in the property to England dem. Sybourn v. Slade, 4 Term Rep. 682; Doe dem. Jackson v. Ramsbotham, 3 M. & S. 516; and Alchorne v. Gomme, *ante*. The rule *formerly* appears to have been confined to leases by indenture, and is expressly laid down in Litt. s. 58. Co. Litt. 476. See Anon. Dyer, 1226; 3 Fitz. Ab. Brief, 747.

administrator or administratrix shall, at the expiration of one full year after the death of the intestate, distribute the residue of his personal estate, after payment of debts, &c. in the following manner, viz.:—

If the deceased leave a wife and children, one-third of his estate is to be given to the widow, and the residue among the children, in equal proportions; or if only one child, the two-thirds to such only child; or if any of them be dead, to their lineal descendants. (1)

If there be no children, or lineal descendants of children, one moiety or half part shall go to the widow, and the residue to the nearest of kin to the deceased, or their representatives.

If there be no wife, then the whole shall be distributed amongst the children who may be living, and the representatives of such as may be dead.

If there be neither wife nor children, nor reprieves of deceased children, the whole is to be given to the father of the intestate.

If he have no father living, the whole shall go to the mother, and brothers and sisters of the deceased, in equal proportions, and the descendants of the deceased brothers and sisters, that is, their children.

If there be neither father, brothers nor sisters, nor descendants of any brother or sister, the whole to the mother.

If there be brothers and sisters, or children of such, but no father or mother, the whole to such brothers and sisters, or their children.

If there be neither of the before mentioned kindred of the deceased living, then the whole shall go to his grandfather or grandmother.

After these, uncles and aunts, together with the nephews and nieces of the deceased, are admitted in equal proportions.

In failure of all the above, then the whole to go to the nearest of kin to the deceased who shall be living.

But no reprieves are admitted amongst

TO THE EDITOR OF THE LEGAL GUIDE.
ANSWER TO PROBLEM XXIII.

By the Statute of Distributions, (22 and 23 Charles II. c. 10) it is enacted, that the

(*g*) See 1 Crom. M. & R. 443-782; 5 Tyrw. 309;
4 Man. & R. 197, 200.

collateral relations, beyond nephews and nieces of the deceased.

The half-blood is deemed equally a-kin to the intestate as the whole blood.

The nearness of kin must be reckoned by the rule of the civil law; namely, by numbering the degrees from the intestate himself, and not according to the canon law, which computes them from the common ancestor. (2)

It is to be observed, that the operation of the Statute does not affect the customs of London and York, or of any other place having peculiar customs.

ADOLPHUS.

(1) In the remotest degree, but the widow of a deceased son will not be entitled to share with his children or child, by representation. See *Price v. Strange*, 6 Madd. 161, and no child (except the heir-at-law) on whom the deceased settled in his life time any estate in lands, or pecuniary portion, equal to the distributive shares, of the other children, shall have any part in the surplu-
sage with their brothers and sisters; unless the estates, so given them by way of ad-
vancement, are not quite equivalent to the other shares, in which case the children so advanced, shall have so much by the distri-
bution as will make them equal. See 2 Blackst. Comm. 515.

If the deceased had covenanted to leave his wife a sum of money, and her distributive share comes to that sum or more, the payment of the share is a performance of the covenant. See *Blandy v. Widmore*, 1 P. Wms. 324 n.; and even though she become entitled to the share, not under an actual but a *quasi* intestacy. See *Goldsmid v. Goldsmid*, 1 Swanst. 221. And if the dis-
tributive share be even less than the amount covenanted to be left, the payment of such share is a performance *pro tanto*. See *Garth-
stone v. Chalie*, 10 Ves. J. 1; and when the covenant extended partly to an absolute

gift, and partly for life only, since the dis-
tributive share could not be a perform-
ance of the latter gift, neither was it con-
sidered a performance of the former. See *Couch v. Stratton*, 4 Ves. J. 391; and where there was an express proviso in the settlement that the wife should not be barred of any thing the husband should give or leave by deed or will, or otherwise; how-
soever she died intestate, and a freeman of London, it was held that the wife's shares by the statute and custom were not a satisfac-
tion of the covenant contained in the settle-
ment. See *Kirkman v. Kirkman*, 2 Bro. C. C. 95. See also *Benson v. Bellasis*, 1 Vern. 14. But where a husband makes provision for her by his will, expressed to be in lieu of her claims on his personal estate, and then makes a disposition of his personal estate, which fails, she will not be excluded from her distributive share. See *Pickering v. Stamford*, 3 Ves. Jun. 332, 492.—ED.

(2) The heir-at-law shall have an equal share with other children in the distribution, without any consideration of the value of the lands, which he may have by descent, or otherwise, from the intestate, in respect of which, he need make no abatement; but where he has had an advancement by his father, before death, in personality, then he shall abate, for such advance, in the same manuer as the other children. Co heiresses, shall bring together into hotchpot, such ad-
vances of personality, made by their father, before they can be entitled to a distributive share. See 4 Burn. Ecc. Law, 397.—ED.

PROBLEM II.

VOL. 2.

AN ESTATE AT WILL—describe it.

QUESTIONS,

PUT BY THE EXAMINERS TO APPLICANTS
FOR ADMISSION AS ATTORNEYS AT THE
EXAMINATION, EASTER TERM, 1839.

I. PRELIMINARY.—AS USUAL.

II. COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS.

4. In what cases, where there are adverse claims, may a defendant apply for protection under the Interpleader act?
5. How does he apply, and at what period should he do so?
6. Are there any alterations made by a late statute in the execution of warrants of attorney and cognovits; and if so, what are they, and what kind of attestation is now required?
7. Should matter arise after plea and before verdict, can the defendant avail himself of it? and if so, how and in what manner should he proceed?
8. What is the difference between issues in fact and issues at law? and when there are both, how may they be disposed of?
9. In actions upon contract, and assumpsit, where some of the defendants let judgment go by default, and others plead, and upon the trial a verdict is found for one or all of the defendants who pleaded, would the jury proceed to assess damages against the defendants who suffered judgment by default, or what would be the result?
10. If the cause of action be matter of contract, on judgment against several persons, may execution issue, and the damages be levied against either, and can he compel contribution, and if so, how? and will it be the same in *tort*?
11. State shortly the nature of replevin, its use, and the mode of proceeding.
12. Describe the different modes by which cases are removed from the inferior courts.
13. In a guarantee on behalf of a third party, must any consideration be stated?
14. Suppose a debt to be incurred by parties resident in this country, and some months after the debtor should leave the country and reside abroad, when would the Statute of Limitations begin to run, and what steps must be taken to keep the debt alive?
15. After what period will a deed prove itself?
16. Can a clergyman be arrested on civil process whilst performing divine service on any other day than Sunday, or in going to or returning from the performance thereof?
17. In what cases is registration of a judgment necessary, and what advantages attend the

doing so, and for different purposes, how should the same be registered?

18. Within what time must application be made to set aside an award?

III. CONVEYANCING.

19. What is a base fee?
20. What is the difference between things lying in livery and things lying in grant?
21. What are the objections to a deed of exchange, as a mode of conveyance?
22. What is meant by the protector of the settlement in the late act for the abolition of fines and recoveries?
23. Since the abolition of recoveries, how are remainders over-barred; and who must join in the proceeding?
24. What is the use of getting assignments of outstanding terms to a trustee for the purchaser?
25. Is a purchaser for a good consideration from a voluntary grantee in a better situation, as to title, than the voluntary grantee?
26. Explain how the usual mode of conveyance by lease and release obviates the necessity of livery of seisin, or giving corporal possession of the land conveyed.
27. What are emblements?
28. State when the next of kin take *per stirpes* and when *per capita*.
29. Is there any difference, in legal effect, between devising land to charitable uses, and bequeathing personal estate to be laid out in land to be settled to such uses?
30. What is the consequence of the omission of the indorsement of the livery of seisin on a feoffment?
31. What constitutes a valid execution of a will under the recent statute of wills?
32. What is the consequence to an attesting witness of a will, so far as regards any and what legacies given by that will?
33. How can the revocation of a will be now effected?

IV. EQUITY, AND PRACTICE OF THE COURTS.

34. What is the process to compel a corporation to answer a bill?
35. How is a suit instituted on behalf of infants?
36. Who is liable for the costs incurred by an infant plaintiff?
37. In what manner is the answer of an infant put in?
38. When is a cause said to be at issue?
39. How soon, after filing his answer, is a defendant at liberty to move that the plaintiff's bill may be dismissed for want of prosecution?
40. Within what time must the plaintiff except to the answer of a defendant?

41. When a plaintiff is served with a notice of motion that the bill may be dismissed for want of prosecution, what step must be taken by him to prevent dismissal?
42. Has a plaintiff any means of enforcing the appearance of a defendant who absconds in order to avoid being served with a subpoena?
43. When can a plaintiff, who has excepted to a defendant's answer for insufficiency, obtain an order to refer such exceptions to the master, if the bill be not for an Injunction? When can he obtain such an order in an injunction suit?
44. Suppose a trader within the bankrupt laws die seised of real estates, and which he may have devised by his will, but not thereby charged with the payment of his debts, and which estates would be assets in the hands of the heir for the payment of *specialty* debts, can simple contract creditors obtain any and what assistance from a court of equity in discharge of such simple contract debts, and how?
45. If there be a decree for the sale of estates to pay debts, and such estates by descent or devise be vested in an infant, what authority has court of equity in such cases to perfect such sale, and whence is that authority derived?
46. If estates be liable to the payment of debts of a settlor or testator, and such estates be vested in a tenant for life or other person having only a limited estate or interest, and the remainder or reversion in fee be vested in other persons, whether within or out of the jurisdiction of a court of equity, what assistance can such court give to perfect a sale of such estates, and how?
47. To what extent can Equity relieve creditors by or out of the copyhold property of persons dying seised of such property, and which persons shall not have charged such property with the payment of their debts?
48. If A. obtain the conveyance of an estate from B. by fraud, and A. sell the same to a purchaser, will Equity relieve B., and set aside such conveyance and annul the sale to the purchaser? State in what case the Court would or would not do so.
49. What judges have the jurisdiction of issuing a fiat in Bankruptcy?
50. What is the difference between a town and country fiat in respect of the number of commissioners before whom the same is prosecuted?
- To what tribunal does the general juris-
- diction in bankruptcy, formerly exercised by the Lord Chancellor, now belong?
52. Does any appeal lie from the judgment of the Court of Review on questions of law or equity, or of evidence received or rejected, and to whom?
53. What is the most general description of a trader liable to be made bankrupt?
54. Will acts of buying only, or of selling only, constitute a sufficient trading, and under what circumstances?
55. Can a person be made a bankrupt who has retired from business, and in respect of what debts?
56. Enumerate some of the acts of bankruptcy under 6 Geo. 4, c. 16.
57. What are the means of compelling a debtor to commit an act of bankruptcy since the abolition of arrest on mesne process?
58. What steps must be taken to obtain a fiat?
59. How is a debt proved, and at what meetings?
60. What is an auxiliary fiat, and for what purposes is it granted?
61. What is done on opening the fiat?
62. What is the effect of proving a debt in respect of securities held of the bankruptcy, or proceedings against him?
63. By what proportion in number and value of creditors is the bankrupt's certificate to be signed? and does it in any, and what circumstances?

VI. CRIMINAL LAW, AND PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

64. What is homicide, and what are its different kinds?
65. When is the crime of cutting and stabbing capital, although the party wounded does not die in consequence thereof?
66. What is sacrilege?
67. Is the stealing of title-deeds relating to a real estate criminal or only actionable?
68. Is it lawful to set a man-trap, spring-gun, or other engine which is calculated to destroy human life, or to inflict bodily harm, in any and what place or places, and when?
69. If a prisoner, on being arraigned, stand mute, and refuse to plead, what is the mode of proceeding?
70. Where a person is convicted of felony, and receives judgment, does all his property, real as well as personal, become thereby forfeited; and if so, is there any and what difference between real and personal property as to the time of forfeiture?
71. Will ignorance of the law in any and what

V. BANKRUPTCY, AND PRACTICE OF THE COURTS.

49. What judges have the jurisdiction of issuing a fiat in Bankruptcy?
50. What is the difference between a town and country fiat in respect of the number of commissioners before whom the same is prosecuted?
- To what tribunal does the general juris-

- case excuse a person who has committed an offence?
72. What is the property qualification of a justice of the peace for a county, and by whom and how is he appointed? and if after his appointment he cease to be qualified, can he nevertheless continue to act?
73. What are the modes by which a parochial settlement can now be gained?
74. Where is the *prima facie* place of settlement of an illegitimate child, and are there any and what exceptions to the general rule?
75. If a woman, having a legal settlement, marry a foreigner or other person not having one, and he die without having gained one, leaving her surviving, has she any settlement? and if so, where?
76. If a pauper, resident in a parish where he is not legally settled, become chargeable, how is he to be removed to the parish in which he is legally settled? And if that parish intend to dispute the settlement, how and before whom is the case to be tried? And if the tribunal before which the trial takes place cannot decide the case, how and to whom is the decision referred?
77. On the trial of an appeal against an order of removal of a pauper, is he or any person who is liable to contribute to the relief of the poor of the parish removing, or of the parish appealing, a competent witness in support of or against the appeal?
78. On what grounds, and in what manner, can a public foot-path be turned, diverted, or stopped up?
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We are very glad to find "*the powers that be*" begin to take the same view of these examinations as ourselves; we do not deny their utility, and under a different government, or Court of Examiners, they would be of essential benefit, tending to make the profession what it ought to be—to make attorneys LAWYERS. We have heard somewhere of "an officer and no soldier," and we at every turn find "an attorney and no lawyer." This unwholesome state of things will continue until these examinations are placed upon another and a better (*a sounder*) footing. It is now admitted, that some of the questions at the last examination "*are easy enough to all but the extremely idle.*" So we have repeatedly said,

and we venture to assert that our PROBLEMS, with the opening we give our subscribers to answers, have done and will continue to do more good to the students, than such examinations would do if made once a week; and it is not to the student alone that these problems, and their answers, work a benefit, but *the experienced practitioner*, also, finds in them, perhaps, what he never before knew. The question is not "What is your name?" answer, "John," but it embraces A SUBJECT, which, when answered, the reader will find *the whole law upon that subject written up to the day.*

As an instance of the value of these Problems, not only to students, who gain knowledge by writing them up, but also to old practitioners who want that knowledge, (because they have neither read or written up, for want of opportunity,) an industrious subscriber answered Problem 11, upon the new Interpleader Act. Here the reader will find all the decisions, chapter and verse, upon this important law; *and so with every problem.* We do not select this; it happens to be open before us.

It appears that 110 candidates attended the last examination; 105 were considered as qualified; five were rejected, and four were absent.

Law Reports.

COURT OF CHANCERY.—May 2.

IN RE BUCKLE, A LUNATIC.

Committees of Lunatics estates not to be allowed in future monies expended for the improvement of a Lunatic's estate, without permission of the Court.

This was a Petition by the Committee of the Lunatic's estate, praying the Court to sanction the expenditure of a sum of money he had laid out in improving the Lunatic's estate; a similar disbursement having been allowed by the Vice-Chancellor.

The LORD CHANCELLOR observed, that the disbursement had been sanctioned by the Vice-Chancellor, as one of the Lords Commissioners of the Great Seal, and he might therefore have

been misled by a previous approbation of the Court. His Lordship, however, desired it might henceforth be distinctly understood and publicly known, that he could not allow such payment for the future in the accounts of committees, and they would make them at their peril, unless care were taken to obtain the previous permission of the Court.

BUSINESS OF THIS COURT.

The LORD CHANCELLOR has declared that he will not hold any Sittings between Easter and Trinity Terms. This however now depends upon any Order that may be made by another Lord Chancellor.

May 8.

CASES WAITING FOR JUDGMENT.

The LORD CHANCELLOR said there were several cases waiting for judgment, some of which were very heavy, and required much consideration. If the parties assented, he would dispose of them when he was more at leisure than he could then be, otherwise he would make arrangements for determining them immediately.

Mr. K. Bruce said, with respect to "Chapman v. Severne," and some others in which he had been engaged, the parties would be most anxious to have his Lordship's decision, and they would readily afford any facility in their power for that purpose.

VICE-CHANCELLOR'S COURT.—May 2.

WARD v. ARCH.

Practice—Whether an Order will be granted to substitute service of an Order on a Clerk in Court for service on a Defendant, an Officer in the Navy abroad.

Mr. K. Bruce moved for liberty to substitute service of execution of an order on the Clerk in Court of Mr. Dobie, a lieutenant on board the Vanguard at Malta. An order had been made some time ago for transferring some funds into Court, and the time had been extended in expectation of his return. He contended he had unnecessarily delayed transfer of the money, as he might have executed a power of attorney for the purpose; and to make the order available they now sought to substitute service of the writ of execution.

Mr. Stuart opposed the motion, and said Mr. Dobie's absence was purely accidental, as the vessel had been long since expected, and there was no pretence for treating a person absent on

her Majesty's service as an absconding party. There was no authority for such an order.

The VICE-CHANCELLOR said the Court had made orders in the case of parties absconding or concealing themselves, but he recollects no instance of such an order.

Motion refused with costs.

ROLLS COURT.—May 2.

JONES v. BROSTER.

Injunction—Liability of the Executrix of an Insolvent Estate to a Creditor's Bill, for an Injunction to restrain interference.

The plaintiff filed this bill on behalf of himself and all other the creditors of Thomas Broster, deceased.

Mr. Pemberton moved for an injunction to restrain the defendant, Harriet Elizabeth Broster, who was the daughter and sole executrix of the deceased, from getting in or receiving any more of the real and personal estate of Thomas Broster, of Wrexham, solicitor, deceased, and to have a receiver appointed, on the ground that the defendant had neglected to pay the debts owing by the testator. He died in January, 1835, having left a will dated November, 1834, by which he devised every thing to the defendant, and the bill alleged that his property consisted of 500*l.*; that he had some real property; the greater part of the furniture the defendant had sold, and had mortgaged the real estate for 100*l.*, but had applied none of the proceeds to the payment of the debts, although repeated applications had been made.

Lord LANGDALE said, the defendant was left executrix and devisee of an estate insufficient to pay the debts due on it, and she carried on the testator's farm for the benefit of the family, when in reality she was not entitled to anything until all debts were paid. If anything was due to the plaintiff, it would be sufficient to support the bill. This must be adjudged as an insolvent estate, insufficient to pay the debts.

Injunction granted.

SANDYS v. LONG AND OTHERS.

Practice—Third General Order, May 5, 1837—As to irregularity in setting down causes.

Mr. Cooper, for the plaintiff, moved that the entry of this cause, set down to be heard at the Rolls, might be struck out of the cause-book as having been improperly entered. The affidavit stated, that the cause was set down by the defendant Long for hearing at the Rolls on the 19th of April, 1838, and that five days afterwards, on the 23rd of April, it was set down by

another defendant to be heard before the Vice-Chancellor. There had been an order in the cause made by the Vice-Chancellor, and a question arose whether, under the terms of the third general order made on the 5th of May, 1837, this was an order made on the merits; for if so, the cause could only be set down before the Vice-Chancellor. One of the defendants, Isabella Long, was an infant, and the order was for removing her guardian *ad litem* and appointing another. This he submitted was an order upon the merits; and as it was made by the Vice-Chancellor, the cause could only be set down for hearing before him. The present suit had arisen out of a suit of "Long v. Long," which had been pending 20 years ago, and the present bill prayed that it might, if necessary, be considered as supplemental to the bill in the first suit. A Mr. Long was the first husband of Mrs. Sandys, and the bill alleged that there was a mistake in the settlement made on that marriage, and prayed for its correction. The object of the present suit was to correct that settlement.

Mr. Girdlestone, for the defendants, opposed the motion. The cause was set down for hearing separately by two of the defendants, but it had not been set down by the plaintiff at all, and probably never would. The bill was filed in October, 1834, the answer was put in a few weeks afterwards, and no further steps had been taken by the plaintiff. The two grounds for the motion were, that under the general orders of May, 1837, there had been an order by the Vice-Chancellor upon the merits, and that this was a supplemental bill, and the original cause had been decided by the Vice-Chancellor. The order had nothing to do with the merits, and as to this being a supplemented suit, the facts were these:—In 1821, the plaintiff, James Sandys, married Robert Long's widow. There was one child of the first marriage, Isabella Long, who was a defendant by her next friend in the present suit. After the marriage with Long, there was a settlement, which, of course, was voluntary; and after Long's death, the widow married Sandys, and the original will was filed to set it aside. A decree was by arrangement made that the settlement was void, but directing a reference to the Master to report what, under the circumstances of the wife surviving with one child, would be a proper settlement. Proposals were taken in to the Master, and, in conformity with the proposals, a settlement was made. The bill was filed, complaining of this settlement, on the ground that the intentions of the parties of the first marriage had not been carried into execution; but this was an original complaint, and not a supplemental bill, for the original settlement had been completely set aside.

Lord LANGDALE.—There were subsequent circumstances in the second bill which raised new equities, but still the object of the second bill was to carry into execution the original decree. He must, therefore, grant the order.

Mr. Cooper said, he should not ask for costs, but the defendants must consider they were leniently treated.

Lord LANGDALE.—I do not think so. The motion has been delayed until the cause was coming on to be heard. It ought to have been made earlier. The costs must be costs in the cause. His Lordship added, that he would endeavour to remove any doubts as to the construction of the order of May, 1837.

QUEEN'S BENCH.—April 27.

Sittings in Banco.

STOCKDALE v. HANSARD.

LIBEL.—*Breach of Privilege*—Whether the House of Commons may order the publication of their proceedings, which contains matter of Libel against individuals, and that it is a high breach of privilege to bring such Libel in question before any Court of Judicature.

(Continued from p. 12.)

Mr. Carrington here read several extracts from the journals of the House of Commons during the last century, in which there were cases of breach of privilege. There were in one year five cases for serving processes on Members, twenty-four cases of trespass; one person for killing Lord Galway's rabbits; one for fishing in Mr. Jolliffe's pond; one, the case of an attorney, who presented a bill of costs which was considered to be extravagant, and he was committed for a breach of privilege.

Mr. Curwood continued.—Is it for a moment to be urged that a body who reports these things for a breach of privilege is not to have their judgment questioned? What will be the question of all of us if this Court should decide that whatever the House of Commons chooses to vote that we must abide by, though it has superseded all law. A late noble Chancellor, not merely a lawyer but a statesman and a scholar, and a man of most enlightened understanding, in his court declared his resolution that the law should supersede this sort of privilege claimed by the House of Commons. In the case of Mr. Long Wellesley, who was committed by Lord Brougham for a breach of privilege in his court, he would not allow Mr. Wellesley his privilege of Parliament, for though it was considered to extend to particular circumstances, yet this noble and learned judge took upon himself to declare that contempt of his court was punishable by him, and he would not allow him the

privilege of a Member of Parliament. This has been assuming something formidable in the name of the House of Commons; they have great powers, and have exercised them many times in a tyrannical way, but it is a spectre which to the imagination may be an object of terror, but meet the phantom with boldness, and it melts into thin air. My Lords, this is a great constitutional question; it is whether the House of Commons shall assume the whole legislative power, whether they are to supersede the law at their own pleasure, for such must be the necessary consequence if this privilege is to be established. My Lords, I trust to the name of Lords Holt and Hale, and the names of your Lordships will be added, and will make another star in the constellation which posterity will look up to with gratitude and admiration. My Lords, I have stated the broad principle upon which I rely, and shall now wait to hear what my learned friend says. I have had a task imposed upon me which I dared not shrink from, though I have come to it with a mind distressed by domestic affliction; my sight is nearly gone, and when I retire from your Lordships' court, I shall undergo an operation, which I trust may in some degree restore me; but, be my days of darkness and misery few or many, it will be a consolation to me that my last efforts in my professional career were applied in the defence of the laws and liberties of my country.

The Attorney-General.—My Lords, I represent here the House of Commons of the United Kingdom, who are called before an inferior tribunal for making public that which they thought was essential to the discharge of their legislative functions; for exercising a power and privilege which they have enjoyed from ancient times—long before the Revolution—which is recognised by the Bill of Rights, and which, since the revolution, has never been questioned by any one but Mr. Stockdale. They are called in question for having made public an abuse requiring, if it does exist, a legislative remedy, and for which the public mind ought to be prepared. They are called upon to repel a presumption of malice, and to shew that they could have no improper motive for making public that which they thought was material for the information of the community. The House of Commons, representing the third estate of the realm, having with the Lords and the Queen, supreme legislative authority, having by their own privileges and power a right to inquire into the administration of justice, and to superintend all inferior tribunals, are called upon now to discuss the extent of the limits of the privileges and powers which they claim to possess. My Lords, they are called upon to defend that which they consider to be essential for the due performance of their legislative and

their inquisitorial powers. My Lords, the importance of that to the public greatly increases my anxiety; it is now, so far as the judgment of this Court extends, to be decided whether there shall be a free intercourse between the constituent and the representative body—whether the representatives of the people can freely communicate to their constituents the information which they deem essential to the public welfare. My Lords, this is not a question respecting any personal immunities claimed by Members of the House of Commons—this is not a question respecting the exemption from arrest for debt, or whether they are liable to be sued when Parliament is sitting, or whether their goods are free, or any personal advantage which might arise to them individually. From this privilege, which is now called in question, no individual Member of the House of Commons can derive the smallest personal advantage; it is claimed and asserted only for the public good. The House of Commons has long felt that it would not have properly discharged either its legislative or its inquisitorial powers, without freely communicating to the public the grounds upon which it proceeds. This is not a country in which it can be said that the people have nothing to do with the laws but to obey them; that laws may be obeyed, the grounds upon which they are made must be understood, must be approved of, then the laws will be respected, and will be observed. My Lords, it is for the public good alone that this privilege has existed, and ought to exist. To this privilege is applicable in a peculiar manner the language employed in an address by both Houses of Parliament to the Throne, in the time of Charles I.:—“The rights and privileges of Parliament are the birthright and inheritance not only of themselves, but of the whole kingdom, to which every one of your Majesty's subjects is entitled, the maintenance and preservation whereof doth highly conduce to the public peace and prosperity of your Majesty, and all your people.” My Lords, my anxiety on the subject is greatly increased by considering the responsibility which I have incurred. My Lords, the House of Commons most undoubtedly have instructed me to appear in this action, but without meaning to submit their privileges to the decision of any other tribunal except the House of Commons. My Lords, they still claim to be the sole and exclusive judges of their own privileges, but they have thought that your Lordships should be informed in the manner I should think most expedient and becoming, that the act complained of was done by their command and their authority in the exercise of the privilege which they assert.

(To be continued.)

COURT OF COMMON PLEAS—May 3.

MILLS v. FOWKES.

Statute of Limitations—Money paid into Court—Right of a Creditor to appropriate a payment made by a debtor generally to whatever account it best suits his interests to select.—Quare. May he apply it in satisfaction of a debt barred by the Statute of Limitations?

The action in this case had been brought to recover the amount of two accounts, one of which was of more than six years' standing, and the other of less. The defendant pleaded the Statute of Limitations as to the first; and as to the second, he paid the amount into court except the sum of £15,—he having paid the latter sum to the plaintiff in the year 1837, generally, without reference to the one account or the other. The cause having been referred to a gentleman at the bar, the arbitrator found the facts specially for the opinion of the Court.

The COURT decided, that as the defendant had not paid the £15. to the plaintiff expressly on account of the old debt, there was nothing from which an intention on his part could be inferred to take that old debt out of the statute of limitations, and therefore as to that part of the case the plaintiff could not recover; but as the law empowered a creditor to appropriate a payment made by a debtor generally, to whatever account it best suited his interests to select, and as it was clearly the interest of the plaintiff to appropriate this payment of the £15. to the old account, which was barred by the Statute, he must be taken to have done so; and consequently the sum paid into Court in respect of the new account was £15. short of the proper amount; the plaintiff was therefore entitled to judgment for the sum of £15.

BAIL COURT.—May 2.

(Before Williams, J.)

REGINA v. TRUSTEES, SWANSEA HARBOUR.

Mandamus—Writ for commanding Defendant to pay Money, and the return stating inability to do so.—Whether return shall be quashed as frivolous?

A Mandamus had issued, commanding the defendants to pay to Thomas Starling Benson £10,341., as compensation for some land of his which they had taken for the purposes of their trust. The return to the writ merely stated that the defendants were unable to pay the money, in consequence of their not possessing a sum of money belonging to the trust funds adequate to the payment.

Sir F. Pollock now applied for a rule, calling

upon the defendants to show cause why this return should not be quashed, as being self-evidently frivolous. It was consistent with this return that they may in fact have £10,340. of funds belonging to the trust, although they may not have £10,341., and at any rate they possessed under the statute a power of raising money by every way which could be resorted to by such a body. Instead, however, of using those powers for the purpose of complying with the exigency of the writ, they attempted to make some bargain with Mr. Benson. The land which they had taken from him was used for making a cross cut into the harbour, but the cut was not navigable. The jury had, it seems, thought that the fact of the cut not being navigable, was a reason why they should enhance the amount of compensation, as they believed, on the other hand, that if the cut had been traversable by vessels, the advantage which Mr. Benson would derive from that circumstance, ought to be taken into account in settling the compensation. In these circumstances the trustees offered to pay Mr. Benson the money, on condition that he would undertake to repay them something if they should make the cut navigable, but nothing otherwise. Mr. Benson had, however, declined to make any terms, believing himself to be entitled to the money without condition. In the mean time the adjournment of payment was entirely for the advantage of the trustees, as they were not liable to interest; so that any litigation to which they may be exposed, was abundantly countervailed by the advantage of retaining the money in their hands.

Return quashed.

COURT OF EXCHEQUER.—May 2.

Sittings in Banco.

BORTHWICK v. RAVENSCROFT.

Practice—Distingas to compel Appearance—Variance in proceedings sufficient to set them aside.

Mr. Humphry shewed cause against a Rule Nisi that had been obtained to set aside a Distingas that had been issued to compel the appearance of the defendant. He took a preliminary objection to the sufficiency of the affidavits on which the rule had been granted, which it seemed were entitled in a cause of "Borthwick v. Humphrey A. Ravenscroft," sued as Humphrey Ravenscroft. As there was no such cause at all, the Christian name of the plaintiff was omitted, and the defendant ought to have been described as he was named in the writ of summons; for though he might have been improperly sued, yet the cause ought to be entitled in the form there used, until the defendant had appeared and set himself right before the Court.

Mr. Gray, *contra*, replied that the variance was immaterial; that the cause was properly described as "*Borthwick v. Ravenscroft*," but

The COURT decided in favour of the objection, and discharged the rule on the ground taken by the learned counsel for the plaintiff.

Rule discharged.

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May 3.

Sittings in Equity, before Lord ABINGER.

DIXON AND OTHERS *v.* SNOWBALL.

PRACTICE.—Amending and Re-amending Bills.—New Point.

Mr. Simphinson moved, on the part of the defendant, that an order obtained by the plaintiffs on the 24th of April might be discharged for irregularity. He said the bill was filed by the plaintiffs, as personal representatives of Joseph Snowball, deceased, against the present defendant, and the object of the bill was to charge the defendant with having been receiver and manager of the estates of the testator, and calling upon him to account for his management. The defendant put in his answer, denying the fact of his agency. The bill was not proceeded with, and the defendant obtained an order to dismiss the bill for want of prosecution. The plaintiffs applied for leave to amend their bill, but the application was rejected with costs, upon which the plaintiffs filed a replication, and thereupon obtained leave to amend their bill, upon an undertaking to state the amendments and to speed the cause. To the amended bill, which totally varied the original bill, the defendant put in an answer, to which the plaintiffs took exceptions. The defendant admitted the exceptions, and the plaintiffs, upon this admission, applied to the Court *ex parte*, and obtained an order to reamend their bill. This was the order which he applied to discharge, as there was nothing either in equity or practice to justify such an order.

Lord ABINGER said, that if there was no rule upon this point, it was left to his discretion to establish a rule. The order to amend, in the first instance, was made upon special application, and implied that the plaintiffs had been guilty of some delay. Although the Court would pass over that, and allow the plaintiffs to amend upon special application, he could not say that an exceptional answer of the defendant purged the original delay, the foundation of the obligation and restraint upon them being, that they should not amend without the leave of the Court, and without stating the grounds of amendment, so that the Court might see that they were material. It seemed to him, therefore, that unless there was some decided case to settle the practice, for it was a mere question of practice, if, after

an order was made that a party should amend, upon stating his amendments to show that they were material, which order implied that he had been guilty of some delay, and that if afterwards, upon those amendments, an answer was put in, to which exceptions were allowed, and there was occasion to make further amendments, he ought to enable the Court to see that those amendments arose from the answer put in containing facts that were unknown before. How otherwise could the Court know that the facts disclosed were not well known before, and that the plaintiffs were not proceeding in their system of delay? It was a mere matter of form, but he thought that the order ought to be discharged, with liberty to the plaintiff to make special application to mend, and that as the point was new, the costs ought to be costs in the cause.

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May 6.

THE CANADIAN PRISONERS *v.* THE GAOLER OF LIVERPOOL.

HABEAS CORPUS.

Informal Return—Whether the Court will discharge a prisoner upon Habeas Corpus, though the return be informal, or shall go into matter foreign to the questions of detainer?

We refer our readers to the Report we have already given of this case (*a*), when the preliminary question was raised by the Attorney-General before the Court of Queen's Bench upon "the Power of a single Judge to sign the writ of Habeas Corpus in vacation," and also to our observations, in which we fully entered upon the question (*b*), after it had been disposed of by LORD DENMAN.

The present application then followed upon the legality of the detainer of the prisoners by the Gaoler of Liverpool, and the informality of the return to the writ of Habeas Corpus, and this morning Lord ABINGER delivered the judgment of the Court.

His Lordship said—This is a case of a Habeas Corpus to the gaoler of Liverpool, on the return to which a motion has been made to discharge the prisoners. The Court is bound to look at the substance of the return; if it contains sufficient matter in substance to show that the prisoner is lawfully detained, we cannot discharge him upon Habeas Corpus, though the return

(a) See ante Vol. I. pp. 184. 201.—See also id. 302.

(b) See ante Vol. I. p. 311.

should in some respects be informal, or should go into matter not essential to the question. The return then in substance is this—that by an Act of the Legislature in Upper Canada, the Lieutenant-Governor, with the advice of the Executive Council of that province, was enabled to grant a pardon under the great seal, upon such terms as might appear proper to such persons then under charge of high treason committed in that province as should petition the Lieutenant-Governor before their arraignment, praying for pardon, and that the same act provides that in case any persons should be pardoned under that act upon condition of being transported or banishing himself from that province either for life or for any term of years, such person, if he should return to the province before the period of his transportation or banishment, should be guilty of felony, and liable to suffer death; that after the passing of that act the prisoner was duly indicted at a special court of Oyer and Terminer, held by authority of another act of the same Legislature, for the crime of high treason; that before his arraignment, in accordance with the statute, the prisoner petitioned the Lieutenant-Governor, confessing his guilt of the treason charged against him, and praying that Her Majesty's pardon ought to be extended to him upon such conditions as the Lieutenant-Governor, by and with the advice of the Executive Council, should see fit; that the Lieutenant-Governor did, with the advice of the Council, consent that Her Majesty's mercy should be extended to him upon condition that he should be transported and remain transported to Her Majesty's colony of Van Diemen's Land for the term of 14 years next ensuing the date of his arrival at Van Diemen's Land, to which terms and conditions the prisoner assented, and therefore the Lieutenant-Governor did, by letters patent under the seal of the province, remit and release the prisoner from all and every punishment that might be inflicted upon him by reason of the said treason so confessed, upon the condition, nevertheless, that he should be and remain transported for the term aforesaid. The return then states, that there being no means of conveying the prisoner directly from Upper Canada to Van Diemen's Land, it became necessary to convey him first to Quebec, in Lower Canada, and then to England, for the purpose of transporting him to Van Diemen's Land, and that accordingly he was transmitted, by authority of the Lieutenant-Governor of Upper Canada to Quebec, and thence, by authority of the Executive Government there, which issued letters patent in the name of Her Majesty, to command that the prisoner should be delivered to Digby Martin, the master of the bark Captain Ross, to be by him conveyed to England, to such place as Her Majesty should think fit, to the end that he might

thence be transported to Van Diemen's Land: that Digby Martin accordingly brought him to Liverpool, the same being the place which seemed fit to Her Majesty, and which was the most proper place for the purpose, and there delivered him to the gaoler of Liverpool, who retains him in his custody whilst means are preparing to transport him to Van Diemen's Land. This is the substance of the return, against which many ingenious objections have been urged, the principal of which seem to be, that the Legislature of Upper Canada had no authority to make any such law; that if they had, it could be binding only within the precincts of that province; that it could communicate no authority to any person out of that province, and therefore could give none to the gaoler of Liverpool; that even if it could have that effect, the pardon granted under that law being conditional, it was not competent to the prisoner to accept a pardon, whereby he submitted himself to imprisonment or transportation, or that if it were competent to him to accept a pardon with such a condition, he has still a right to retract his consent, and to be set free from the obligation imposed upon him by the condition. All these topics have been elaborately argued on both sides, and have received due attention from the Court; but in the view which we take of the case, we do not think it necessary to pronounce any opinion upon them. If the condition upon which alone the pardon was granted be void, the pardon must also be void. If the condition were lawful, but the prisoner did not assent to it, nor submit to be transported, he cannot have the benefit of the pardon; or if, having assented to it, his assent be revocable, we must consider him to have retracted it by this application to be set at liberty, in which case he is equally unable to avail himself of the pardon. Looking then at the return, the position of the prisoner appears to be this, that he has been indicted for high treason committed in Canada against Her Majesty; that he has confessed himself guilty of that treason; that he is liable to be tried for it in England; that he cannot plead the pardon which he has renounced; and that he is now in the custody of the gaoler of Liverpool under such circumstances as would justify any subject of the Crown in England in taking and detaining him in custody, till he be dealt with according to law. Any subject who held him in custody with a knowledge of these circumstances would be guilty of a crime in aiding and assisting his escape, if he be permitted to go at large without lawful authority. How then can we order the gaoler of Liverpool, or any other person who has him in custody with knowledge of these circumstances, let him go at large? If the prisoner cannot be lawfully transported under his present circumstances, it is to be presumed that the Government, upon being so cer-

tified, will take proper measures for prosecuting him for the crime of treason in England. For these reasons we are of opinion that the prisoners must be remanded.

The prisoners were removed by Mr. Batchelor (the Gaoler of Liverpool).

COURT OF BANKRUPTCY.—*May 4.*

RE LEWIN, A BANKRUPT.

Jurisdiction of the Court—No power for a Judge or Commissioner sitting alone to enforce obedience to its Orders.

In this case the assignees applied to have several witnesses examined separate from each other.

Mr. Humphreys appeared for the assignees, and applied to the Commissioner to order some of the witnesses who were not under examination to withdraw.

Mr. Isaacs said, that his clients were materially interested in this examination, and with all possible respect, as Mr. Commissioner Evans had said, that the Commissioner sitting singly had no power to enforce an order for the withdrawal of any witnesses, the witnesses in attendance must decline to withdraw.

Mr. Humphreys urged that the interests of justice and the creditors required that the witnesses should be examined privately, and though he felt the inconvenience to which it might lead if examinations of this sort were to be taken before a subdivision court, he must pray an adjournment to a subdivision Court, which Court had the power of enforcing its own orders. He should propose to take the opinion of a subdivision Court whether it could not order that no witnesses but the one under examination should attend before the single Commissioner, so as to make a breach of that order a contempt of the subdivision Court.

Mr. Commissioner HOLROYD said, he could but lament that the Court of Bankruptcy was allowed to remain in so inefficient a state as it had been placed in by the statute 5 and 6 William IV. cap. 29, sec. 25, by which it was enacted that a Judge or Commissioner sitting alone should have all the power of a court of record, except that (which was incident to the lowest court of record in the kingdom) of committing or imposing a fine for contempt of its order. He (the learned Commissioner) had power to order the withdrawal of a witness not under examination, but if the witness declined to comply with such order, as in the present instance, his Honour had no power of enforcing his own order. It was true that the contempt of a Commissioner sitting alone was by the section referred to made cognizable by the Court of Review, which Court might deal with it as a con-

tempt of the Court of Review. But the reference to that Court of the contempt of a Commissioner sitting alone was inefficient for the purpose intended, and impracticable. Such a course would be wholly inconsistent with the immediate and effectual exercise of the duties of a Commissioner sitting alone, and must always be at the hazard of defeating the object of the examination, where such object was the discovery of the property of a bankrupt, or the detection of fraud. The law in bankruptcy ought to be administered in a vigorous, able, and efficient tribunal, but no Court could have these requisite qualifications which had not the power of preventing obstruction to the performance of its duties. Under the circumstances, he (the learned Commissioner) would comply with the application of Mr. Humphreys, and adjourn the examination to a subdivision Court, but he could not but feel that it would tend to manifest inconvenience and probable hindrance and delay to the general business of the Court, if private examinations of this sort were to be thrown upon the subdivision Courts, besides the great additional expense that would be thereby occasioned. The question generally deserved serious consideration

PREROGATIVE COURT.—*May 3.*

MUNDY v. SLAUGHTER.

NEW WILL ACT, Sect. 17.—Whether an Executor and Legatee having intermeddled with the effects, and then renounced and assigned his Legacy, is a competent witness?

This cause came on to be heard upon an objection to the competency of a witness, who was named executor, and had intermeddled with the testator's effects, afterwards renounced, and assigned his Legacy.

After hearing the argument of the Queen's Advocate and Dr. Robertson, in support of the objection,

Sir H. JENNER stopped Dr. Addams on the other side, and was of opinion that, under the 17th section of the new act, the party having been permitted to renounce (though it now appeared, of which fact the Court was not aware in the first instance, that he had intermeddled with the effects), and having assigned his legacy, was a competent witness, and overruled the objection.

RE CHARLOTTE WICKEY, Widow, deceased.

NEW WILL ACT, Sec. 21.—Validity of Obiterations, Interlineations, or Alterations in a Will.

Mrs. Wickey made her will, dated in July 1835, and a codicil dated in May 1837. There were several alterations and interlineations made

by the deceased in her own hand writing, in the will, but when they were made did not appear, and upon application being made for probate by Dr. NICHOLL, he contended that the burthen of proof was thrown on the party who contended that the alterations are not to have effect.

Sir H. JENNER said, the construction of the 21st Sect. of the Act, has hitherto been the other way; and that alterations are not valid, except the words are so completely obliterated, that it cannot be made out what they originally were. Probate is then granted as if they were blanks in the will. To say that the substituted words are to be valid, and are to have effect without the attestation of witnesses as required for the execution of a will, (a) would be contrary to the whole scope and spirit of the Act. When words are so obliterated as not to be apparent, and other words are interlined, the substituted words cannot be taken as part of the Will. In the present case the presumption is, that the alterations were made before the Act came into operation; and upon that question rests the only doubt. With regard to the construction of the 21st sect., wherever a real question arises, the Court will not decide it on a mere

ex parte motion, but will afford the party an opportunity of carrying the case before the Judicial Committee of the Privy Council.

Upon the presumption probate was decreed.

REVIEW OF NEW BOOKS.

COSTS as at present allowed on Taxation, sold by Mr. JENNINGS, Master's Clerk, and Mr. HECKFORD, Signer of the Writs at the Exchequer Office, Lincoln's Inn. London: Published and sold by G. F. Cooper, Law Bookseller, 57, Carey Street, Lincoln's Inn Fields. 1839.

This appears a very desirable appendage to an Attorney's office. The book is divided into four parts, which comprise Official Fees—Costs, lower scale—Costs, higher scale—and Miscellaneous Costs, such as are allowed in the Exchequer of Pleas; and it is stated that the variance in the allowance in the other Courts is now so trifling as not to require particular notice.

(a) Sec. 9. Ed.

ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNIES *In Trinity Term, 1839.*

[Continued from Vol. 2. p. 15.]

QUEEN'S BENCH.

Clerk's Name and Residence.

To whom articled, assigned, &c.

Meare, Edward, 5, Princes-street, Bedford-square; and Winchester.	Todd, John Henry, Winchester.
Norman, James Ormond, 13, Bloomsbury-square.	Swain, Thomas, late of Frederick's-place, Old Jewry.
Nicholson, John, Hawkshead.	Slater, John, Hawkeshead.
Norman, John, Carlisle.	Nanson, William, Carlisle.
Northwood, George, 1, Wine Office-court; Worcester; and Tring.	Webber, John Huish, Caroline-street; assigned to Bedford, Charles, Worcester; assigned to Branscomb, Walter, and Benson, Richard, Wine Office-court; and Tring.
Olivier, Daniel James, 5, Doughty-street.	Lee, Daniel James, Field-court, Gray's Inn.
Pickering, Joseph Henry, 2, Old Millman-street; and Derby.	Flewker, John, Derby.
Palmer, William Henry, 2, Old Millman-street; and Doncaster.	Palmer, William, Doncaster.
Pain, Thomas, 47, Lower Stamford-street; and Odiham.	Lamb, George, Odiham and Basingstoke.
Pinckney, George Henry, East Sheen.	Hillier, Edward, 6, Raymond-buildings.
Petch, Robert, the younger, 18, Everett-street, Brunswick-square; Kirbymoorside; and Gloucester-street.	Petch, Robert, Kirbymoorside.
Richardson, Joshua Thomas, 3, Featherstone-Buildings; Ferrybridge, near Pontefract; and York.	Mitton, Michael, the younger, Pontefract.

Business of the Courts.**COURT OF QUEEN'S BENCH.**

Middlesex Common Juries.

The Queen v. Hawdon and others—Barford v. Orchard—Field v. Beaumont—Darke v. Hempson—Bell v. Adams—Lewis v. Reilly and another—Fisher v. Way—Williams v. M'Taggart—Banks v. Rough—Elverd v. Foster the elder, and another—Horwood v. De Charms and others—Norris v. Smith—Chapman v. Kent—Clarke v. Cholmondeley, undefended.

The last defended cause is No. 21 on the list.

COURT OF COMMON PLEAS.

Middlesex Common Juries.

Farrow v. Delaporte—Drewry v. Hodson—Baylis v. Bragg—Lloyd v. Sandford—Lacy and another v. Buchanan—White v. Eley—Frost v. Grant and another—Hilton v. Swann—Hume v. White, undefended.

The last defended cause is No. 33 on the list.

COURT OF EXCHEQUER.

Revenue Causes.

Attorney-General v. Grocock and another—the Queen v. Stevens.

Middlesex Common Juries.

Harman v. Mills—Thwaites v. Goren—Rose v. French—Henderson v. Harris—Flint v. Emery—Dyson v. Cookes—Sealey v. Harris—Shepherd v. Stone—Higgins v. Dowding—Pennefather v. Lock.

EQUITY EXCHEQUER.

Long v. Hill, peremptory—Moorwood v. Foster, decree *nisi*—Bailey v. Dennett—White v. Hillacre—Serjeant v. Chafey—the Same v. the Same—Wood v. Wood—Robinson v. Wickham—Crease v. Penprase—Ellis v. Mann—Hughes v. Jones—Cropper v. Gibbon—Cromek v. Rowlandson—King v. Leach.

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ERRATA.

P. 11, col. 2, line 9—for “the rate had included it,” read “the rate had not included it;” and in the same column, line 18, for “They,” read “He.”

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The Legal Guide.

VOL. II.]

SATURDAY, MAY 18, 1839.

[No. 3.

LAWS OF REAL PROPERTY.

(Continued from Vol. I. p. 339.)

CONSTRUCTION OF SEC. 2, "AS TO THE TIME AT WHICH THE RIGHT TO MAKE A DISTRESS FOR ANY RENT SHALL BE DEEMED TO HAVE FIRST ACCRUED."

The New Statute Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

WE will now continue to shew in what manner the Courts are disposed to give effect to the new Statute of Limitations (*a*). In the Court of Common Pleas it was determined (Hilary Term, 1837), that since this statute a distress or action *for an annuity*, accruing by will, must be resorted to within 20 years from the death of the testator.

The case was one of REPLEVIN, for goods distrained on the 17th March, 1835 (*b*). It was alleged by the defendants in their avowry and cognizance, that the house was, on the 10th November, 1804, the freehold of John Salter, deceased, father of the defendant, Salter—that the distress was made in pursuance of a power contained in the will of John Salter, dated 3d August, 1800, for raising an annuity of £30. that he thereby gave the defendant Salter, which he charged upon the house, and because £870. arrears of such annuity were unpaid, the defendant Salter, distrained.

The action was tried at the Dover Assizes, 1836, before GURNEY, B. when an objection

was taken that the claim had not been made within 20 years, as prescribed by the statute. The JUDGE was of opinion that the defendant had *no right* to distrain. The Jury returned a special verdict, shewing the facts, and that the defendants took the goods in the name of a distress for £870. for 29 years arrears of the annuity, and that the defendant Salter had never received any part of the annuity, in his own right. This he avowed, and the other defendant, his bailiff, acknowledged taking the goods. The plaintiff had pleaded in bar: First, an objection to the title. Secondly, that the distress was not made at any time within 20 years next after the time at which the right to make a distress for arrears of the annuity first accrued to defendant Sadler. Thirdly, that it was not made within six years after the arrears in respect of the annuity first became due.—The defendants replied to the 2d plea, that so far as the same related to £585. the distress was made within 20 years after the defendant Salter's right accrued; and to the 3d plea, that the distress was made within six years after the arrears first became due.

A rule *nisi* was obtained for a new trial on the ground that the avowant's claim did not fall within the provisions of the statute 3 & 4 W. 4. c. 27. s. 2. which was made absolute, and upon the new trial it was argued for the plaintiff that the avowant was barred by the lapse of 20 years upon the 1st, 2nd

(*a*) See Ante, vol. I. p. 305.
(*b*) S. C. 2 Bing. N. C. 505.

and 3rd sections of the statute, confirmed by the 40th sec. and that at all events the avowant was limited to a claim for the last six years.

For the avowant it was contended, as to non accrue of the right within 20 years, that a claim under a will being expressly excepted in the 3rd clause of the 3rd sec. was a *casus omissus* in the statute, that if the case fell within the 40th sec. the 2nd must be abandoned, but that it did not fall within the 40th sec. for that applied only to money charged on land and legacies, and with respect to the six years limitation, it was contended that the last plea was not well framed.

TINDAL, C. J. delivered the following judgment of the Court (*a*).—The question which has been argued before us, arises upon a special verdict, found on the second and last issues raised between the parties to this action; the second issue being the question, whether the distress, so far as relates to £585., part of the money in the avowry and cognizance mentioned, was made within twenty years next after the time at which the right to make a distress for the said sum of £585., and every part thereof being arrears of the said annuity of £30. first accrued to the defendant, John Salter; and the last issue being upon the question, whether the distress in the avowry and cognizance mentioned, was made at any time within six years next after the arrears, in respect to the annuity of £30., first became due; of these two issues, the first appears to us to be principal, and, indeed, the only important one; for if the plaintiff is entitled to judgment in his favour on that issue, the right and title of the defendant, Salter, to the annuity is altogether barred; and he cannot, in any view of the case, be allowed to recover the arrears for the last six years, to which only the pleadings, on which the last issue is raised, can be held to apply. His

Lordship then adverted to the facts found by the special verdict, and continued:—Upon this state of facts, it appears that the right to make a distress for the annuity, first accrued to John Salter the son, on the expiration of the twenty days next after the first quarterly day of payment, subsequent to the testator's death, that is, at the very latest, some time in April, 1805. It also appears, that so far as there is any allegation, on the record, or any finding by the jury, there was no payment, or receipt of the annuity by the defendant Salter, before the distress was put in, in March, 1835, for it was then put in by the defendant for the whole arrears since the death of the testator. And, although the defendant has, by his own voluntary act, in his replication to the plea in bar, abridged the amount of the arrears for which he had distrained and avowed, that is, from twenty-nine years to nineteen years and a half, still this act of the defendant has no bearing on the fact appearing from the record, that no distress was made for twenty-nine years after the right to distract first accrued. Now, upon reference to the statute 3 and 4 Will. 4, c. 27, it appears to have provided two distinct periods of limitation, within which all distresses for arrears of annuities must be made, the two periods being prescribed, in respect of claims and objects in their own nature perfectly distinct. The second section (*b*) contemplates and provides for the case, where the right or title to the annuity itself is disputed; and directs, “that no person shall make a distress for any rent but within twenty years next after the time, at which the right to make such distress shall have first accrued to the person making the same.” That forty-second section, (*c*) contemplates and provides for the case, where the title to the annuity is not disputed, but the distress is made for arrears due; and

(*a*) S. C. James v. Salter and another. 2 Bingh. N.C. 505.

(*b*) See Ante, vol. i. pp. 2, 18.

(*c*) Ante, vol. i. p. 34.

for that purpose directs, "that no arrears of rent shall be recovered by any distress but within six years next, after the same respectively shall have become due."

The *second issue* arises upon a plea in bar, framed upon the second section; the *last issue* arises upon a plea in bar intended to be framed, though not accurately or aptly framed, on the 42nd section.

Now with respect to the second issue, it is manifest, that the facts found in the special verdict will bring the case precisely within the provision of the second section of the Act, unless that section is to be governed and controlled, not simply explained and construed, by the third; that is, unless the third section does in terms exclude from the operation of the second, the claim of any person whose right to a rent is derived under a will, by reason of the words "*other than by will*," which are found in the third section. And when this case was originally before the Court, upon a motion for a new trial, after the rule had been made absolute, upon a ground perfectly distinct from that which is now before us (a), an opinion was expressed by the judges then in Court, that the present case was *excluded* from the operation of the second section, by reason of its not being comprehended within the third; which third section appeared to us, upon a more hasty view, to contain an enumeration of instances to which only the second section could be held to be applicable. For myself, however, I am ready to admit, and I am authorised at the same time to say the same for my three brethren who were then in Court, that the further argument which we have heard on this point, when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed, and that we think (in which my brother *Vaughan* en-

tirely concurs with us) that this case is governed by the second section of the statute, which under the facts found in the special verdict, affords a bar to all claim and title to the annuity.

That the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and, upon a more close examination of the third section, the object and intent of it seems to us to be no more than this: to explain and give a construction to the enactment contained in the second clause, as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second. Many reasons concur to show that such must be the just construction of the Act. In the first place, if it had been intended that the third section should limit the application of the second to those cases, and those only, which are enumerated in the third, it might justly have been expected that the words would have been employed to express clearly and distinctly such an intention; but in this section there are no words that can be said directly to exclude all instances, except those enumerated in the third section. Again, if the words "*granted by any instrument other than by will*," were to be held to prevent the application of the statutory limitation of twenty years to claims of land or rent granted by will, it would be at direct variance with other parts of the statute; for the instance in the third section, immediately following that now under consideration, which provides for cases of claims in respect of estates in reversion or remainder, "*or other future estates or interests*," is large enough to comprehend, and would comprehend, all executory devises; and again, sec-

(a) S. C. 2 Bing. N. C. 505.

tion 40 expressly provides for the case of any legacy. And, indeed, the words "by any instrument other than by will," carry the matter no further than if the third section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent would have been granted, and had omitted to *mention* a will, in which case the only inference that could be drawn from such omission would have been, that the case not being enumerated in the third section, fell back upon the general provision contained in the second; indeed, unless this is held to be the true construction, the case which is likely to occur, perhaps, with the most frequency, viz. the devise of an estate in possession in land, or of an estate in possession in a rent-charge first created by the will, would be altogether unprovided for by the statute. For the third class of instances enumerated in sect. 3, describes the grant to be "by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent," a description which can neither apply to the case of a devise of a particular estate in land, or of a newly created rent; for the devisor who has by his will carved an estate in land out of the estate whereof he was seized, can never be said to have been possessed in respect of *the same estate or interest* as that claimed by the devisee; still less can the devisor who creates a new rent-charge by his will, be said to have been in the receipt of the rent. The case, therefore, under discussion, not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby; that the claim and title of the defendant Salter to the annuity is barred by the lapse of twenty years since his right to distrain first accrued; and that the verdict upon the *second issue* must be entered for the plaintiff. His LORDSHIP considered the last issue but of little importance, except as regarded the costs

depending on that issue, and said, that taking it as if it stood alone, and applying thereto the finding in the special verdict, we think it appears that the distress was made within six years next after the arrears of the annuity became due. For upon this last issue there is no objection made to the avowant's right or title to the annuity itself, but simply to the amount of arrears claimed beyond those of the last six years, and the distress was evidently made within time for this last six years. We, therefore, think the verdict on the last issue must be entered for the defendant; but that upon the whole record the judgment must be for the plaintiff.

(To be continued.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 22, VOL. I.

Of what do Incorporeal Hereditaments consist?

(Continued from Vol. I. p. 374.)

4. WAYS. A right of way is the privilege which an individual, or a particular description of persons, such as the inhabitants of the village of A, or the owners or occupiers of the Farm of B, may have, of going over another person's ground. It is an incorporeal hereditament of a real nature; entirely different from the King's highway, which leads from town to town; and also from the common ways, which lead from a village into the fields.

By the 2 and 3 W. IV. c. 71, s. 2, it is enacted, that no claim which may be lawfully made at the common law by prescription or grant, to any way or easement, or to any watercourse, or the use of any watercourse, or the use of any water (a); when the same shall have been actually enjoyed by the persons claiming right thereto for 20 years shall be defeated by shewing the commencement thereof; and where such way or other matter shall have been enjoyed for

(a) All these are incorporeal rights, and may become an incorporeal hereditament by grant, or prescription.

40 years, the right thereto shall be absolute unless had by consent or agreement.

There are three kinds of ways. First, a footway, which is called *iter, quod est, ius eundi vel ambulandi hominis*. The second is a footway and horseway, and is called *actus ab agendo*. This is vulgarly called a pack and prince way, because it is both a footway, and a pack or drift way also. The third is, *via* or *aditus*, which contains the other two, and also a cartway; for this is *ius eundi, vehendi, et vehiculum et jumentum ducendi*. This is twofold; namely, *regia via*, the King's highway for all men; and *communis strata*, belonging to a city or town, or between neighbours. (1 Inst. 56. a.)

Notwithstanding these distinctions, it seems that any of the ways here described which are common to all the King's subjects, whether it lead directly to a market town or only from town to town, may properly be called a highway; and that any such cartway may also be called the King's highway. But a way to a parish church, or to the common fields of a town, or to a village, which terminates there, may be called a private way; because it does not belong to all the King's subjects, but only to the inhabitants of a particular parish, village, or house. (1 Vent. 189—1 T. R. 570.)

A right of way over another person's ground may be claimed in three ways. 1. By *prescription* and usage. 2. By a *grant* from the owner of the soil over which the way is granted. And 3. A person may claim a right of way over another land from *necessity*. As if A grant a piece of land to B, which is surrounded by land belonging to A, a right over A's land passes of necessity to B, for otherwise he could not derive any benefit from his acquisition. And the feoffer shall assign the way where he can best spare. It is the same, though the close aliened be not totally inclosed by the land of the grantor, but partly by the land of a stranger; for the grantor cannot go over the stranger's land. (2 Rot. Ab. 60.)

5. OFFICES, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments, whether public, as those of Magistrates, or private, as of Bailiffs, receivers and the like. For a man may have an estate in them either to him and his heirs, or for life, or for a term of terms, or during pleasure only; save only that *offices of public trust cannot* be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators. (9 Rep. 97.) Neither can any *judicial office* be granted in reversion; because though the grantor may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient: but *ministerial offices* may be granted (11 Rep. 4); for those may be executed by deputy. Also by 5 and 6 Edw. VI. c. 16. no public offices (a few only excepted), shall be sold, under a pain of disability, or dispose, or hold of it.

6. DIGNITIES being a species of incorporeal hereditament, I shall here mention that all degrees of nobility and honour are derived from the Queen as their fountain. (4 Inst. 363.)

The titles of the nobility now in use are: 1. Dukes; 2. Marquises; 3. Earls; 4. Viscounts; 5. Barons. As to the origin, nature, and Law of Dignities in general, I beg to refer the reader to *Cruises Dig. Vol. III. Tit. 26, DIGNITIES*.

7. FRANCHISES. A Franchise is a royal privilege, or branch of the King's prerogative, subsisting in a subject by a grant from the Crown.

Franchises are extremely numerous, some of which I shall here mention.

1. A *Forest* is defined by Manwood, to be,—“A certain territory or circuit of “woody grounds and pastures, known by “its bounds and privileges, for the peace-“able being and abiding of wild beasts and

"fowls of forest, chase, and warren; to be under the King's protection for his princely delight; replenished with beasts of venery and chase, and great coverts of vert for the cover of the said beasts; for preservation whereof there are particular laws, privileges, and offices, belonging thereto."

2. A *Chase* is a franchise or liberty of keeping certain kinds of wild animals within a particular and known district, with an exclusive right of hunting them therein. The only difference between a forest and chase is that a forest has laws peculiar to it, but a chase has not.

3. A *Park* is an enclosed chase, extending over a person's own grounds, privileged for beasts of venery and beasts of forest and chase, by the King's grant or prescription. To a park three things are necessary:—1. A grant from the Crown; 2. inclosures by pale, wall, or hedge; 3. beasts of park, such as buck, doe, &c. (11 *Rep.* 87. b.—*Cro. Car.* 60.)

4. A *Free warren* is a franchise to have and keep certain wild beasts and fowls called game, within the precincts of a manor or other known places. This franchise must be derived from a royal grant, or from prescription which supposes such a grant.

5. A *Manor* consists of the demesniers, that is, the lands whereof the lord is seized, whether in his own occupation or in that of his lessees for years, copyholders, or customary tenants; together with the wastes; and also the rents and services reserved on grants in fee simple, originally made to the tenants (see *Bro. Ab. Tit. Manor*, 2.).

6. A *Court Leet* is a Court of Record, having the same jurisdiction within some particular precincts, as the Sheriffs' town has in the county, and is derived by a grant from the Crown.

7. A *Free Fishery*, or exclusive right of fishing in a public river, is a royal franchise, which is now frequently vested in pri-

vate persons, either by grant from the crown or by prescription.

8. A *Hundred* is a franchise, consisting of a right to hold a Hundred Court, or wapentaker, which of common right belongs to the King; but a subject may have it by grant from the crown or by prescription (see 2 *Rol. Ab.* 73—1 *Vent.* 402. 2 *P. W.* 399.).

Besides the franchises above-named, there are many others, such as the lord's right to the game within the manor; waifs, wreck, estray, treasure trove, royal fish, goods of felons, deodands, a right to hold a fair or market; all which I would have described, but I fear I have already "spun my yarn too long."

8. *RENTS* are of three kinds, namely—*rent-service*, *rent-charge*, and *rent-seck*.

1. *Rent-service* is where a tenant holds his land by fealty and certain rent (*Litt.* § 213). A right of distress is inseparably incident to this rent. 2. A *rent-charge* is where a rent was granted out of land by deed, but the grantee not having any power to distrain for it, because there was no fealty annexed to the grant, it became usual to insert an express power to distress in the grant, in consequence of which it was called a *rent-charge* (1 *Inst.* 143 b.). 3. A *rent-seck*, or barren-rent, is nothing more than a rent, for the recovery of which no power of distress is given, either by the rules of the common law, or the agreement of the parties.

B. C.

6th April, 1839.

PROBLEM III.

VOL. 2.

ACTIONS OF DEBT AND DETINUE.—Upon what is an Action of DEBT founded?

For what is an Action of DETINUE maintainable?

Law Reports.**QUEEN'S BENCH.—April 27.***Sittings in Banco.***STOCKDALE v. HANSARD.**

LIBEL.—Breach of Privilege—Whether the House of Commons may order the publication of their proceedings, which contains matter of Libel against individuals, and that it is a high breach of privilege to bring such Libel in question before any Court of Judicature.

(Continued from p. 28.)

If there were anything inconsistent with their legally claiming to be the judges of their own privileges in the plea that had been pleaded, the fault would rest entirely with myself; but, my Lords, by appearing in the name of the defendants, against whom this action is nominally brought, and pleading in bar that the act was done by command and authority of the House of Commons, I conceive that the facts alleged being admitted, that it only remains for the Court to give judgment for the defendants. My Lords, to suppose that by appearing and pleading the privileges of the House are submitted to the judgment of your Lordships, is to contend two things that are clearly distinguishable, and that confusion could only arise in minds little imbued with legal principles, as to suppose that the liability for a libel depends upon whether the publication is gratuitously circulated, or whether it is distributed upon payment of a part of the price of printing, so as to prevent a wasteful circulation. My Lords, no one would confound this distinction, except he were an enemy to all privileges, and were prepared to say that no argument can be advanced in favour of privilege that would not equally shew that the Members of the House of Commons have a right to go and rob and murder on the highway. My Lords, according to various precedents from the proceedings of both Houses of Parliament, and from the proceedings which I will by-and-bye bring particularly before your Lordships, of the Courts in Westminster Hall, a different course might undoubtedly have been pursued, a summary proceeding might have been instituted against a party bringing an action for the direct purpose of calling in question the undoubted privileges of the House of Commons, and appealing to an inferior Court to have those privileges overruled. Not only, my Lord, might this summary proceeding have been justified by the House of Commons, and by the House of Lords, but by what has been done by the Court of Exchequer, by the Court of Chancery, and by

other Courts in Westminster Hall. My Lords, I have thought that it was a more expedient course, instead of at all seeking to interrupt the action by any summary course, to refer the case to your Lordships. My Lords, one strong argument always weighed with me in considering such a subject as this—that it is much better to allow justice to proceed without interruption, and to place confidence in the constituted tribunals of the land. My Lords, there is likewise this great advantage in such a mode of proceeding, that it gives the plaintiff who complains the opportunity of denying that the act was done under the authority of the House of Commons, or under the authority of the House of Lords, or it might be under the authority of a Court of Justice; it gives the plaintiff likewise this other advantage, which I think he ought to enjoy, which is not only to deny that the act was done under the authority assumed, but that there was an excess beyond what that authority would have justified; that the plaintiff by a new assignment might point it out for the information of the Court, so that he might be compensated in damages by a jury; that although the command were lawful, its extent had been exceeded. My Lords, for these reasons I concurred in the opinion that it was the proper course to enter an appearance to this action, and to state upon the record the authority under which the act complained of was done; but, my Lords, I do expect that on the nature of the defence being disclosed, your Lordships would say that by the law and constitution of this kingdom you are incompetent to inquire into the existence of privilege, the question so arising, and that if you could inquire, you would, after a full and patient consideration of the whole case, decide that the privilege does exist. My Lords, the two Houses of Parliament have no reason to distrust the judges of the common law. Formerly, when the judges were the depending creatures of the Crown, they were too frequently the enemies of the people; but since the judges have happily been made independent, they have steadily supported the privileges of Parliament, equally disregarding the favour of the Crown, and despising to create a shortlived and despicable popularity. My Lords, having respectfully, in the face of the Court and the country, repeated the protest that the House of Commons, like other courts of exclusive jurisdiction, and as a branch of the legislature, is by the law of England the sole judge of its own privileges, and that no action can be maintained for an act authorized by them, I would observe that I have given to this subject a degree of labour and pains adequate to its great importance.

(To be continued.)

*Sittings in Banco.**May 1.***Doe Dem Mayew v. Asby.**

FORFEITURE.—*Breach of Covenant to repair after notice to repair served on Lessee—Whether the Court will grant equitable relief under statute 4 Geo. 2, c. 28.*

In this case the defendant, who was the lessee of some houses under a lease, which contained the usual covenants on his part to repair and to make good all dilapidations within three months after notice, had received the required notice to repair which he did not comply with, and thereupon the lessor of the plaintiff brought an ejectment for a forfeiture, and obtained judgment.

A rule had been granted to show cause why the judgment should not be set aside, on payment of the costs of the action, and of the rule as between attorney and client; the defendant having sworn that he had *since* fully repaired the premises, and therefore he claimed the *equitable interference of the Court* upon the statute 4 Geo. 2, c. 28, which enabled the Courts of Common Law to give relief in cases of forfeiture, under particular circumstances.

Lord DENMAN, C. J. said.—I think that we have not the power to grant this application, and by making this rule absolute we should only be tempting parties to come before us and make these unsatisfactory applications, on points on which they must ultimately be defeated.

LITTLEDALE, J. concurred, and observed that if the premises had been repaired according to the covenant even within a short time after the expiration of the notice to repair, that would have been an answer to the ejectment; for if there is a general covenant to repair, and if there is also a particular covenant to repair within a specified time after notice, if the repairs are performed within that time, that would prevent the forfeiture.

The rest of the Court concurred.

Rule discharged with costs.

In this case an attempt was certainly made to extend the power, or rather the jurisdiction of the Courts of Common Law, beyond that of the Court of Equity, which has refused to grant injunctions to stay proceedings at law in cases of *forfeiture*, except only for mere non-payment of rent (*a*). The covenant to repair generally, and the covenant to repair within a specified time, after notice, have been generally held (where inserted in

well drawn leases), to be distinct and independent covenants; but we unfortunately find many leases prepared by ignorant persons, where the covenant can only be construed as *one covenant*, in which the generality of the first part is restrained (or so held to be) by the latter part; hence a plaintiff declaring upon the covenant, without setting out the qualifying part relating to the notice, becomes nonsuited, see *Horsfall v. Vestar*, 1 Moore 89, S. C. 7, Taunt. 385. It may be well here to observe, that whatever form, a covenant to repair assumes, it runs with the land, and affects the reversion in the hands of every person who may have it.

In *Roe v. Davis*, (*b*) it was observed by Lord ELLENBOROUGH, it might perhaps be true, that before the statute a practice obtained in this Court of relieving the tenant up to the extent contended for: but it appears by the words of the Act, that the legislature only meant to legalise that practice to a certain extent, viz. *upon the application of the tenant before trial*. If, therefore, the Court were to extend the same relief to him *after trial*, it would be exercising the function of legislation, instead of judicial construction, and would depart from the line which the statute has drawn. In *Doe dem Harris v. Masters* (*c*), the Court refused to relieve the tenant *after trial*, by staying proceedings in an ejectment for rent upon payment of the arrears and costs, and in equity Lord Eldon refused relief (*d*).—ED.

*May 4.***STRANGE v. PRICE.**

Bill of Exchange—As to what is a good notice of dishonour.

This case had been tried, and the plaintiff had a verdict against the defendant, upon a Bill of

(*b*) 7 East, 363.

(*c*) 2 Barn. & Cress. 490.

(*d*) See *Hill v. Barkley*; 16 Ves. J. 402. & 18 Ves. J. 56.

(*a*) See *Bracebridge v. Buckley*. 2 Price, 200. White v. Warner, 2. Merlo. 450.

Exchange, of which he was the indorser. He this Term obtained a Rule to show cause why the Verdict should not be set aside, and a nonsuit entered. The question at issue was, whether the following was a good notice of the dishonour of a bill of exchange:—"Mr. Strange informs Mr. Price that Betterton's acceptance is not paid: as endorser, Mr. Price is therefore called upon to pay the money, which will be expected immediately."

The COURT considered that they were bound by the authorities, and therefore this notice would not be sufficient.

The rule for a nonsuit was made absolute.

When one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay; yet that is with the limitation, that if the bill be not paid in convenient time, the person to whom it was payable shall give the drawer notice thereof, for otherwise the law will imply the bill paid, because there is a trust between the parties; and it may be prejudicial to commerce, if a bill may rise up to charge the drawer, at any distance of time, when in the meantime all reckonings and amounts are adjusted between the drawer and the drawee. TREBY, C. J. Allen v. Dockwra Salk 127. See Show. Rep. 319. 1 Lill. 234.

But the *drawer* of an accommodation bill is not entitled to notice of dishonour, because he can receive no injury for want of it. See Collott v. Haigh, 8 Camp. 281. and such a drawer making a bill, payable at his own house, that is sufficient evidence of its being an accommodation bill. Sharp v. Bailey, 4 Man. and Ry. 4.

In a notice by letter, as in the case here reported, it should state, that the bill has been presented to the drawer and dishonoured. It is not sufficient merely to demand the money, leaving the drawer, to infer the presentation, and dishonour. See Solarte v. Palmer, 1 Bing, 2 New Rep. 194; 1 Scott, 2.; 5 Moo. and Payne, 475; 1 Tyrw. 371; 1 Carr. and Payne, 417, confirmed on appeal to the House of Lords, 2 Clarke and Fin. 93 Hartley v.

Case, 6 Dow and Ry. 505.; 4 Barn. and Cress. 339.; 1 Carr. and Payne, 555.

Even notice by the *acceptor* to the drawer, that he could not pay, and a payment by such acceptor to the drawer in part, and to enable the latter to take up the bill, will not prevent the necessity for a notice to the drawer of presentation and dishonour. See Baker v. Birch, 3 Camp. 107.; Forster v. Jurdison, 16 East, 105.—EDITOR.

May 7.

REGINA v. GREGORY.
THE SATIRIST, *Sunday Paper*.

LIBEL—Judgment.

The defendant was this day brought up to receive the judgment of the Court for a libel published in his paper, called THE SATIRIST, reflecting on the character of Mrs. Hogg, the wife of Mr. Hogg, the Member for Beverley, and against whom a verdict of "Guilty" had been returned.

Mr. Justice LITTLEDALE delivered the judgment of the Court. The defendant stood on the floor to receive judgment for a libel published in the *Satirist* reflecting on the character of Mrs. Hogg, calculated greatly to distress the feelings of herself and Mr. Hogg. It must have been a great grievance to them for the world to suppose that their children were illegitimate. The circumstances of the case were so minutely stated in the libel, that if the defendant had made an inquiry, he might easily have ascertained its falsehood, but the description exactly fitted that of Mr. and Mrs. Hogg. Mr. Hogg certainly owed it to himself and his family, and to society at large, to institute these proceedings. He would have been lost to all honourable and proper feeling if he had not done so. The defendant said in his defence that it was all a mistake on his part. The Court could not say whether it was or not, his own feelings were the best judge. But, supposing it to have been a mistake, it ought not to have been published at all. It was much the same whether it was a mistake or not, because it was calculated to injure Mrs. Hogg in general society. He had admitted he meant to libel somebody else instead of Mrs. Hogg, and he had therefore admitted himself to be a libeller. Mr. Hogg had thought it right to press the Court for punishment, and the Court could not blame him, because if he had shrunk from doing so, it might have been supposed there had been some compromise between the parties. Under all the circumstances the sentence of the Court was that the defendant should be imprisoned for three calendar months.

(*Sittings at Nisi Prius.*)—May 9.

GUEST v. REYNOLDS AND OTHERS.

Excessive Levy under Writ of Execution issued upon a Warrant of Attorney—Improper sale of the Levy by the Plaintiffs on the Writ of Execution, themselves purchasing part of the goods, whether they are liable to damages. (a)

It appeared that the plaintiff in this action carried on the business of a chymist and druggist at Tunbridge, and the defendants, who carried on the business of wholesale druggists in London, supplied him with goods. The plaintiff had given a warrant of attorney for the sum of £200, to the defendants as a security for the amount of his debt to them. In December, 1837, the plaintiff fell into difficulties, and the defendants put an execution into his house, and the goods were sold. The irregularities complained of in this execution were—that the defendants levied for the sum of £119. 16s. 9d., when no more than £20. 16s. 4d. was due, the defendants having included in the amount they levied a large sum for interest on bills of exchange, which they had no right to do. The second ground of complaint was, that the defendants had improperly conducted the sale of the furniture and goods levied under the warrant. The defendants employed their own auctioneer, Mr. Standige, from London, to sell the goods, &c. and Mr. Gunton, one of the defendants, accompanied him, and went to the sale and bought the goodwill and stock in trade of the shop at the price of £115., which was said to have been worth £400. Mr. Gunton having persuaded a purchaser present not to bid in order that he might buy it cheap. The defendants did not advertise the sale in any of the papers circulating in Tunbridge, but only in *The Times* London paper, and they gave no notice of the day of sale until the evening before it took place, when a few placards were posted about the town of Tunbridge. In consequence of the improper manner in which the goods seized were sold, the sum of money raised by the sale was far less than it would have been had the goods been disposed of to the best advantage.

On the part of the defendants, it was contended that the first charge, of having levied a larger sum than was due, was not supported, for the interest complained of was not interest on bills of exchange, but the interest that was due on the warrant of attorney, and that there was no proof of any misconduct in conducting the execution and the sale, for it was under the control of a London auctioneer, who did what he thought fit, and, therefore, no blame could attach to the defendants.

Verdict for the plaintiff, damages £200., on the second count, against the defendant Gunton only; and in favour of all the defendants on the first count.

(a) See *Burgess v. Pierce*, ante Vol. I. p. 279.

May 14.

JURIES.

This day the foreman of the jury addressed the Court upon the practice of summoning juries, and the inconvenience attending it to the jurymen. At present 48 jurymen were summoned to each Court, who were to attend the sittings in and out of term. They were obliged to be there every day, which his Lordship might suppose was a very great inconvenience. It thus took 576 jurymen for each year for all the courts of Westminster. There were no less than 25,000 persons liable to serve in this county, and he would beg to suggest to his Lordship, that if 36 different persons were summoned for each day, and fined if they did not attend, it would take more than twenty years to exhaust the list, and no gentleman would complain at being obliged to attend for one day in a year.

Lord DENMAN observed, that it was worthy of consideration whether some plan could not be adopted, and perhaps the proper mode would be to bring some bill into Parliament on the subject. Ultimately his Lordship said he would look at the present Act of Parliament, and see whether he could not himself adopt some measure of relief.

COURT OF COMMON PLEAS.

Sittings in Banco.

May 7.

PENNY v. SLADE.

Double Costs—Power of the Court to award them independent of the Certificate of the Judge.

A rule *nisi* had been obtained to shew cause why a suggestion should not be entered on the Roll.

The action was brought against the defendants for an act done in their magisterial capacity, for the purpose of authorizing the Master to tax to the defendants double costs of suit under the provisions of the Act of the 7th of James I. c. 5. It appeared from the affidavits that an application had been made to Lord Deaman, as the judge who had tried the cause, for a certificate to allow double costs, but his Lordship said that he would consult the judges of the Court of Common Pleas on the subject; and on a subsequent application having been made to him in the matter, his Lordship returned no answer. Consequently, the present rule had been applied for, on the ground that the Court in which the action was brought had the power to award double costs, independently of the certificate of the judge before whom the case was tried. The counsel for the plaintiff contended that the Court had no such power.

Mr. Serjeant Wilde, in support of the rule,

argued that the words of the statute allowing double costs to magistrates were imperative, and that the Court, in which the action was commenced, had jurisdiction to award such costs, no matter whether the judge granted a certificate or not.

The COURT were of a contrary opinion.

Rule discharged with costs.

COURT OF EXCHEQUER.—*May 5.*

(*Sittings at Nisi Prius.*)

LAMONT AND ANOTHER v. SOUTHALL.

Poor Rates and Highway Rates—Alleged illegal Distress for—Whether a Constable distraining for Highway Rate is entitled to Notice of Action—So for Poor Rate.

This was an action of trespass, in which the plaintiffs, who were brewers, sought to recover damages for the seizing of their goods, in consequence of which they were obliged to pay 9*l.* 15*s.* with 16*s.* for costs to redeem them.

It appeared that Joseph Seager, the tenant of a public-house at Hornsey, called the Sluice-house, being distressed for want of means to get rid of a distress for 110*l.* rent due to his landlord, applied to the plaintiffs for assistance. They, however, declined to increase their own demand upon him, which already amounted to 100*l.*, but expressed their readiness to treat with him for the assignment to them of his interest in the premises and the furniture; on which it was agreed that for 216*l.* he should make over all his property to them, it being part of the arrangement that the debt to the plaintiffs should be cancelled, while they should take upon themselves the payment of the rent for which the distress had been put in, the expenses thereof, and also the current quarter. In accordance with this, an assignment was drawn up and executed, possession given up, the arrears of rent discharged, and a man put into the occupation of the Sluice-house on behalf of the plaintiffs, while, until the license could be transferred at the next transfer-day, Seager's name was kept up, he and his family being moreover allowed, as an act of kindness on the part of the plaintiffs, to occupy a portion of the house until they should suit themselves elsewhere.

At the time that the assignment was made Seager was in arrear for poor-rates and highway-rates, and having been summoned for each and no payment made, the parish officers placed separate warrants in the hands of the defendant to levy the sum due on all, amounting to 9*l.* 15*s.* including the costs. This levy was accordingly made, and the question for the jury would be whether there had been any *bond fide* sale to the plaintiffs. It was also objected for the defendant

that he was entitled to notice of action, by reason of his having acted in obedience to the warrant of the justice of the peace.

Mr. Thesiger, in reply to this objection, said that whatever force there might be in the right to notice under the Highway Act, which he was not prepared to dispute, it was clear that no such existed with respect to the poor-rate, and that being the case, he would be entitled at all events to a verdict in respect of the goods seized for the latter claim.

Lord AINGER took the same view of the objection, it was ultimately arranged that a verdict should be given for the plaintiff as to the goods seized for the poor-rate, the jury being of opinion that the assignment was a *bond fide* one, while liberty was given to the parties to take the opinion of the Court in the ensuing term as to all the questions raised on both sides.

The verdict was accordingly taken for the plaintiff, with damages—the value of the goods seized for the poor-rate.

Sittings in Banco.

May 7.

WOOD v. DUNCAN.

Costs—A cause down for trial, and referred—Award set aside, and cause subsequently tried—Whether Costs of the former proceedings shall follow the verdict.

In this case a rule *Nisi* had been granted to shew cause why the Master should not review his taxation of costs. Mr. Cowling now shewed cause against the rule.

It appeared that the cause had been originally set down for trial, and referred to an arbitrator, whose award had been set aside for want of any finding being made on one, and that an immaterial issue. In consequence of this, the cause was taken down for trial again, when a verdict was given by a jury, in conformity with the material finding of the arbitrator, which was in favour of the defendant. The Master having refused to allow the costs of the former trial, this rule had been obtained on the authority of “*Poole v. Selwood,*” (a) 1 Price, 310, by which it was contended that the cause under such circumstances ought to be treated as a *remandet*.

Mr. Cowling, for the plaintiff, distinguished that case from the present, which he urged was to be looked on as an order for a *venire de novo*, in which view of the matter neither party could claim the costs of a former and abortive trial.

Mr. Watson replied, and cited “*Payne v. Bailey,*” 3 Brod. and Bing. 304. (b)

The COURT held that the latter case was no authority in this question, which ought to be treated as had been suggested by the counsel for

the plaintiff, and taken to be as if a *venire de novo* had been ordered.

Rule discharged.

(a) In this case it was held that if a cause standing for trial be referred, and the arbitrator's award in favour of the plaintiff should be afterwards set aside, and the cause be in consequence subsequently tried, the plaintiff, if he should afterwards succeed on that occasion, will be allowed the costs of the former trial.—ED.

(b) In that case the plaintiff obtained a verdict, subject to an award, the arbitrator had made a material mistake in his award, and the defendant refused to refer matters back to him. The Court of Common Pleas set aside the verdict, and discharged the rule for the reference; and the plaintiff having taken the cause down to a second trial, and again obtained a verdict, it was held that he was entitled to the costs of both trials.—ED.

BAIL COURT.—May 3.

(Before Mr. Justice WILLIAMS.)

REGINA v. THE LEEDS AND MANCHSETER RAILWAY COMPANY.

CERTIORARI—*To remove an inquisition from a local Court into the Queen's Bench to be quashed, on the ground of a juryman being interested, and the local court being presided over by an unauthorised person.*

In this case the defendants required some land for the purposes of their Railway, and had summoned a jury pursuant to the act of incorporation, for the purpose of assessing the compensation to be given at the Manor Court-house, in Manchester.

The landholder, who made the present application, deposed that the Court was not presided over either by the Sheriff or the Under-Sheriff, and that the person whom the deponent supposed to be performing the duties of the latter office, turned out to be an attorney's clerk; that the foreman of the jury held several shares in the stock of the Company, and that on the preceding evening he had toasted prosperity to the undertaking. In these circumstances it was scarcely possible that a proper trial could have been had, and the present application, therefore, was for a *certiorari*, to remove the inquisition into this Court, in order that all the proceedings may be quashed.

Rule granted.

COURT OF REVIEW—May 4.

FIAT AGAINST HENRY JONES.

PETITION OF GEORGE BAKER; JOHN GRAY, RESPONDENT—*As to the right of proof by a retired partner against the separate estate of another partner becoming Bankrupt—Practice—As to petition for removal of Assignees.*

The petition prayed that the proof of debt made by the respondent for £493. might be expunged with costs. The debt in question was contracted during a partnership between the respondent's brother, Thomas Gray, and the bankrupt, which was dissolved in 1836, when the latter took the whole of the property, guaranteeing payment of outstanding debts. It was argued for the petitioner, that under the authorities of Williams's case (a), and "*Ex parte Freeman*," the right against a solvent partner invalidated the proof against a separate estate. The respondent alleged an assent before bankruptcy to accept the liability of the continuing partner, as proved by the receipt of a warrant of attorney.

The COURT said this was a proof on a judgment entered up on a warrant of attorney given by the bankrupt. The respondent at the dissolution of the partnership agreed to become a separate creditor of the continuing partner; the petitioner himself had followed the same course. Time was given, and both parties received warrants of attorney, but at different periods. There was sufficient evidence of adoption to enable the Court to admit the proof against the separate estate. The prayer for the removal of the assignees was absurd. It was an appeal from the decision of the commissioner, who on application had investigated the matter, confirming the proof; and the present petition must be dismissed with costs.

INSOLVENT DEBTORS' COURT—May 7.

JOHN WILLIAMS'S CASE.

Abolition of Imprisonment for Debt Bill. As to discharging a Prisoner out of Custody while his Petition under the late Insolvent Act was on the file of the Court.

In this case a rule nisi had been obtained (b) for the creditors, to shew cause why the Insolvent should not be dismissed, in order that he might avail himself of the benefit of the Act, and be discharged from custody on mesne process, which order the Court could not make while the Insolvent's petition remained upon the file of the Court.

Mr. Nicholls shewed cause this day.

The Court made the rule absolute for dismissing the petition.

(a) 11 Ves. J. S.

(b) See the case reported, ante, p. 13.

SITTINGS appointed to be held in Middlesex and London, before the Right Honourable THOMAS LORD DENMAN, Lord Chief Justice of the Court of Queen's Bench, in and after TRINITY TERM, 1839.

		IN TERM.			LONDON.
		MIDDLESEX.			LONDON.
Thursday	.	May 23			
Monday	.	May 27	Tuesday	.	June 11
Monday	.	June 10			
		AFTER TERM.			
Thursday	.	June 13	Friday	.	June 14

The Court will Sit at Eleven o'Clock in Term, in Middlesex; at Twelve in London; and in both at Half-past Nine after Term.

N. B.—Long Causes will probably be postponed from the 23rd and 27th of May to June 13th; and all other Causes on the Lists for the 23rd and 27th of May, will be taken from day to day until they are tried.

Undefended Causes only will be taken on June 10th.

Short defended as well as undefended Causes entered for the Sitting on June 11th, will be tried on that day, if the Plaintiffs wish it, unless there be a satisfactory affidavit of merits.

The Court will probably Sit in Banc instead of at Nisi Prius for six days beyond the Term.

EXCHEQUER OF PLEAS.

SITTINGS in Middlesex and London before the Right Honourable JAMES LORD ABINGER, Chief Baron of Her Majesty's Court of Exchequer, in and after TRINITY TERM, 1839.

IN TERM.

		MIDDLESEX.			LONDON.
1st Sittings,		Friday, May 24.			
By Adjournment		Saturday, May 25.			
(if necessary),		Monday, May 27.			
2nd Sittings,		Wednesday, June 5.			
By Adjournment		Thursday, June 6.			
(if necessary),					

AFTER TERM.

MIDDLESEX.

LONDON.

Thursday, June 13. | Friday, June 14.

The Court will Sit during Term at Ten o'Clock.

SITTINGS appointed in Middlesex and London before the Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Lord Chief Justice of Her Majesty's Court of Common Pleas at Westminster, in and after TRINITY TERM, 1839.

IN TERM.

		MIDDLESEX.			LONDON.
Wednesday	:	May 29.	Friday	:	May 31.
Wednesday	:	June 5.	Friday	:	June 7.

AFTER TERM.

Thursday	.	June 13.	Friday	.	June 14.
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N.B.—The Court will sit at Ten O'Clock in the Forenoon on each of the days in Term, and at Half-past Nine precisely on each of the days after Term.

The Causes in the List for each of the above Sittings Days in Term, if not disposed of one those Days, will be tried by Adjournment on the Days following each of such Sitting Days.

On Friday, the 14th of June, in London, no Causes will be tried, but the Court will adjourn to a future day.

EXAMINATION OF ARTICLED CLERKS AT THE LAW SOCIETY
Easter Term, 1839.

GENTLEMEN WHO PASSED THIS EXAMINATION.

<i>Names.</i>	<i>Name & Residence of Attorney to whom articled, or assigned.</i>
Abbott, Vernon Montague	Charles Murray, 59, Chancery-lane ; James Archibald Murray, 59, Chancery-lane.
Ainsworth, Samuel	John Sudlow, Manchester.
Allatt, William	John Sanderson Archer, Ossett, Yorkshire.
Allee, Lawrence Turton	James Ralfe, Winchester.
Allison, Henry	Robert Nesham, Darlington, Durham.
Aller, James	Thomas Hippisley Jackson, Stamford, Lincoln.
Baker, Henry	William Mitchell, Petersfield ; assigned to William Lawrence Bicknell, 57, Lincoln's Inn Fields.
Barber, George	John Lambert, Alnwick, Northumberland.
Barton, Richard Carroll	Joshua Mayhew, 26, Carey-Street.
Beesley, James	William Walford, Banbury.
Benn, John Higginson	William Wyse, Rugby.
Bentley, Henry William	George Frederick Abraham, 6, Great Marlborough-street.
Billings, William Frederick	Thomas Billings, Cheltenham.
Bird, John Proctor	William Smith, 22, John-street, Bedford-row.
Bishop, Frederick	William Bishop, Shelton Hall.
Bradley, Edward Gould	Robert Clark, Queen-square, Bath.
Brook, John Calver	Messrs. Bohun and Rix, Beccles.
Brooks, Abraham James	David William Weddell, Gosport ; William Minchin, Portsea.
Brooks, John, the younger	Alfred Higginbottom, Ashton-under-Lyne.
Bryan, James	Charles Edward Hunt, 2, Barnard's-inn.
Bunting, Jabez, the younger	Thomas Percival Bunting, Manchester.
Cameron, Dugald Edward	John Campbell Cameron, 1, Raymond-buildings.
Chalmers, Charles Boorn	Charles Carter, Barnstaple ; Evan Price, Great Torrington.
Challinor, Edward	John Norris, Manchester.
Clough, Thomas William	William Clough, Pontefract.
Clutton, John, the younger	John Clutton, the elder, High-street, Southwark.
Coles, James Bond	Thomas Milliken Mills, Taunton ; assigned to John Manning, Innes, Hazelton, Taunton.
Cooper, Samuel Nicholas	William Read King, 11, Sergeant's Inn, Fleet-street.
Cory, Charles	Robert Cory, the younger, Great Yarmouth.
Cory, Edward James	Charles Kingdon, Holsworthy, Devon.
Crockett, Richard Singleton	Edward Mortimer Green, Ashby-de-la-Zouch, Leicester ; assigned to Henry Turner, Wolverhampton ; assigned to Campbell Wright Hobson, 13, Warwick-court, Holborn.
Cronhelm, John	Edward Harker Soulby, Leeds ; assigned to Edwin Eddison, Leeds.
Davenport, Robert	John Marriot Davenport, Oxford ; assigned to Joseph Blower, 61, Lincoln's Inn Fields.
De Medina, Henry Augustus	Edward Rice, 2, Verulam-buildings.
Dunn, Henry Thomas	John Dunn, Durham ; William Vizard, 51, Lincoln's Inn Fields.
Dyson, Matthew Henry Moorhouse	Martin Kidd, Holinfirth.
Edwards, James Barber	John Mercer, Deal.
Evans, William Cornwallis	William Richard Berryman, Devonport.
Gamble, George Spencer	Robert Crabtree, Halesworth, Suffolk.
Girdlestone, William Bolton	James Turner, 41, Bedford-row ; assigned to Thomas Garwood, Wells next the Sea.
Gibbons, Robert	Samuel Bellamy, Gainsburgh.
Gilham, John	John Shearman, 21, Bartlett's-buildings.
Good, George Frederick	John Fiske, Saffron Walden.
Govett, John Clement	Charles John Shebbeare, Grove Cottage, Clapham ; assigned to Benjamin Field, Lincoln's Inn Fields.

(To be continued.)

ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNEYS
In Trinity Term, 1839.

[Continued from Vol. 2. p. 31.]

QUEEN'S BENCH.

Clerk's Name and Residence.

<i>Clerk's Name and Residence.</i>	<i>To whom articled, assigned, &c.</i>
Robinson, Henry, 2, Snow-hill, London ; Sheffield ; and Whittington, Derby.	Thomas, Wotton Byrchinshaw, Chesterfield ; assigned to Brown, John, Sheffield.
Richards, Thomas, 124, St. John-street, West Smithfield ; and Llandilofawr, Carmarthen.	Thomas, James, Landilofawr.
Raw, Joseph, 8, Three-crown-square, Southwark ; and Kirkby Lonsdale.	Pearson, Francis, Kirkby Lonsdale.
Staple, John, 21, King-street.	Johnston, James, 26, Carey-street.
Silk, John Alexander, 3, Mylne-street, Claremont-square.	Fisher, William, 5, Great James-street.
Smith, Richard Curgenven, Plymouth, Devon.	Luxmoore, Jonathan, Plymouth.
St. Aubyn, William St. John, 34, Guildford-street.	Fleming, Sr. John, Lancaster-place ; assigned to Henderson, William, Lancaster-place ; assigned to Tustin, Edward Erskine, 4, New Bridge Street.
Staunton, Edward, 55, Lincoln's-inn-fields.	Staunton, Thomas, Bath ; assigned to Ensor, Thomas Rainsford, 14, South-square.
Shaw, Thomas, 14, Wakefield-street ; Hudcar within Bury ; and Paradise-place.	Woodcock, William Plant, Bury.
Shum, Robert, 44, Marchmont-street.	Manisty, Henry, King's-road.
Smith, Robert Wyndham, Ross, Hereford.	Prothero, Thomas, Newport.
Scott, Edward Wilson, 29, Hart-street ; 38, Dowgate-hill ; and Kendal.	Wilson, Richard, Kendal.
Straight, Robert Marshall, 34, Great James-street.	Straight, Samuel, Sessions-house, Old Bailey.
Simpson, Thomas, Stafford.	Thomas, David, Stafford.
Starling, Thomas, 40, Leicester-square.	Starling, Edward, 40, Leicester-square.
Stowers, Thomas, Epsom.	Puttock, James, Epsom.
Torre, John Alexander, 9, St. James-street.	Knocker, Edward, Dover ; assigned to Abbott, G. Washington, 9, St. James-street.
Teulon, Peter Ross, 22, Queen-street, Golden-square.	Hammet, Joseph Pope, 12, Southampton-buildings.
Todd, Robert, 37, Sidmouth-street ; and King-ston-upon-Hull.	Levett, Arthur, Kingston-upon-Hull.
Thorner, Paul Harrison, 12, Sussex-street ; and Poulton, Lancaster.	Liddell, Alexander, and Whiteside, William, Poulton.
Turner, John Hawkes Valentine, 10, Calthorpe-street ; 23, Alfred-street ; and Frome, Selwood.	Miller, Henry, Frome Selwood.
Tombs, Edward Thos. 41, Cambridge-terrace.	Dewe, Charles Thomas Reynolds, Derby.
Tevor, James, 82, Upper Seymour-street; Bridgewater ; 14, Gloucester-street ; 28, Great Ormond-street ; 67, Lamb's Conduit-street ; and 13, New North-street.	Trevor, John William, Bridgewater ; assigned to Loftus, Thomas, New Inn.
Upton, Henry, 24, Stockbridge-terrace, Pimlico ; and Petworth.	Ellis, John Luttmann, and Hale, William, Petworth.
Underhay, John, Brixham.	Pitt, James, the younger, Exeter.
Wroe, John Blomely, the younger, 31, Amwell-street ; and 5, Upper Porchester-street.	Walker, John, Manchester ; assigned to Jesse, Joseph Ablett, Manchester.
Woodrow, Jeremiah, 12, Huntley-street ; Ryde, Isle of Wight ; and 63, Chancery-lane.	Butt, William, Ryde.
Wellborne, Charles, 11, East Harding-street.	Elkins, William Morris, 4, Cook's Court.
Wright, John Hippolite, Lincoln Chambers.	Leman, James, Lincoln's-inn-fields.

- Wells, William, 52, Gloucester-street; Dursley; and 4, Arundel-street.
 Walcot, Thomas, 40, George-street, Euston-square.
 Whish, John Buchanan, 22, Everett-street; Hastings; and Frampton-on-Severn.
 Williams, William, Stroud Green, Hornsey
 Wood, James, 5, Brown's-buildings, Islington; and Bradford.
 Whidborne, John, 28, Lamb's Conduit-street.
 Wood, William, Liverpool.
 Washborne, William, 15, Tavistock-place; Norwich; and Newbury.
 Welsby, William, 15, Alfred-street, Bedford-square; and Ormskirk.
 Yonge, John, 110, Strand.
 Yockney, Jones, 20, Torrington-square.
- Wells, William Berry, and Bishop, Henry, Dursley.
 Enfield, Henry, 19, Southampton-buildings; assigned to Cuveljé, Thomas, 19, Southampton-buildings; assigned to Skilbeck, William, 19, Southampton-buildings.
 Wise, William, Rugby.
 Murray, William, 5, London-street.
 Bentley, Greenwood, the elder, Bradford.
 Smale, Charles, and Harvie, Harry Arthur, Bideford; assigned to Wickens, Henry, 1, Christopher-street.
 Wood, Charles, Manchester.
 Unthank, Clement William, Nowich.
 Welsby, John, Ormskirk.
 Atcheson, Robert Shank, 23, Duke-street; assigned to Ridge, William, 23, Duke-street; assigned to Rice, Henry, 39, Jermyn-street.
 Moseley, Thomas, 31, Bedford-street

LAW EXAMINERS.

Trinity Term, 1839.

Sir F. Dwarris, one of the Masters of the Court of Queen's Bench.

Mr. Amory,
 Mr. Clayton,
 Mr. Foss,
 Mr. Martineau,

Attorneys.

Wednesday, June 5, is appointed for the Trinity Term Examination. Gentlemen applying to be examined must leave their testimonials of due service on or before *Tuesday, the 28th May.*

NOTICE TO CORRESPONDENTS.

Inquirer. We are obliged, from consistency, to refer this gentleman to our Notice to Correspondents, ante Vol. I. p. 96, *first notice.*

R. P. Your being a constant correspondent, entitles your letter to the notice we otherwise should not give it. We see no sufficient reason to admit that our strictures are too severe. You have not entered into the *amicable* spirit of them, as the very essence of your letter would lead us to imply. Suppose that the EXAMINERS went through an examination in open Court by the Judges of the land before their appointment, then indeed some of the questions would not be too simple. Your assertion that "from your own knowledge parties have passed who have not answered two-thirds of the questions, and what is worse, who have answered many of them in a way that must have clearly exposed their ignorance of the subject," only tends to confirm our observations, that "under a different government,

or Court of Examiners, the questions (as they are called) would be of essential benefit, and tend to make the profession of an Attorney what it ought to be."

Preparing for Publication.

PART I.

PRECEDENTS in CONVEYANCING, *adapted to the present State of the Law, with Practical Notes.* By THOMAS GEORGE WESTERN, Esq. F.R.A.S., of the Middle Temple, Author of the Commentaries on the Constitution and Laws of England, dedicated, by special command, to Her Majesty; intended as a continuation of **PRECEDENTS IN CONVEYANCING**, by N. VALLIS BONE, Esq. of Lincoln's Inn, Barrister-at-Law.

This Part will contain
CONDITIONS OF SALE AND CONTRACTS.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 16th May, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, MAY 25, 1839.

[No. 4.

LAWS OF REAL PROPERTY.

(Continued from p. 36.)

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

THE LIMITATION FOR THE RECOVERY OF RENT RESERVED ON LEASE.

Construction of 3 & 4 W. 4. c. 42. sec. 3. as applied to sec. 42 of this new Statute of Limitations.

HAVING shewn the Construction made by the Court of Common Pleas upon Sec. 2. of this new Statute of Limitations—“As to the time at which the right to make a Distress for any rent shall be deemed to have first accrued,” we will turn our attention to the limitation prescribed for the recovery of rent reserved on Lease. The question, that a period of six years was no bar to an action of Covenant for rent, under the new laws, was raised in *Paget v. Foley*, (a) which was an action on a Covenant in an Indenture of Lease, whereby Ann Chambers did, for herself, her heirs, executors, administrators, and assigns, covenant to pay the rent at the times in the Indenture specified, to which the defendants pleaded the Statute of Limitations, and that the rent had not become due within six years since the commencement of the action. To this there was a general demurrer and joinder; in support of the demurrer, it was argued that the

period of six years was no bar to an action of Covenant for Rent—that the 42nd Sec. of this Statute of Limitations (b) did not apply to rent reserved on a Deed, or, if it did, that it was repealed by the Statute 3 & 4 W. 4. c. 42. s. 3. which enacts, “that all actions of debt for rent upon an Indenture of Demise, all actions of covenant or debt, upon any bond, or other specialty; and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award, where the submission is not by specialty, or for any fine due, in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now, or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon any Indenture of Demise or Covenant, or debt upon any bond, or other specialty, actions of debt or *scire facias*, upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of

(a) S. C. 2 Bing. N. C. 079.

(b) See ante, vol. i. p. 34.

such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is, or shall be, by any statute specially limited."

TINDAL, C. J., said, in giving judgment for the plaintiff, I am disposed to rest on the construction of the second statute; at the same time, if we were bound to decide whether or not the case fell within 3 & 4 W. 4. c. 27., I should say, there are strong reasons for thinking that it does not include the present case. That Statute is entitled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the remedies for trying the rights thereto," which seems more pertinent to rents that are a charge on the land, than to mere conventional rents. Then a reference to the rents specified in the 1st sec. of the statute, shews that the arrearages of rent mentioned in sec. 42, have no relation to a conventional rent reserved on a lease. In sec. 2, it is clear the word *rent* is used to express charges for which an assize would lie—rents which are a charge on land. Sec. 36 (a) goes to abolish all real and mixed actions. Sec. 40 enacts that money charged on land, shall be deemed satisfied at the end of 20 years, if there be no interest paid or acknowledgment. It is said, that sec. 41, which relates to dower, enacts that no arrears of dower shall be recovered for more than six years, and that when sec. 42 follows, by enacting that no arrears of rent or interest shall be recovered for more than six years, we must intend that the legislature proposed thereby to include all other kinds of rent. I should say it was proposed to include other rents of the same nature, as those to which the Act, according to its title and preamble, was intended to apply, rather than conventional rents reserved on a lease. However, it is not neces-

sary to give an opinion on the point; for on comparing the enactment with the third section of 3 and 4 Will. 4, c. 42, if it was intended in the former to include rent on an Indenture of Lease, the latter statute has now excluded that species of rent from the operation of the former. The first Act received the royal assent on the 24th of July, 1833, and it was to come in force on the 1st of January, 1834; the second received the royal assent on the 14th of August, 1833, and it was to come in force on the 1st of June, 1834. The legislature, therefore, by the second statute, made a new and distinct enactment to come into operation before the other. If there be any thing in the second, irreconcileable with the first, it would be a strange proceeding that the legislature should designedly pass one law to be in force for some time in one year, and a different law on the same subject matter, to come in force the next. But it seems to me that there is nothing conflicting in the two. His Lordship then read section 3, of 3 and 4 Will. 4, c. 42, and at the end continued. Those are not merely negative words, but import an affirmative also; not merely, that a plaintiff may not sue for rent accruing more than ten years before, but that he *may* sue for all that time to come for rent in arrear at the time the Act passed. Therefore, here is in August, 1833, a legislative declaration, that actions may be brought for rent in all that period: compare that with section 42, in the former Act, if that section is to be taken as comprehending similar causes of action. His Lordship read that section, and added: If this is a general enactment, the subsequent declaration that an action of covenant may be commenced during a longer period, is virtually an exception out of the former: we are to reconcile the two enactments if it be possible; but if it be not, the affirmative and negative cannot co-exist, and the action of covenant, must be taken as an exception.

(a) See ante, vol. i. p. 193. 209.

Therefore, without affecting the clause in the first statute further than is necessary to give effect to the second, we decide that the plea of six years' limitation of the cause of action is bad.

PARK, J. said.—I am inclined to think that this is a case not intended to be included in the first Act of Parliament; but I abstain from giving any express opinion on the point. If, however, it be included in the first Act, the second is so express and clear in its language, that I cannot distinguish it from this case, and am of opinion it repeals the first, as to the action of covenant, for rent of this description. When I find the legislature using in the second statute, language incompatible with the first, if the first, is to be taken, as involving a case of this kind, I must give effect to the latter. In that I find, that "all actions of debt for rent upon an indenture of demise, all actions of covenant, or debt, upon any bond, or other specialty, and all actions of debt, or *scire facias* upon a recognizance," are limited as therein prescribed. If there be any use in language, this is an action of covenant, such as that contemplated by the Act, and the plaintiffs are entitled to sue.

VAUGHAN, J. said.—It is difficult to suppose, from the short interval between the passing of these two Acts, that any contradiction could have been intended by the legislature; but if there be any conflict between the two Acts, the latter is so plain and unequivocal, that it must prevail.

BOSANQUET, J. said.—I agree in thinking that the plaintiffs are not confined to six years for the recovery of rent reserved on a lease. If the case had rested on the first Act, and the second had never passed, I should have thought the right to recover, had been confined to six years. The first section enacts, that the word *rent* shall extend to all heriots, and to all services and suits, for which a distress may be made. It appears to me that that must include rent

service. The second section appears to relate to the recovery of an estate in the rent; and after limiting twenty years for the recovery of an estate in the rent, other provisions are introduced as to the recovery of arrears. Section 40 relates to principal, money charged upon land. Then comes section 42. It is contended that this does not apply to rent reserved by specialty, a case (a) has been referred to on the construction of the statute of James I. But if we look to the words with which arrears of rent are associated, it seems difficult to confine the expression to rent reserved by parol agreement, for interest cannot be made a charge on land by parol; and there is no limitation but this for the recovery of arrears, whether due by parol or on specialty. However, on this point it is unnecessary to give any opinion, for if such be the true interpretation of the first act, it is quite inconsistent with the second; and in such case the latter enactment must prevail, and the plaintiffs had judgment.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 1, VOL. II.

What is the remedy for injuries to, or disturbance of, a right of way?

If a man has a right of way over another's land (1), and be disturbed in the enjoyment of it, either by the tenant of the land, as by working it, ploughing across it, or otherwise spoiling it, or by a stranger; the general remedy is by an action on the case against the party who has caused the obstruction. Case also lies for stopping up a common passage, if the plaintiff can shew any special damage from it. But an action will not lie by an individual for an obstruction in a public highway, unless he sustain a particular damage(2); but if the plaintiff state that the defendant obstructed the road in

(a) See 2 Bing. N. C. 684.

such a manner that he (the plaintiff) was obliged to go a longer and more difficult way (3), and that the defendant opposed him in attempting to remove the nuisance, this is a sufficient damage to support the action. (Willes 73.) A declaration for disturbance in a right of way was held good, without prescription being alleged. (Winford v. Wolaston, 3 Lev. 266.) (4)

All injuries whatsoever to a highway, as by digging a ditch, or making a hedge across it, or by laying logs of timber on it, or by doing any other act which will render it less commodious to the king's subjects, are public nuisances at common law (1 Hawk. P.C. 76. §. 144.), and are indictable offences only, and not actionable (4 Bl. Com. 167.); unless, as before mentioned, a person has sustained some particular damage, when he may bring an action against the person who was the cause of such damage. (Willes 73.)

C. B.

(1) The Romans had their *servitudes* or rights of country farms, as the right of going on foot, of driving waggons and beasts loaded or not loaded; of carrying water either by canals or leaden pipes through the land of another person. See Vitruv. viii. 7. *de Servitutibus. Inst. L. ii. tit. 3. Pandects L. viii. Lactantius. Inst. Div. L. i. c. 1.* Among them the *res privatae* were either *res mancipi* or *nec mancipi*; the *res mancipi* being such as might be sold and alienated by a certain right used amongst the Roman citizens only, so that the purchaser might take them as it were with his hand, the seller being answerable for his quiet enjoyment;

Cic. pro Murena, s. 2. Boetius in Cic. Topica; whilst the *res nec mancipi* could not be so transferred, and therefore the risk rested with the purchaser. Plaut. Pers. iv. 3. 55. Thus the distinction of *mancipium* and *usus*; *vitaque mancipio datur* in property or perpetuity, *omnibus usu*; Lucret. iii. 985. So *mancipium* and *fructus*. Cic.

Ep. Fam. vii. 29, 30. They had also many other *servitudes* or rights upon the lands of each other, similar to those which are still in use in this country. The farms that were free, and not liable to any of these servitudes, were called *praedia libera*; while those that were subject to them were called *praedia serva* (a).

(2) It must be particularly shewn in the pleadings *what kind* of way is claimed. See Rex v. Barr, 4 Campb. 16. so that the trespass declared for may be justified. Proof of a prescriptive right for *carriages* does not establish a right for *cattle*, although it is evidence for a jury. See Ballard v. Dyson, 1 Taunt. 279. The *termini* of the way must be proved. See Wright v. Rattray, 1 East 377. Simpson v. Lewthwaite, 3 Barr. & Ad. 226.

The rule of H. 4. Wm. 4. provides that where a defendant, in an action of trespass, pleads a right of way for carriages, cattle, and on foot, in the same plea, whereupon issue is taken, the plea shall be taken distributively, so that, if the jury find a right of way for cattle, or on foot, but not for carriages, the defendant shall be entitled to a verdict in respect of such of the trespasses proved as shall be, and the plaintiff to a verdict in respect of such of the trespasses as shall not be justified by the right so found. (See Stott v. Stott, 16 East, (343.) When a plaintiff intends to show that the way has been stopped up by order of two justices, he must follow the form prescribed by the statute. See Davison v. Gill, 1 East 64; Welsh v. Nash, 8 id. 394; De Pontheiu v. Pennyfeather, 5 Taunt. 634.

(3) See ante, vol. i. p. 170.

(4) See Greasly v. Colling, 2 Bing. 263. An action on this case will not lie where the inconvenience is only general. See Fineux v. Hovendon, Cro. Eliz. 664; Hubert v. Groves,

(a) *Optimo enim jure ea sunt profecto praedia, qua optima conditione sunt. Libera meliore jure sunt quam serva.* Cic. in Rull. iii. 2.

1 Esp. 148. And if the way be claimed as from necessity, the plaintiff must prove a grant to himself of the land to which the way leads, and that there is no other way to his land. See *Clarke v. Cogge*, Cro. Jac. 170.

EDITOR.

PROBLEM IV.(a)

VOL. 2.

In what cases may an action be brought by a person who has entered into a special contract against the person with whom he has contracted, while the plaintiff's own side of the contract remains unperformed?

We will subdivide this question into two branches.

1. In what cases may the action be brought in **SPECIAL ASSUMPSIT** upon the contract?

2. In what cases may it be brought in *indebitatus assumpsit*?

Law Reports.

ROLLS COURT.—May 5.

BACON AND OTHERS, v. SPOTTISWOODE AND OTHERS.

Patent right—Injunction—Practice— *An injunction will not be granted, merely because a party has a patent, but he must prove at the hearing a clear and unexceptionable title, as to hearing an injunction case without a previous motion for the Court to grant it.*

A bill had been filed by the plaintiffs against the defendants, Directors of the New London Gas Company, for an injunction to restrain them from selling, using, or manufacturing a gas lamp or burner, alleged to be a counterfeit imitation of the plaintiff's patent gas burner, and for the accounts of the sales of the articles, and the case was brought on for hearing without the usual motion in the first instance.

Lord LANGDALE, in giving judgment, said,— It was an unusual occurrence to bring a case of this kind to a hearing, without a previous motion for the Court to grant the injunction; but, however unusual, the plaintiff was not precluded from seeking for the injunction, because he had

not applied for it on interlocutory motion. The usual course was to do so, and the Court then had an opportunity of directing such proceedings as were necessary to determine the validity of the patent. If, however, the plaintiff omitted to move at an earlier period, he must at the hearing show that an injunction was not immediately necessary, or that he did not consider it necessary for the protection of his interest, and he also imposed upon himself the necessity of making out a clear unexceptionable title. It would be very inconvenient if the plaintiff should be permitted to avail himself of doubts which he had himself raised, and to obtain further time to do that which he might have done before. At the hearing of the cause, the Court had to look at the facts produced in evidence, not to consider the propriety of a simple injunction, but whether a perpetual injunction should be granted. It was true, that when a patent had been granted, and there had been some enjoyment and exclusive possession, the Court might interpose its injunction without putting the party to establish the validity of his patent by an action at law, but this must depend to a considerable extent upon the circumstances of the case, and on the nature of the defence. The Court was not bound to grant injunctions, merely because a patent had been granted, and exclusively enjoyed for some time, but at the hearing the plaintiff was to prove his title clearly, and not to reply upon evidence upon a *prima facie* title. In this particular case, having regard to the nature of the patent and specification, and its alleged infringement, and also considering the defence and all the facts, he thought an injunction would not have been granted upon the same facts if applied for before the hearing, without having the validity of the patent previously established by an action at law. The plaintiff had not made out a clear title, and he had, therefore, to consider whether the bill should be retained to give him an opportunity to bring his action; but he thought not, and the bill must be dismissed with costs.

QUEEN'S BENCH.—April 27.

Sittings in Banco.

STOCKDALE v. HANSARD.

LIBEL.—Breach of Privilege—Whether the House of Commons may order the publication of their proceedings, which contains matter of Libel against individuals, and that it is a high breach of privilege to bring such Libel in question before any Court of Judicature.

(Continued from p. 39.)

My Lords, without a long and painful and laborious investigation, I would venture to say

(a) See Notice to Correspondents, No. 1.

that no advocate in such a case can render to the Court that assistance which the Court may fairly expect from the bar, or that he can do justice to his client; and I would further say, without such long and laborious inquiry and consideration, it would be impossible for any judge to come to a satisfactory conclusion. My Lords, I am still afraid, notwithstanding the time and pains I have bestowed upon this subject, that there may be matters of great importance which have escaped my attention; that both authorities and arguments deserving great weight might be brought before your lordships, which I shall be unable to supply; but, my Lords, I shall place before your Lordships, with all the brevity which the nature of the case will allow, the result of many weeks of painful and laborious investigation. My Lords, my friend gave your Lordships a short statement of the record, with which I can find no fault, for it will be my duty to lay before your Lordships, fully and fairly, all the authority I can find on either side, and the comments upon them, and likewise to bring before your Lordships all the arguments on either side which I think could fairly be brought to bear upon this case. Now, my Lords, this case coming upon demurrer to see whether a question of law arises, of course we are to examine the record. We have a declaration in case for libel. My Lords, the declaration, I have no hesitation in admitting, is good upon the face of it; it sets out a publication, which, if issued to the world without authority, would give the plaintiff a just cause of action; it imputes to the plaintiff that he had published an obscene book, which book was found in the hands of the criminals confined in Newgate; but, my Lords, while I admit that this is a crimatory publication, I by no means admit that it is a libel. A libel I apprehend to be a crimatory writing, published without just occasion or authority. My Lords, suppose there had been an action brought for preparing an indictment, or for a report of either House of Parliament which had been confined to the use of either House, or for a letter in answer to an inquiry respecting the character of a servant, I should be obliged to make the same admission, because the declaration would disclose what is *prima facie* a good cause of action; but do I admit that the indictment, or the report, confined to the use of the Members of the House of Commons, is a libel? No, my Lords, these are publications for just cause, and whatever loss they may occasion to the object of them, it is *damnum absque injuria*; it is not a libel, and no action can be maintained; and I must complain of the ribaldry which has been used, that the House of Commons had opened a libel shop, the persons who use that language not being able to understand the distinction between cri-

minatory proceeding with lawful authority, and that which is done maliciously and without lawful authority, and with an intention of defaming. My Lords, to this declaration there is a plea to the nature of which I must call your Lordships' particular attention; it is a plea in bar, not to the jurisdiction, and that I suppose some may say takes away from me the opportunity of contending that when such a plea is pleaded this Court cannot judge of the existence of the plea. Your Lordships, however, are well acquainted with the distinction between pleas to the jurisdiction and a plea in bar. My learned friend has surrendered the case of "The King v. Williams," which it was impossible for him to maintain, but by surrendering that he admits himself out of Court. That case can only be accounted for from the spirit that prevailed at the time that judgment was pronounced, for the judges were then but the creatures of the Crown, and wholly prostituted their high and sacred office. My Lords, where the Court has jurisdiction over the subject-matter disclosed in the declaration, then I apprehend that a plea in bar is the only plea that can be pleaded. It is laid down in the case of "The King v. Johnson," 6 East, that a plea to the jurisdiction is bad, unless the plea discloses another Court where the case is recognizable. My Lords, we do not say that there is another Court where Mr. Stockdale might have proceeded for the injury inflicted upon him, but I say he has no cause of complaint whatever, that no action can be maintained, that it is a justifiable publication. The defence is, that the writing was published by the authority of the House of Commons in the exercise of its privileges; that it is a lawful publication; and that, there having been no wrong, there is no action. But by this plea we do not at all admit that your Lordships can entertain the question. Suppose it were an action of trespass and false imprisonment, and that the defence was that the party had been taken under a writ of *capias ad satisfaciendum* upon a judgment in the Court of Common Pleas. This Court could not interfere as to whether that judgment was right or wrong. Is it then to be said that a justification of privileges is to be decided by a court of common law? My friend says that the times of ignorance and tyranny have passed away, and that even the question of the privileges of the Houses of Parliament is to be submitted to the consideration of every Court, because there is no distinction in this respect between the Court of Queen's Bench and the County Court, or the Hundred Court, or the lowest Court in the kingdom. Suppose, then, an action of trespass and false imprisonment brought against a Member of the House of Commons in this Court, who pleaded, by way of justification, that the plaintiff, being summoned to attend at the bar of the House of

Commons, did not attend, and therefore that he was committed for contempt; or that, having attended, he had prevaricated, and therefore was committed. It would still be necessary, upon an appearance and a plea, to allege the authority for the commitment, and then, upon a demurrer, would it be open for this Court to say, that the House of Commons had no right to summon, or had no right to commit a witness for prevarication. Suppose that a Member was committed for some outrage in the House, for words spoken in the House, or for assaulting the Speaker in the chair—he brings his action—the commitment under the authority of the House is pleaded in bar to the action—would it be competent for this Court to decide that there is no privilege in the House of Commons to commit a Member for words spoken in his place, or for assaulting the Speaker of the House? The question, from the manner in which it has been urged by my friend, assumes a most fearful importance. According to the principles for which he contends, every privilege, not only of the House of Commons, for in this respect there is no distinction between the two Houses, but every privilege of both Houses may be brought before the lowest tribunal in the country, and may be submitted to their judgment; and it will depend upon the opinion of an attorney's clerk, sitting as assessor for the sheriff, or for the steward of a lord of a manor, to decide upon the privileges of both Houses of Parliament. My Lords, under this plea in bar, we shall respectfully call upon your Lordships, seeing that this act was done in the exercise of a privilege of the House of Commons, to give judgment for the defendants without inquiry into the evidence of the privilege.—This plea is perfectly consistent with the doctrine that by the law and privilege of Parliament, the two Houses of Parliament have the sole and exclusive jurisdiction to determine upon the existence and extent of their privileges, just as a plea under the commitment by the Court of Common Pleas or Exchequer for contempt would be consistent with the doctrine that these courts have the exclusive jurisdiction to determine what shall be a contempt of their own particular court.

(To be continued.)

April 30.

FAULKNER v. CHEVALL.

ATTORNEYS—*An Attorney acting as Deputy Town Clerk and Deputy Clerk of the Peace, and practising as an Attorney, whether liable to penalties.*

Mr. Andrews showed cause against a rule for a new trial in this case, which was an action to recover penalties, on the ground that the defendant had practised as an attorney at the

borough sessions at Cambridge, he then filling the offices of deputy town-clerk and deputy clerk of the peace for that borough. It had been proved at the trial, that the defendant had been appointed deputy town-clerk, and had acted in the duties of clerk of the peace, but Mr. JUSTICE PARK, who tried the case, was of opinion that the mere fact of having acted as clerk of the peace was not sufficient to maintain the action, and he nonsuited the plaintiff. It was now contended that the offices of town-clerk and clerk of the peace were perfectly distinct, and were in the appointment of different parties, and that the mere discharging the duties of an office did not entitle the party to hold the office, and therefore he could not, without appointment, be considered as the particular officer.

Mr. Kelly contended that the two offices in question had always gone together, and had always been filled by the same party, and that the party having discharged the duties of the office must be considered as holding it, and therefore would be within the statute.

The COURT held the opinion of Mr. JUSTICE PARK to be correct.—Rule discharged.

May 6.

REGINA v. THE POOR LAW COMMISSIONERS.
THE CAMBRIDGE UNION.
CERTIORARI—*Power of the Poor Law Commissioners to appoint Collector of Poor Rates.*

Mr. Thesiger moved for a rule to show cause why a writ of certiorari should not issue, to compel the defendants to bring up to this court an order which they had issued for appointing a collector of poor-rates for the parish of St. Andrew-the-Less, which was included in the Cambridge Union. The Poor Law Commissioners had ordered a man of the name of Brown, he being an assistant-overseer, to collect the rates for part of the Union. It was contended that the Commissioners had no power to make this order, and the New Poor Law Act showed that this right had never been contemplated.

The Attorney-General shewed cause against this rule in the first instance, and contended that the act gave to the Commissioners powers amply sufficient to justify this order. The right of appointing a collector was necessarily incident to the other powers conferred upon the Commissioners; by the act of Parliament he urged that it was necessary for the Commissioners to have such power, and to exercise it, in order to discharge their duties.

Lord DENMAN was of opinion that the act contained no such provision; that such a power could not be implied, for if the Commissioners possessed it, they must have had it from the parishioners.—Rule absolute.

May 7.

REGINA v. THE POOR LAW COMMISSIONERS.

Certiorari, to quash an Order of Defendants, directing in what manner the Guardians of the Poor of the parish of St. Mary, Lambeth, should be elected. Quære.—Whether, when the Commissioners have once laid down rules and regulations, they can afterwards alter them without the consent required by Sec. 41 of the Statute. Spirit of the Statute,—that every person paid out of the parish funds should be appointed by the parish—Powers of the Poor Law Commissioners upon appointments.

Sir F. Pollock applied, on behalf of the churchwardens and overseers of the parish of St. Mary, Lambeth, for a rule calling upon the Poor Law Commissioners to show cause why a writ of *certiorari* should not issue, to bring under the notice of the Court their election order, dated the 26th of February, 1839, in order that that order might be quashed. The order related to the election of guardians for the parish of St. Mary, Lambeth. That parish was extremely populous, and was not governed by any act prior to the passing of the Poor Law Amendment Act; but after the passing of that Act, it came immediately under the control of the Poor Law Commissioners, by an order that they issued for that purpose. It appeared that on the 2nd of March 1836, they issued an order directing in what manner the guardians of the poor for that parish should be elected under the provisions of the Poor Law Amendment Act, appointing the number of guardians, the mode of election, who the assessors should be, and other matters necessary to be settled in order to direct the parish in what way to proceed in order to elect guardians. This was done under the provisions of the 38th section of the Poor Law Amendment Act. That clause directed that the commissioners should determine the number and prescribe the duties of the guardians, and direct the nature of the qualification; and it directed in what way these various matters should be conducted, and it gave to the commissioners the power of laying down rules for the conducting of the elections. Those rules were laid down, and they were acted upon in 1836, 1837, and 1838, and it appeared that the expenses of the election, conducted according to those rules, amounted to somewhat about £130.

Lord DENMAN.—Is that stated?

Sir F. Pollock said it was; but if their Lordships expressed some degree of surprise that so large a portion of the funds of the parish should be expended by virtue of the order of the Poor Law Commissioners, in order to ascertain who were to be the persons who were to discharge certain public duties, as to the spending of the residue, he was sure the Court would feel more

surprise when he stated, that under the order that was complained of, and that had been acted upon in the present year, the expenses of the election amounted to the sum of £454. He was about to mention that fact, in order to show that the present application was not the complaint of faction, but the complaint of the whole parish, which was suffering under an enormous grievance, and he called the attention of their Lordships to that which was very much the inducement of the parish to complain, for their Lordships had expressed some surprise that the expenses should amount to £130. The order made this year, was complained of, for the following reasons:—In the first place, the Poor Law Commissioners having, under the Act of Parliament, laid down the rules by which these elections were to be conducted, they directed the qualifications of guardians, the duration of office, the qualification of voters, and they then appointed a returning officer, and they said the churchwardens and overseers of the poor should, on or before the day fortnight preceding the day of election, nominate a barrister of not less than five years' standing to be the returning officer, and should submit to the commissioners the name of such barrister. Then the returning officer was to have power to appoint a sufficient number of competent persons to assist him.

Lord DENMAN.—I suppose this order differs from the orders of former years?

Sir F. Pollock said it did.

Lord DENMAN.—In what respect?

Sir F. Pollock said, in the first place in this respect, that instead of being an order laying down a general rule for the conduct of the elections in the parish, it was confined entirely to the present year; and this would lead to such a system of eternal interference and intermeddling, and would leave the parish in such doubt as would be quite insufferable. When the Poor Law Commissioners had made the orders and laid down the rules for the regulation of elections, there was nothing in the section which said that they were from time to time to alter them. He submitted that when they had made those rules, they were *functi officio*. They had no right to interfere, or if they had, he submitted that they had no right to interfere in the temporary manner they had, by directing the parish for one particular election, suspending all the former rules, and telling the parish what to do that day fortnight. They repealed and suspended all the rules they laid down for the guidance of the parish, and told them what to do that year, and when the next year came they would tell them what to do. He submitted that under the clauses of the Act the commissioners had no right to lay down a rule for one election, but they were bound to lay down a rule for all future elections. They

went further than this,—instead of allowing the churchwardens and overseers of the parish to elect a returning officer, to be approved by the commissioners, they had directed that their own Assistant Poor Law Commissioner should be the returning officer, which he (Sir F. Pollock) said they had no right to do whatever. They had given to their Assistant Poor Law Commissioner the power of appointing such assistants as he should think fit, and to call in the aid of certain persons in the conduct of the election, and they were to be paid out of the poor-rates; and it was in payment of these assistants that the expenses of the election had been increased from the not very moderate sum of £130 to the exorbitant sum of £454. This was contrary to the express provisions of the Act. He thought he might state it as being the undoubted policy of the Legislature in passing this Act,—of its wisdom he said nothing, of its effect he abstained altogether from saying one word. He was quite sure, when he read the section, their Lordships would do justice to the intention of the Legislature to this extent, that it was clear that Parliament intended to confer on the commissioners the largest powers, the most effectual control, and the greatest authority, but no patronage. It was intended by that Act to prevent the commissioners acting from any personal motive connected with pecuniary corruption. Other personal motives, arising out of the disputes of parishes, it was almost impossible to prevent. There was one clause in the Act pointed expressly to this, that the commissioners should, on no occasion where a person was to receive money out of the public rates, have the power to appoint, or any person appointed by them, of nominating such person; that was the 46th section; and, in truth, there would have been no security, seeing what immense powers were confided by this Act to the Poor Law Commissioners, if they had been permitted to mix up patronage with their very extensive and peculiar jurisdiction. If there had been any patronage mixed up with their jurisdiction, it was impossible to say what mischief might not have resulted. It was said expressly, that it should be lawful for the commissioners, as and when they should see fit, by order under their hands and seal, to direct the overseers and churchwardens to appoint such paid officers, with such qualifications as the commissioners should think necessary, to superintend the employment and relief of the poor, and otherwise carrying into effect the provisions of this Act. This was section 2. Therefore the commissioners had the power of directing the qualifications, and by that means seeing that fit persons alone should be appointed by the parish; but the Act carefully excluded the commissioners from the power of nominating the guardians. They had a power to control and to require the proper qualification,

but they had no power of appointment. He submitted that the appointment of the returning officer, and still more one of their own body, was a direct violation of the spirit of the Act of Parliament, which never intended that the Poor Law Commissioners should have anything like patronage.

Lord DENMAN.—Does the order contain anything about that?

Sir F. Pollock said, it contained more; it directed the mode of conducting the election of guardians, and that Dr. Kay, one of the Assistant Commissioners, should be the returning officer at the election for this year. Their Lordships knew that if an Assistant-Commissioner went into a parish for the purpose of acting as a returning officer at the election, he was paid by the public for some other service which he ought to be rendering, of a general character, and not interfering with an election in a particular parish; if he was paid by the public, it was an abuse of his appointment, and of the public money; if he was paid by the parish to superintend one particular parish, it was a violation of the act of Parliament, the spirit of which was, that every person paid out of the parish funds should be appointed by the parish, and subject to any control the Poor Law Commissioners thought right; but with that appointment the Poor Law Commissioners had nothing to do, but merely to see that the qualifications were such as would secure an efficient discharge of the public duty. The order went on to say that the returning officer should have power to employ a competent number of persons, no one of such persons being a churchwarden or overseer, to assist him in collecting votes; and in the selection of such persons he should, in the first instance, select such of the paid officers as should be able to afford such assistance as he required, if such officers should be willing to assist, and that all such assistants shall be paid out of the parish rates such sum as the Commissioners thought fit. So that, translating that into plain English, it was—the Poor Law Commissioners appoint one of their own Assistant-Commissioners, and give him unlimited power to elect assistants, and they should be paid whatever the Poor Law Commissioners sanction out of the poor-rates.

Lord DENMAN.—There is no particular direction in the act about the returning officer.

Sir F. Pollock.—None.

Lord DENMAN.—Merely general. Is there any other clause about appointment but the 46th? If I read that right, it directs the Commissioners to direct the overseers to appoint.

Sir F. Pollock said, it was directed to this that the Commissioners should have no patronage.

Lord DENMAN.—There appears to me to be a sufficient ground for a rule. You may state your other grounds.

Sir F. Pollock thought there was one other point which seemed to make an entire end to the matter; the 41st section had a proviso which provided that it should be lawful to the Commissioners, if they should think fit, from time to time, with the consent of the majority of the owners of property and the rate-payers of any parish or union, then existing, or to be formed, to alter the period for which the guardians should be appointed for such other period as they saw fit, and to make such alteration in the number, mode of appointment, removal, or period of service, as to the said Commissioners, with such consent, should appear to be expedient. It seemed to him that this strongly confirmed the view he had stated, that when the Commissioners had once laid down a certain set of rules and regulations, it was not competent to them, without they had the consent of the majority of persons mentioned here, to alter those orders or rules.

COURT OF COMMON PLEAS.—May 1.

Settings in Banco.

SAUNDERSON AND ANOTHER v. PIPER AND ANOTHER.

BILLS OF EXCHANGE—Whether the words in the body of a Bill of Exchange controls the figures in the margin.—As to the admissibility of parol evidence.

SPECIAL CASE.

This was an action by the endorsees against the acceptor of a bill of exchange. It appeared that the bill in question was drawn for a sum of £200., according to the words in the body of the bill, whilst, according to the figures in the margin, the sum was £245. The stamp was the proper stamp for the larger sum, and, according to the parol evidence in the case, the parties had treated the bill as one for that amount. The question for the opinion of the Court was, whether or not the figures in the superscription controlled the words in the body of the bill.

Mr. Serjeant Wilde, on the part of the plaintiff, argued that there was an ambiguity as to the amount of the bill, the conduct of the parties might be looked to to ascertain what was intended to be the sum for which the bill was accepted.

Mr. Peacock, for the defendant, contended that the ambiguity being patent, or apparent on the face of the instrument, it was not competent to the parties to give parol evidence in explanation of it; and as, according to the authorities on the subject, the words in the body of the bill controlled the figures in the margin, the bill in question could only be taken as a bill for £200.

The COURT adopted the latter view of the question, and decided that the verdict should be entered for only £200.

BAIL COURT.—May 3.

(Before Mr. Justice WILLIAMS.)

REGINA v. JERROLD.

MANDAMUS—Copyholds—Steward's Fees.

Mr. Thesiger moved for a rule to show cause why a mandamus should not issue against a Mr. Jerrold, the steward of the manor of Bishop's Stoke, in the county of Hants, to take a surrender of 2,500 acres of land on the terms offered by his clients. This was copyhold property, and had belonged to a Mr. Thomas, who a short time ago made a surrender of it in favour of his son, securing also a settlement on it of £3,500 for his daughters. For these arrangements Mr. Jerrold charged for 28 surrenders, of 79 folios, as the property happened to consist of 28 distinct holdings. Young Mr. Thomas having since arranged with a Mr. Terry to give him a mortgage on the property for £5,000, the steward insisted that he should again execute, and charge for, 28 new surrenders. The solicitor of the parties prepared, however, only two surrenders, and called on the steward to execute them, offering him at the same time eight guineas, as the amount of the fees due for so many surrenders. The steward said that nobody had a right to bring surrenders prepared to his court, and that no fewer than 28 surrenders would be sufficient. As the fees on such a number would exceed £60., his (Mr. Thesiger's) client refused to comply with the steward's demand, and instructed him to make the present application.

The COURT.—Was he not entitled to some fee?

Mr. Thesiger.—He was offered eight guineas for the two surrenders. He was not instructed to say that there was not a custom in the manor for the stewards to prepare all surrenders.

Rule granted.

COURT OF EXCHEQUER.—May 27.

BENNET v. BROUGHTON AND AVERY. (a)

Whether a Police Constable be entitled to notice of action under the 10 Geo. 4. c. 43.

Mr. Butt in this case had obtained on last Hilary Term a rule nisi to enter a verdict for the defendant Avery. The action was one of trespass against Mr. Broughton, the police magistrate, and Avery, one of the police force, by which the plaintiff sought to recover compensation for alleged misconduct, by which one Wm. May, a debtor of the plaintiff, was rescued from the hands of the Sheriff's officer. Mr. Brough-

(a) See this case reported, *ante* vol. i. p. 205.

ton had been acquitted, but it being the opinion of Lord Abinger that Avery was not justified, the jury gave a verdict against him, with damages. The rule *nisi* was obtained upon two questions raised; first, whether under the terms of the 41st Sec. of the Metropolitan Police Force Act, Avery was not entitled to notice of action in order to enable the plaintiff to maintain his action, there not having been any such served on him. 2ndly. Whether the plaintiff ought not to have proved the writ and warrant against the debtor, facts which were put in issue by the plea of general issue.

Mr. Thomas showed cause against the rule, and contended that the first point was of no avail, as the statute did not apply to this case, and that the last had been obviated by the course taken at the trial.

The COURT, however, thought that whatever doubt there might be on the right of the defendant to claim the protection of the act, it was clear that the plaintiff did not prove, and that he ought to have proved, the formal proceedings against his debtor, for which reason the rule must be made absolute, unless within one week both parties should agree to enter a *stet processus*, and thus bear their own costs.

HIGH COURT OF JUSTICIARY, EDINBURGH.

REGINA v. ALEXANDER HUMPHREYS, CALLING HIMSELF EARL OF STIRLING.

Indictment for Forgery.

The prisoner, Alexander Humphreys, who had assumed the title of Earl of Stirling, was indicted for forgery, also for wickedly and feloniously using and uttering as genuine a forged document, knowing the same to be forged; as also the wickedly and feloniously fabricating false and simulate writings, to be used as evidence in courts of law, and so using the same as genuine; as also the wickedly and feloniously using and uttering as genuine fabricated, false, and simulate writings, knowing them to be fabricated, false, and simulate, by producing the same as evidence in courts of law, he having formed the fraudulent design of procuring himself to be recognized as Earl of Stirling in Scotland, and of obtaining certain great estates or territories in North America and Scotland, with the pretended right of conferring the honours and bestowing the titles of baronets of Nova Scotia, as being the representative, and entitled to the honours, privileges, and estates of William, First Earl of Stirling, and of procuring loans or advances of money from ignorant or credulous persons, on the faith of his being en-

titled to those estates and privileges, as he falsely represented.

The first two counts related to one document, and charged the prisoner with having, by the hands of his agent, tendered to the Court of Sessions an excerpt from a pretended charter of *novodamus* to the first Earl of Stirling, as evidence of his claim to certain lands in Scotland, which he maintained in two separate actions; and in each rested his claim upon the evidence of the excerpt in question. The excerpt purported to be granted to his ancestor by Charles I.

The third count stated that Lord Cockburn, as Lord Ordinary, in December, 1836, having pronounced an unfavourable judgment to the panel in the last civil action, on the ground that, supposing the abovementioned document to be genuine, the panel had not proved his descent, and especially pointed out that the evidence in support of two links in his pedigree was defective; the prisoner proceeded to Paris, and there, in a house in the Rue de Tournon, occupied by Marie Anne Le Normand, bookseller or fortuneteller there, between the 31st of December, 1836, and the 27th of July, 1837, he forged certain documents on the back of an ancient map of Canada. The alleged forgeries under this count consisted of two classes; the first was a note by a M. Ph. Mallet, dated Lyons, August, 1706, stating that when he was in Canada he had seen the charter of *novodamus* from Charles I. to the Earl of Stirling, and that he had taken some extracts from it, which he wrote on the back of the map, "in order that every person who opens this map of our American possessions, may form an idea of the vast extent of territory which was granted by the King of England to one of his subjects." The extracts so written confirm the charter mentioned under the first and second counts, as to the regranting of the American possessions, and also to the extending the line of succession to the heirs-female. Near to this note on the map was a second, purporting to be from a M. Caron St. Estieane, stating that he also had seen the charter, and confirming the account given of it by Mallet. Near this again was a third note, purporting to be from the celebrated Flechier, Bishop of Nismes, stating that he had read a copy of the charter, and certifying, at the request of Estienne, that Mallet had given a correct account of it. Near Mallet's writing was another note, purporting to be from Louis XV. expressing interest in the matter, and wishing to see the original documents. The second class related to a letter purporting to be from an ancestor of Lord Stirling to a lady in France, giving an account of his family, and supplying the defective evidence with regard to the two descents which was pointed out by Lord Cockburn; and on the margin of

this letter was written a note by the celebrated Fenelon, Archbishop of Cambray, authenticating it as a genuine document. This letter, with Fenelon's note, was pasted on the back of the map. Another document, pasted on the back of the map, was the copy of an inscription on a tombstone, which was alleged to have once existed in the churchyard of Newtonards, county of Antrim, another copy of which, however, had formerly been used in Court. This document was also authenticated by the writings and signatures of other parties. The count concluded by charging the prisoner with having presented this map, with these fabrications on the back, as evidence to be received by the Court of Session in the action then depending.

The fourth count charged him with having forged a series of papers, which were sent to his publishers in Tavistock-street, addressed to the Earl of Stirling, accompanied by a note, intimating that they had been stolen from the prisoner's father by "a young man in a situation of trade which placed him above suspicion."

The fifth count related to his producing, on being required by the Court of Session, the copy of the letter which was said to have accompanied the transmission of the map to Mademoiselle Le Normand, and which was also charged to be a forgery. It was in French, and the writer stated that he had bought the map in 1819 for the sake of the autographs; but learning that Mademoiselle Le Normand took a lively interest in the success of the Earl of Stirling, he had sent it to her in gratitude for certain great obligations that he had been under to her; but excused himself from coming openly forward in the matter, on the plea "that the duties of an office which I at present hold do not permit me to make myself known in this affair of Lord Stirling's. You, who know a great deal about it, will feel no surprise that a man in office should not dare to interfere in it openly."

A great many witnesses were examined in support of the indictment in reference to the alleged forgeries; and as regards the pecuniary part of the transaction, a witness named Tyrrell deposed that he was formerly acquainted with the prisoner. Thinks he first knew him in October, 1829. He was then living at the corner of Jermyn-street and Regent-street. His pecuniary circumstances at that time were very bad. Prisoner stated his prospects were very great in regard to his claim, but that he required a sum of money to complete it. The money was to send out an agent to take possession of a prodigious quantity of acres in Maine, and to prosecute his suit in Scotland. He said he had made good his claim to estates in Maine; that Mr. Banks had been out, and had ascertained that the prisoner had only to send out and take pos-

session; and that part of the lands were occupied, and part not; and that the occupiers were ready to give a quarter dollar per acre to be confirmed in their possession. Witness understood from him that they were willing to pay this sum. The whole extent of land was about eleven millions of acres. He also gave witness to understand, that if he had money to prosecute his claims, he should receive the estates of Tullibody, Tillicoultry, Gartmore, and Menstrie. On these representations, witness agreed to raise money for him. He negotiated several transactions on which the prisoner obtained money. In one case a Mr. Ward agreed to lend £10,000, and an account was opened with a banker, who discounted a bill for the prisoner for £4,000. After that, the prisoner and Mr. Ward had transactions themselves, but witness continued for almost a year and a half transacting business with the prisoner. Negotiated several sums of money for the prisoner. Cannot give an estimate of the whole amount of the money raised, as some valuable paintings were purchased with the money and lodged as collateral security with Ward. Some of the pictures were purchased with the bonds, and were then sold at auction to raise money. Witness would suppose that altogether, including Mr. Ward's £10,000, there were £13,000 raised by him for the prisoner. The nominal amount of the bonds granted by the prisoner was about £50,000. When he lived the second time in London, he went by the name of the Earl of Stirling, and lived in good style. From the transactions he had with the prisoner, he thought him a very clever man.

The jury found an unanimous verdict to the effect that "the excerpt charter in question was a forged document," and by a majority, that there was no proof that the prisoner had any knowledge of the forgery, or that he uttered it as genuine, knowing it to be forged.

The chancellor of the jury then proceeded to read the remaining part of the verdict.

"2. Find unanimously, that the documents upon the map libelled on are forged; and by a majority find that it is not proven that the prisoner forged them, or was art and part therein: and not proven that he uttered them as genuine, knowing them to be forged.

"3. Find unanimously, that the documents in De Porquet's (the prisoner's publishers) packet are not proven to be forged, or that they were uttered by the prisoner as genuine, knowing them to be forged.

"4. Find the letter of Le Normand, in the 5th charge, not proven to be forged, or uttered as genuine by the prisoner, knowing it to be forged."

Lord MEADOWBANK ordered the verdict of acquittal to be recorded.

CIRCUITS

OF THE

COMMISSIONERS FOR THE RELIEF OF INSOLVENT DEBTORS.

1839.	Northern Circuit.	Home Circuit.	Southern Circuit.	Midland Circuit.
Summer Circuits.	H. B. Reynolds, Esq., Chief Commissioner.	J. G. Harris, Esq. Commissioner.	T. B. Bowen, Esq. Commissioner.	W. J. Law, Esq. Commissioner.
Monday, June 24	.	.	.	
Wednesday . 26	Oakham	.	Reading . .	
Friday . . . 28	Sheffield	Lewes . . .	Oxford . . .	
Monday . July 1	Wakefield .	.	Worcester & City	
Tuesday . . . 2	.	.	Presteigne . .	
Thursday . . . 4	.	.	Hereford . .	
Friday . . . 5	Kingston-upon- Hull	.	Brecon . . .	
Monday . . . 8	York and City	.	Carmarthen and Borough . . .	
Wednesday . 10	Richmond .	.	Cardigan . . .	
Friday . . . 12	.	.	Haverfordwest and Town . .	
Saturday . . . 13	Liverpool .	Canterbury .	Swansea . . .	
Monday . . . 15	.	Dover . . .	Cardiff . . .	
Wednesday . 17	Chester and City	Maidstone .	Monmouth . .	
Friday . . . 19	Mold .	.	Gloucester & City	
Saturday . . . 20	Ruthin .	.	Bristol . . .	
Monday . . . 22	.	.	.	Chelmsford.
Tuesday . . . 23	Beaumaris .	.	.	Colchester.
Wednesday . . . 24	Carnarvon .	.	.	Ipswich.
Thursday . . . 25	.	.	.	Yarmouth.
Friday . . . 26	Dolgelly .	Hertford .	Wells . . .	Norwich & City.
Monday . . . 29	Welsh Pool .	.	Exeter and City	Lynn.
Tuesday . . . 30	.	.	.	Bury St. Edmunds
Wednesday . 31	Preston .	.	.	Cambridge.
Thursday, Aug. 1	Lancaster .	.	.	Huntingdon.
Same day .	.	.	.	Peterborough.
Friday . . . 2	.	.	.	
Saturday . . . 3	.	.	.	Lincoln & City.
Monday . . . 5	.	.	.	Nottingh. & Town
Tuesday . . . 6	.	.	.	Derby.
Wednesday . 7	.	.	.	Leicester.
Thursday . . . 8	Kendal .	.	.	Lichfield.
Friday . . . 9	Appleby .	.	.	Sheffield.
Saturday . . . 10	Carlisle .	.	.	Shrewsbury.
Monday . . . 12	.	.	.	
Tuesday . . . 13	Newcastle-upon- Tyne, & Town	.	.	Oldbury.
Wednesday . 14	.	.	.	Birmingham.
Thursday . . . 15	Durham .	.	.	Coventry.
Friday . . . 16	.	.	.	Warwick.
Monday . . . 19	.	.	.	Northampton.
Tuesday . . . 20	.	.	.	Bedford.
Wednesday . 21	.	.	.	Aylesbury.

EXAMINATION OF ARTICLED CLERKS AT THE LAW SOCIETY.

Easter Term, 1839.

GENTLEMEN WHO PASSED THIS EXAMINATION.

(Concluded from page 46.)

<i>Names.</i>	<i>Name & Residence of Attorney to whom articled, or assigned.</i>
Gregory, William, the younger	William Gregory, the elder, Bristol.
Griffin, William Henry	William Henry Green, 80, Basinghall-street.
Grubb, William Dawson	Henry Heald, 16, Austin Friars.
Hanbury, Thomas James	Thomas Sewell, Newport, Isle of Wight ; assigned to Robt. Carr Foster, John-street, Bedford-row.
Hayward, William Webb	Thomas Fellowes, Rickmansworth, Herts.
Herbert, Samuel	George Ware, 33, Blackman-street, Southwark.
Hill, Henry Edward	Edward Castleman, Winborne Minster.
Horner, Robert Ayder	Francis Price, Cheltenham.
Houchen, John	George Lucas, Great Yarmouth.
Hulbert, William	John Matthews, Hungerford ; assigned to Thomas Halbert, Hungerford.
Innis, Charles, the younger	Abraham King, 81, Castle-street, Holborn ; William Moeson Keams, 5, Red Lion-square.
Jackson, Thomas Henry	Nathaniel Griffin, Portsea, Southampton ; George Caught, Portsea.
Kay, Samuel, the younger	Samuel Kay, the elder, of Manchester.
Kettle, Rupert Alfred	Richard Fryer, the younger, Wolverhampton, Stafford ; Edward Henry Rickards, Lincoln's-inn-fields.
Kingdon, Joseph Francis	Francis Kingdon, Great Torrington ; assigned to William Gill Glub, Great Torrington.
Kitson, Edward Bellamy	John Marsh Templeman, Crewkerne.
Knipe, John Williams	William Laslett, Worcester.
Latham, John	Thomas Ives Brayne Hostage, Northwich, Chester ; assigned to William Latham, Sandbach.
Lloyd, Robert	David Evans, Liverpool ; assigned to Joseph Peers, Ruthin.
Margetts, Henry Clarke	John Lawrence, St. Ives.
Marsh, John	Thomas Edmund Marsh, Llanidloes ; assigned to Thomas Yates, Welshpool ; assigned to James Cross, 9, Staple Inn.
Marshall, Henry Pightling	John Clutton, 48, High-street, Southwark.
Munday, William	William Smith, 22, John-street, Bedford-row.
Nash, John Howell	John Nash, Chepping Wycomb.
Parker, William Phillips	John Collier, 9, Carey-street, Lincoln's-inn-fields.
Petch, Robert, the younger	Robert Petch, Kirbymoorside.
Pollock, Lodowick Anderson	George Redaway, 16, Clement's-inn ; assigned to Thomas Wellard King, Ramsgate ; assigned to Thomas Hodges, Grove Snowdon, Ramsgate.

Articled Clerks, &c.

Prideaux, George Fisher	Neast Greville Prideaux, Bristol.
Pruen, Septimus Alexander Conant	Edward Pruen, Cheltenham.
Pugh, Charles	Robert Hemming Parr, Poole, Dorset.
Palmon, William Thrush	Edward Hemmingway, Leeds.
Ramsden, Thomas	William Pickard, Wakefield ; assigned to James Witham, Wakefield.
Rule, Frederick	Thomas Kirk, 10, Symond's inn.
Scott, Philip	Charles Small, Bideford.
Sedgwick, Samuel Godwin	Thomas Potter, Manchester.
Shaw, Thomas	William Plant Woodeock, Bury, Lancaster.
Sherard, Edward Castel	William Lawrence, Peterborough.
Shields, Thomas	Thomas Christopher Maynard, Durham ; assigned to Joseph Blower, 61, Lincoln's-inn-fields.
Silk, John Alexander	Messrs. Waugh and Fisher, 5, Great James-street.
Simmonds, Charles John	John Lintorn Simmons, Keynsham.
Simpson, Thomas	David Thomas, Stafford.
Smallwood, Henry George	James Powles, Monmouth.
Smith, Joseph	Charles Ireland Sheriff, 7, Lincoln's-inn-fields ; assigned to John Jackwood, Cheltenham.
Sorrell, John	Joseph Kinder, 8, London-street, Fenchurch-street.
Staple, John	James Johnston, 26, Carey-street, Lincoln's Inn.
Sudlow, John James Joseph, the younger	William Fisher, 20, Chancery-lane.
Taylor, Clement	Adam Taylor, Norwich.
Taylor, Pearson	Robert Benson, Cockerhamouth.
Taylor, William James	Thomas Rawsthorne, Lancaster.
Todd, Robert	Arthur Levitt, Kingston-upon-Hull.
Tombs, Edward Thomas	Charles Thomas-Reynolds Dew, Derby.
Trotter, Thomas Dixon Marr	Percival Fenwick, Newcastle-upon-Tyne.
Vickerman, Charles Ranken	Charles Ranken, Gray's Inn.
Vollans, John William Thompson	George Miller, Kingston-upon-Hull ; John Therney, Kingston-upon-Hull.
Welsby, William	John Welsby, Ormskirk.
Wemyss, James Robert	John Aubrey Whitcombe, Gloucester.
Whish, John Buchanan	William Wyse, Rugby.
Whitfield, William	John Oxley, Rotherham.
Wilkin, Thomas Martin	Thomas Wilkin Soham, Cambridge ; assigned to Thomas Pocock, 59, Bartholomew Close.
Wood, James	Greenwood Bentley, the elder, Bradford.
Woodburne, Thomas	William Dickson, Preston.

CHANCERY SITTINGS.

Trinity Term, 1899.

LORD CHANCELLOR'S COURT.

Saturday, May 25, and daily, to Wednesday, June 29, both inclusive, Appeals.

Thursday, May 30.—Appeal motions and appeals.

Friday, May 31, and daily, to Wednesday, June 5, both inclusive.—Appeals.

Thursday, June 6.—Appeal motions and appeals.

Friday, June 7, and daily, to Tuesday, June 11, both inclusive.—Appeals and Causes.

Wednesday, June 12.—Appeal motions and appeals.

Such days as his Lordship is occupied in the House of Lords, excepted.

VICE-CHANCELLOR'S COURT.

Saturday, May 25, and daily, to Wednesday, 29, both inclusive.—Pleas, demurrs, causes, exceptions, and further directions.

Thursday, May 30.—Motions.

Friday, May 31.—Short causes, unopposed petitions, and causes.

Saturday, June 1, and daily, to Wednesday, 5, both inclusive.—Pleas, demurrs, causes, exceptions, and further directions.

Thursday, June 6.—Motions.

Friday, June 7.—Short causes, unopposed petitions, and causes.

Saturday, June 8, and daily, to Tuesday, 11, both inclusive.—Pleas, demurrs, exceptions, causes, and further directions.

Wednesday, 12.—Motions.

ROLLS' COURT.

In and after Trinity Term, 1839.

Saturday, May 25, and daily, Wednesday, 29, both inclusive.—Pleas, demurrs, causes, further directions, and exceptions.

Thursday, May 30.—Motions.

Friday, May 31, and daily, to Wednesday, June 5, both inclusive.—Pleas, demurrs, causes, further directions, and exceptions.

Thursday, June 6.—Motions.

Friday, June 7, and daily, to Monday, 10, both inclusive.—Pleas, demurrs, causes, further directions, and exceptions.

Tuesday, June 11.—Petitions in the general paper.

Wednesday, June 12.—Motions.

At the Rolls.

Thursday, June 13.—Short causes, after swearing in the Solicitors.

Short and consent causes, and consent petitions, every Tuesday, at the Sitting of the Court.

NOTICE TO CORRESPONDENTS.

OUR QUESTIONS!

Having completed our first volume, and seen with satisfaction that some of our subscribers, who have worked upon these Problems, are men of education, desirous of acquiring such a proper knowledge of the law, as shall enable them to practise it with honour and credit to themselves, and with advantage to the public, we are inclined to bestow upon them another boon, beyond our first pledges. We think that the Problems in the first volume have produced answers to satisfy us with the *elementary* acquirements of some of our present correspondents;

and, as we have them so far in harness, we wish to see how they can work. With this view we shall occasionally offer a practical Problem, similar to that in the present Number, to which we direct the *earnest* attention of our correspondents. It will require some close reading to meet it, and a good practical knowledge of the question to combat with it. To enable them to do this with comparative ease, we refer them to *Williams v. Saunders*, where they will find much valuable information on the subject. At the same time, by way of not checking their course, it is right we should tell them, that they must travel much further to arrive at a sound solution.

HENRICUS, and R. P. are under consideration.

Adolphus.—Our Publisher has received your letter, and paid the postage, a sufficient reason that no attention will be paid to it: see our Second Notice to Correspondents, Vol. I. p. 320.

Preparing for Publication.

PART I.

PRECEDENTS in CONVEYANCING,
adapted to the present State of the Law,
with Practical Notes. By THOMAS GEORGE WESTERN, Esq. F.R.A.S., of the Middle Temple, Author of the Commentaries on the Constitution and Laws of England, dedicated, by special command, to Her Majesty; intended as a continuation of PRECEDENTS IN CONVEYANCING, by N. VALLIS BONE, Esq. of Lincoln's Inn, Barrister-at-Law.

This Part will contain
CONDITIONS OF SALE AND CONTRACTS.

JOHN RICHARDS and Co. Law Booksellers and Publishers, 194, Fleet Street.

The Subscribers to "Bone's Precedents in Conveyancing," and the Profession, are respectfully informed by Messrs. JOHN RICHARDS and Co. that no unnecessary delay shall take place in completing this work.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 25th May, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, JUNE 1, 1839.

[No. 5.

LAWS OF REAL PROPERTY.

(Continued from p. 51.)

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

Construction of Sect. 40, as to the application of the word "LEGACY" within the meaning of this section.

THE case we last cited (*Paget v. Foley*) would seem to imply, that the title and general tenor of this statute contemplates only *real* property; nevertheless, the word *legacy* will be found introduced in sections 40, 42, and 43, which, remaining unexplained, appears to embrace every gift of a legatory nature, and according to section 43, even of pure personality, whether particular or residuary. Sect. 40 enacts:—That after the 31st day of December, 1833, no action or suit, or other proceeding, shall be brought to recover any sum of money, secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of any land, or rent, at law or in equity, or *any legacy*, but within twenty years next after a present right to receive the same shall have accrued, to some person capable of giving a discharge for, or release of the same; unless in the mean time some part of the principal money, or some interest thereon, shall have

been paid, or some acknowledgment of the right thereto, shall have been given in writing, signed by the person, by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action, or suit, or proceeding, shall be brought, but within twenty years, next after such payment, or acknowledgment, or the last of such payments, or acknowledgments, if more than one, was given.

Sect. 42 enacts:—That after the said 31st day of December, 1833, no arrears of rent, or interest, in respect of any sum of money, charged upon, or payable out of, any land, or rent, or in respect of *any legacy*, or any damages in respect of such arrears of rent, or interest, shall be recovered by any distress, action, or suit, but within six years next, after the same respectively shall have become due, or next, after an acknowledgment of the same, in writing, shall have been given to the person entitled thereto, or his agent, signed by the person, by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer, shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage, or other incumbrance, on the same land, the person entitled to such

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subsequent mortgage, or incumbrance, may recover in such action, or suit, the arrears of interest, which shall have become due, during the whole time that such prior mortgagee, or incumbrancer, was in such possession, or receipt as aforesaid, although such time may have exceeded the said term of six years.

Upon this section Sir Edward Sugden says (*a*)—“This clause should be modified without loss of time, or the grossest injustice will be committed upon the just rights of legatees, and others, particularly infant legatees.” See also *Campbell v. Sandford*, 8 Bligh’s Parl. R. N. S., 622, per Lord *Brougham*, wherein he says:—“The late Act has settled periods of limitation in other cases; but there is *none* fixed with respect to a *legacy*.”

Section 43 enacts:—That after the said 31st day of December, 1833, no person claiming any tithes, *legacy*, or other property, for the recovery of which he might bring an action, or suit, at law, or in equity, shall bring a suit, or other proceeding, in any spiritual court, to recover the same, but within the period, during which he might bring such action, or suit at law, or in equity.

A question upon section 40 came before the Lord Chancellor, in *Phillip v. Munnings* (*b*), on the 16th March, 1837, the facts of the case appeared to be these:—Matthew Buscall, by his will, gave £400. to Edmund Buscall upon trust, to invest it, and pay the interest to Sarah Buscall for life, and after her death, to pay the legacy to John Buscall (deceased), whom the plaintiffs represented, and the testator appointed Edmund Buscall executor of his will, who proved it, and possessed the testator’s personal estate, and paid all the debts and legacies other than the aforesaid legacy of £400., to an-

swer which he set apart the sum of £400. Edmund Buscall, the executor, died, and by his will appointed the defendant, James Munnings, his executor, who proved his will. The Bill was filed by the plaintiffs, who claimed to be beneficially interested in the £400. against the defendant, alleging that he had possessed himself of the £400. or the securities for it, and had refused to pay it to the plaintiffs, and had converted them to his own use. The Bill prayed the usual account; an injunction restraining the defendant from parting with the £400. or the securities for it, and that the same might be transferred to the Accountant-General in trust in the cause. The defendant admitted the facts stated by the Bill, and stated that Edmund Buscall, the executor, had invested the £400. upon mortgage, which was paid off two years after his death, and the defendant invested the amount in Navy five per cent. annuities, which he afterwards sold out, and did not reinvest the produce, but kept it in his own hands; that the last payment of interest on the £400. made by the defendant was on the 1st of March, 1801, and that John Buscall had not been heard of since the year 1800. He claimed in bar of the suit the same benefit of the Statute of Limitations and of the laches of the plaintiffs in putting their claim to suit, as if he had pleaded the same in bar to the Bill.

The plaintiffs, after filing the original Bill, obtained letters of administration to John Buscall, and by supplemental Bill insisted that all difficulty as to the time of the death of John Buscall was thus removed.

The VICE-CHANCELLOR, upon motion, ordered that the defendant should transfer £430, 10s. New £3½ per cent. annuities, being the amount which the Navy £5. per cent. annuities sold out by the defendant would have produced, and that he should pay into the Bank £392. 3s. 2d. cash, the amount of dividends which would have ac-

(*a*) *Vendor and Purch.* vol. 1, p. 411.

(*b*) *2 Mylne and Craig*, 309.

crued between the year 1814 and the present time upon the stock sold out, and also the further sum of £246. admitted by the defendant to have been previously received for dividends or interest.

The defendant appealed against this order, and in support of the motion for its discharge, it was argued that the 40th section of this Statute of Limitations was a complete bar to the plaintiff's demand, that it might be argued for the plaintiffs that this was not a suit for a legacy, but a suit to make the defendant answerable as a trustee, which would go too far; as every executor is a trustee, and every suit for a Legacy is to compel the performance of a trust; and that if the argument were to prevail the consequence would be, that there would be no case to which this part of the Statute could apply, and the express provision which the legislature has made, would be entirely inoperative. (a)

The LORD CHANCELLOR, without calling upon Counsel for the plaintiffs, said—A man who being in possession of a fund, which he knows to be not his own, thinks proper to sell it and apply the produce to his own use, certainly does not come before the Court under circumstances which entitle him to much indulgence; and the only question is, whether by the statute which has been referred to, I am prohibited from entertaining this suit to make him responsible for that breach of trust. The whole fallacy of the defendant's argument consists in treating this suit as a suit for a legacy. Now, the fund ceased to bear the character of a legacy, as soon as it assumed the character of a trust fund. Suppose the fund had been given by the will to any body else, as a trustee, and not to the executor; it would then be clearly the case of a breach of trust. In this case, the executor when he severed the legacy

from the general personal estate, could not pay it over to any other person, he was bound by the direction of the testator to hold it, upon certain trusts, until the legatee attained twenty-four. What he would have done by paying it to a trustee, he has done by severing it from the testator's property, and appropriating it to the particular purpose pointed out by the will. It is impossible to consider that the executor, so acting, is acting as an executor: he has all this while been acting as a trustee. This suit must be considered, not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust; and it is clear, therefore, that it is not within the terms of the act in question: and the motion was refused with costs.

Messrs. Mylne and Craig, in their note to this case, say (a), "There is room, perhaps, for considerable doubt, whether the act above referred to, extends to any legacies which are not charged upon land. The *title of the act relates solely to land*; and so, apparently, do all its provisions, except the words in the 40th section above cited, with respect to the recovery of legacies, and similar words in the 42nd section, with respect to the recovery of interest upon legacies; and a declaration in the 43rd section, that no person claiming any tithes, legacy, or other property, which might be recovered at law or in equity, shall have a longer time to recover the same in any spiritual Court, than he has at law or in equity."

The bar to *equitable* claims is not, however, susceptible of the same certainty and precision as the bar to legal claims: a large discretion must still belong to the judge in cases involving questions of fraud, concealment, acquiescence, mistake, and other matters peculiarly of *equitable cognizance* (b).

(To be continued.)

(a) 2 M. and C. 315 n.

(b) Sections 25, 26, and 27. See *ante*, vol. I. pp. 81, 93. See also Attorney-General v. Christ's Hospital, 3 Mylne and Keen, 344.

(a) See Murray v. E. I. Company, 5 Barn. and Ald. 204.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 2. VOL. 2.

An Estate at Will—describe it.

An estate at will, as described by Littleton, sec. 68, is “where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession.”

As this estate originates by the mutual agreement of the parties; so it depends upon their joint concurrence; therefore the dissent of either may determine it.

This estate can never be the subject of conveyance, for a tenant at will hath no certain indefeasible estate, nothing that can be assigned by him to any other person, because the lessor may determine his will, and put him out whenever he pleases.

Every estate at will is at the will of both parties, landlord and tenant, so that either of them may determine his will, and quit his connection with the other, at his own pleasure, Co. Litt. 55; but at the same time this must be understood with some restriction. For if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits, Co. Litt. 56. And the reason of this is, on account of uncertainty; for the tenant cannot possibly know when his landlord will determine his possession, and therefore can make no provision against it. The tenant having sown the land (which is for the public good) upon a reasonable presumption, it is but just that he should reap the fruits of his industry; consequently the law will not let him be a loser by it. But in the case of the tenant's determining his will, it is quite different; for then, the landlord shall have the profits of the land, and this upon reasons equally as good as in the former case, see Co. Litt. 55.

The law does not favour an estate at will, and where the rent is received yearly, or half yearly, it frequently takes that circumstance as evidence of a term, that is a lease for a year, or from year to year, see Wat. Con. by Mer. 62; but as this presumption is only for the furtherance of justice, if it should be productive of wrong, it cannot take place, for the maxim is, “that a construction of law as such, shall do injury to none.” For, supposing that a lease from year to year would work a forfeiture, there can be no reason for construing such a demise a lease for a year, rather than an estate at will. See Fenny, d. Eastham *v.* Child. 2 Maul & Sel. 255. Nor can it be construed a tenancy from year to year, when a positive Act of Parliament has declared it to be an estate at will.

It is enacted by the Statute of Frauds (29 Car. II. c. 3. s. 1.) that a lease by parol for a longer term than three years, shall have the force and effect of an estate at will only. But Lord Kenyon, in Clayton *v.* Blakey, 8 T. R. 3. says, “The meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will, has since been properly construed to enure as a tenancy from year to year.”

This certainly seems to me to be a very strange explanation of the clause of the statute, and I cannot help thinking with Mr. Watkins, that “it is certainly very bold, if not as certainly very wrong, to assert that that estate, which the statute positively declared shall be an estate at will only, and shall not either in law or equity be deemed or taken to have any other or greater effect, shall not be an estate at will only, but shall be deemed and taken to have another and greater effect.”

I apprehend that where a lease is made by parol, without expressing the time for which the lessee is to hold, and there is a reservation of an annual rent, the law will

construe such a lease a tenancy from year to year, rather than an estate at will. *Legg v. Strudwick*, 2 Salk. 414; *Timmins v. Rawlinson*, 3 Burr. 1609; *Doe d. Martin v. Watts*, 7 Durnf. & East, 83; *Clayton v. Blakey* 8. ibid. 3; *Doe, d. Warner v. Brown*, 8 East, 165. But where a lease is made by parol for a longer term than three years, then the statute expressly declares it to be an estate at will only.

Where a tenant holds over after the expiration of a lease, he becomes tenant from year to year. See *Doe, d. Castleton v. Samuel*, 5 Esp. 173; and also *Roe v. Ward*, H. Bl. 197.

An estate at will can be created by the express agreement of the parties. See *Richardson v. Langridge*, 4 Taunt. 128. There can be no under tenant to a tenant at will. Per *Ashurst J. 1 Doul.* 283.

Offices may be granted at will. See *Reynold's case*, 9 Co. Rep. 97a; *Dyer*, 176a. Grants by the King may be at his will only, and may be granted to commence in future. *Rex v. Kemp*. 1 Salk. 473; *Howard v. Wood*, 2 Show, 21.

A tenant at will on entry may accept a release of the inheritance from his lessor. Co. Litt. 27 b.

An action of trespass may be brought against a tenant at will, committing waste; but not an action of waste, not being within the Statute of Gloucester. Co. Litt. 57 a.

This estate is determined by notice on the land, or by notice given to the parties, or by the landlord entering and exercising acts of ownership, or on the part of the tenant, by abandonment, assignment, &c. See Co. Litt. 55 b, 57 a. Or by the death of either of the parties. *James v. Dean*, 11 Ves. 391.

It is important to know the difference between a tenancy at will and a tenancy from year to year, so far as relates to the recovery of possession.

A tenancy from year to year requires a regular notice to quit, previous to bringing

an ejectment; but in the case of a tenant at will in possession, or has been let into possession with the privity of the owner, as under an agreement for the purchase of lands, an ejectment may be maintained against him on a demand of possession and refusal to quit. See *Doe, v. Jackson*, 1 Barn. & Cres. 448; *Right v. Beard*, 13 East, 210; 2 Phil. Evid. 271; 1 Stark. N. P. C. 308; 2 Taunt. 148. Nor is a demand necessary previous to bringing an ejectment, if the tenant agreed to quit on a given day, if a purchase was not completed. *Doe v. Breach*, 6 Esp. 106; *Sugden's Vendors*, 234. Nor is a demand necessary where the tenant in possession is a mere tenant at sufferance. 2 Phil. Evid. 266. 271.

HENRICUS.

Middle Temple,
May 16th, 1839.

PROBLEM V.

VOL. 2.

A REMAINDER.

What is it?—When is it vested?—When contingent?

Describe the rules to be observed in creating it.

Imperial Parliament.

HOUSE OF COMMONS,
May 28.

BUSINESS OF THE HOUSE.

LORD JOHN RUSSELL moved that the House should adjourn till next Thursday. His Lordship stated the course he intended to pursue relative to the business of the House, and after speaking upon the Jamaica and Canada questions, said, with respect to some other questions, he had to mention that he would propose to go on with the second reading of the County Courts Bill, on whatever day that measure stood in the orders. On Friday next his hon. and learned friend the Attorney-General would move the House into committee on the Registration of

Voters' Bill. He was anxious to bring forward, with as little delay as possible, a measure relative to the Metropolitan Police Courts, and also a bill respecting factories, but at present he could fix no day for the consideration of those measures. With regard to the bill for the better ordering of prisons, he hoped to be able to proceed with it on Friday or Monday next. That besides Monday and Friday, orders of the day should take precedence of motions on Thursdays, unless by a special order of the House.

Mr. RICE said, that on an early day it was his intention to propose a resolution with respect to the postage of letters, grounded on the recommendation of the Committee on Postage.

The motion that the House at its rising do adjourn till Thursday next was agreed to.

Law Reports.

VICE-CHANCELLOR'S COURT.—May 25.

CARTER v. BEARD.

Construction of Statute 3 & 4 W. 4. c. 104. Whether funeral expenses are included in the debts to which the real estate of an intestate is liable, and whether money expended for maintaining a lunatic can be recovered as a debt, under this statute, out of his real estate.

The facts of this case appeared to be, that the lunatic's father, Thomas Beard, who died in 1800, gave all his property to trustees in trust, to suffer his widow to enter into and enjoy the same during her natural life, provided she should continue unmarried, and on her death or marriage the real estate was to be equally divided between his two sons, Enoch and Benjamin, and the residue among his five daughters. Three years after the testator's death his widow married Carter, the plaintiff, who continued in possession, and received the rents of that moiety of the freehold which had become the property of Enoch on his mother's marriage. Enoch became a lunatic when he was 22 years old, and continued so up to the time of his death in 1835. His brother Thomas, as his heir-at-law and administrator, then commenced actions against Carter, the stepfather, for the recovery of the estate, and the profits that had accrued since his death. Thomas recovered possession under the action of ejectment in 1838, but in order to restrain the action for the subsequent rents, Carter commenced the present suit in the nature of a creditor's bill against Thomas, the lunatic's heir and administrator, and alleged that the amount paid

by him for the maintenance and support of the lunatic at different asylums, far exceeded the amount for which the action was brought. The case stated by Carter was, that the income of Enoch's moiety did not amount to more than £20. a-year; that it was much too small to bear the expense of an inquisition; and that if he had withheld the necessary advances, the lunatic must have suffered starvation, and been left to the parish to bury. He was perfectly ready to account for all the rents he had received belonging to the lunatic, and only sought to be reimbursed the reasonable sums he had expended in his necessary support and in burying him. The defendant contended there were no personal assets of the lunatic, and though he had received £450. for the real estate, which he had lately assigned to one Simmons, yet he insisted that neither the funeral expenses of Enoch, nor any sums expended in his maintenance beyond the income of his property, could be recovered under the recent statute out of his real estate. The plaintiff's counsel said, though it had often been regretted by the Lord Chancellors Lyndhurst and Brougham, that the Court had no power to make provision for a lunatic out of the capital of his property where the income was inadequate to his support, yet that the Court in administering a lunatic's estate would not, since the recent statute, which made all real estate assets for the payment of simple contract debts, hold it exonerated from the payment of those necessary and proper allowances which had been expended in the maintenance and burial of the intestate, because they happened to exceed the income, and that therefore it would continue the injunction which restrained the action at law.

An injunction had been obtained by Carter to restrain an action at law by Thomas Beard to recover the profits of the land that had accrued since the death of the lunatic, and the defendant now applied to have that injunction dissolved.

This case raised two questions: first, whether the real estate of an intestate was liable, under the 3rd & 4th William IV. c. 104. to the payment of his funeral expenses; and, secondly, whether a creditor for advances made toward the maintenance of a lunatic, where the income of his property was insufficient, could recover his debt under the statute out of the intestate's real estate.

The VICE-CHANCELLOR said, that the clear construction of the 3rd & 4th William IV. c. 104. was, that funeral expenses were not included in the debts to which the real estate of an intestate was liable, nor that the sort of claim the plaintiff had in point of honour against the lunatic's estate, for what he had expended in his maintenance, came within the meaning of the statute. The obvious intent of the statute was

to render intestates' estates liable for the debts they themselves had created, and a debt could not be contracted by a dead man or a party incapable of entering into a contract. The Court was therefore bound to make the order absolute for dissolving the injunction.

ROLLS COURT.—May 1.

WHITE v. SMITH AND OTHERS.

Trustees.—Liabilities of—Relief afforded to Trustees, where the Trust funds have been misappropriated, or placed in an insecure state through the instrumentality of the Cestui que trust.

The plaintiff in this cause filed his bill against the defendants for an account of all the trust funds and dividends possessed and received by the defendants or any of them, or by Joseph Gould, deceased, belonging to the plaintiff, and for an account of the disposal thereof, and of principal in the bank-books which had been sold out, that the defendants might be decreed to replace the funds sold out, and that Thomas Smith might be removed from being trustee, and for a reference to the Master to appoint a new trustee.

It appeared that in 1820 the plaintiff sold to Sleigh an estate, charged with an annuity of 40*l.* for the plaintiff's wife (who was living apart from him, and also with an annuity of 100*l.* for her in case of survivorship), against which annuities Sleigh required to be indemnified, and for this purpose it was agreed that 3,000*l.*, part of the purchase-money, should be set apart; and it was accordingly laid out in consuls (producing 4,301*l.* 1*s.* 6*d.*), in the names of the defendants Thomas Smith and Joseph Gould, since deceased, and by a deed the trusts were declared to be for the indemnity of Sleigh against these annuities, and subject thereto for the plaintiff. The trustees, out of the dividends, were to satisfy the annuities, and pay the surplus to the plaintiff. The stock remained in the name of the trustees up to February, 1824. The bill was filed to recover the value of that stock, upon the ground that it was sold out by the trustees, without the plaintiff's knowledge, and that they had applied the money to the use of the defendants, or some of them. The plaintiff had therefore to make out that the stock was sold without his knowledge, and that a large portion of the proceeds were misappropriated. Several witnesses had been examined, and in some particulars they did not agree; but with respect to the material circumstances, it appeared that in 1824 the plaintiff White was in embarrassed circumstances, and consulted his solicitor, Charles Coupland, how to obtain relief. Coupland suggested that as, since the time when the 3,000*l.* was invested in consuls, the funds had very much risen in price,

and the investment was then worth considerably more than 3,000*l.*, Sleigh would most probably be contented with 3,000*l.* worth of stock for his indemnity, and if that would indemnify Sleigh, then all the proceeds of the stock above 3,000*l.* might be appropriated by the plaintiff to his own use. Upon this suggestion application was made to Sleigh, who consented to allow the stock invested for his indemnity to be reduced to so much as would be of the value of 3,000*l.*, and no more. Coupland acted as the solicitor both for the plaintiff and Sleigh, and he made this arrangement—that the whole of the stock should be sold out; that the plaintiff White should receive from the proceeds all the excess above 3,000*l.*; that the 3,000*l.* should be invested in stock for the security of Sleigh against the annuities for the plaintiff's wife, charged on the estate purchased by Sleigh, and subject thereto for the benefit of the plaintiff. Under this arrangement Coupland applied to the trustees of the stock, Smith and Gould, and obtained from them a power of attorney to John Billinge, (silk broker, of London, charged in the bill to be a friend of Sleigh, but) a stranger to the plaintiff, to sell the stock. The stock was accordingly sold out, and the proceeds of the sale, 3,924*l.* 12*s.*, were received by Billinge, and 924*l.* 12*s.*, the surplus over the 3,000*l.*, was paid to the plaintiff through the hands of Coupland, and the remaining 3,000*l.* continued in the hands of Billinge from the sale in February, 1824, until he became bankrupt, in the middle of 1826. The question raised was on whom the loss should fall.

LORD LANGDALE.—In this as in all other cases the relief must depend upon what has been alleged and proved. The plaintiff must not rely upon the errors of the defendants or of their witnesses; it is his own allegations and proofs that must entitle him to a decree—he can have no other title. His Lordship was of opinion that the sale took place by the plaintiff's own authority, through Coupland, and that the plaintiff was not entitled to call on the trustees, Smith and Gould, to make good the deficiency of the proceeds of the stock sold out. He also thought that there was not sufficient allegations in the bill to charge the trustees upon a distinct trust as answerable for the default of Billinge, whom they had by the power of attorney authorised to receive the proceeds of the stock. The cause set forth in the bill was not adapted to that new case, and it was desirable to have something more than was set forth. It appeared that Coupland was the agent of both parties, and that the plaintiff was receiving interest on the 3,000*l.* until the bankruptcy of Billinge, and knew that he was receiving interest, and not dividends; so that from all the circumstances he must have known that the

money remained in the hands of Billinge. After the direction of the plaintiff and Sleigh, the only persons beneficially interested in the stock, the trustees could not properly have refused to make the transfer. The plaintiff had established no right whatever, and the bill must be discharged with costs.

May 22.

ADDISS v. CAMPBELL.

Vendor and Purchaser—Fraud—Conditions to which purchasers of Reversionary property are subject in equity—Circumstances under which the Court will order a production of the Deeds and Papers as will lead to show the nature of the transaction, the value of the property, and the price given.

This suit was instituted to set aside a sale made by the plaintiff's father, by which the plaintiff complained that he had been defrauded. The bill stated that Francis Gostling in 1801 devised the estate in question at Colesey-wood, in Suffolk, to trustees, to the use of his son, Francis Gostling, for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, and in default of issue to his (testator's) daughter, Mildred Addiss, for life; remainder to her first and other sons in tail male. The testator died in 1806, and left surviving Francis Gostling, his only son, and his daughter, Mildred, the wife of Henry Addiss. She died in 1818, leaving one son, Henry Joseph Addiss (plaintiff's father), who became tenant in tail male in remainder, expectant on the life estate of Francis Gostling. Henry Joseph was extravagant, got into scrapes, and was even sentenced to transportation, but the sentence was not carried into execution. In 1819 the interest he had in the estate was advertised for sale, and was purchased by John Crooke by contract. The purchase-money was stated in the deed to be 625*l.*, but 500*l.* was only paid, and a bond for 1,000*l.* more was given, which Henry Joseph afterwards sold for 50*l.* to a friend of the purchaser, who got it. Francis Gostling died afterwards without issue, by which the estate of entail in remainder of Henry Joseph, who had bound himself to suffer a recovery, became an estate in possession, and Crooke, the purchaser, entered into it. He in 1828 contracted with Francis Gostling, whose representatives and trustees the defendants were, for the sale of the property for 6,500*l.* The sale was completed, and Crooke afterwards died. In 1832 Henry Joseph Addiss died in Margate workhouse, leaving the plaintiff his son and issue in tail, who

filed his bill claiming the estate, and seeking to set aside his father's sale to Crooke, and the present application was made in order to enable him to prove his case.

Mr. Pemberton for the plaintiff moved that the defendants should deposit with their clerk in Court all the deeds and papers relating to the property, for the inspection of the plaintiff, which he contended he was entitled to by reason that the purchase by Crooke was fraudulent; that Francis Gostling, who purchased of Crooke, was aware of all the circumstances, and that the plaintiff was entitled to an inspection of all the deeds and documents necessary to substantiate his case.

Mr. Kindersley contended there was no fraud in the purchase by Crooke in 1819, for that the vendor, Henry Joseph Addiss, had no estate in possession, so that if the then tenant for life, Francis Gostling, had a son, such son would have taken in tail, and the estate of Henry Joseph would never have accrued, in which case Crooke would have lost his purchase-money entirely. He only purchased a contingency, that the party for whom the defendants were representatives made a fair and *bond fide* purchase, and as such purchasers were not bound to produce their title deeds, or to do any act to assist the plaintiffs in attacking their title.

May 24.—Lord LANGDALE pronounced Judgment.—His Lordship said the defendant insisted that the transaction was fair, the sale to Gostling by Crooke being made to him *bond fide* upon payment of a valuable and sufficient consideration, and confirmed by Henry Joseph Addiss, the plaintiff's father. As this was the purchase by Crooke from Henry Joseph Addiss of what was at the time a reversionary interest, it was subject to the conditions of sales of estates of that nature: the purchaser was to show that there was no fraud, and also to show the particulars of the transaction. The defendant said he was ignorant of the transaction between Henry Joseph Addiss and Crooke, but alleged that the conveyance to his testator was fair. The plaintiff had, however, produced a letter from Gostling, which the defendant did not deny, showing that Gostling was fully aware that the transaction between Crooke and Joseph Henry Addiss was, to say the least of it, doubtful. The defendant must produce such deeds and documents as would tend to show the nature of the transaction, the value of the property, and the consideration given.

QUEEN'S BENCH.—April 27.

Sittings in Banco.

STOCKDALE v. HANSARD.

LIBEL.—*Breach of Privilege—Whether the House of Commons may order the publication of their proceedings, which contains matter of Libel against individuals, and that it is a high breach of privilege to bring such Libel in question before any Court of Judicature.*

(Continued from p. 55.)

The ATTORNEY-GENERAL continued.

My friend has alluded to certain resolutions of the House of Commons, as if they could be in the smallest degree in derogation of the powers and authorities of courts of justice, or were inconsistent with that reverence due to courts of justice, which all good men must entertain; for the House of Commons have believed, and do believe, and I hope will have every reason to continue to believe, that all courts and judges in these courts will confine themselves to their just jurisdiction, and will protect the subordination between the courts of justice and the Houses of Parliament that the constitution has established. The learned counsel then proceeded to allude to the plea put upon this record, which set out that inspectors of prisons had been appointed, who had sent in reports to the House of Commons, and that a resolution had been passed in that House that those reports should be printed, and that the defendants had been employed to print and sell these particular reports. The plea admitted that the laws of the land could not be superseded, suspended, or altered, by any resolution or order of the House of Commons: that the House could not, by any resolution or order, create any new privileges to themselves, inconsistent with the known laws of the land; if otherwise, there would be no security for the lives or property of the subjects of these realms. To all these pleas, he (the learned counsel) would say, "agreed." He claimed no power for the House of Commons to supersede, suspend, or alter the law of the land. He claimed a power in the House of Commons to declare what was the law of the land respecting a privilege which was part of the *lex terræ*. The House of Commons was the proper tribunal to which the administration of that peculiar branch of the law was intrusted by the constitution. He did not say that the House would create any new privileges to themselves, but to that House was intrusted the power of saying, what was the law of Parliament, as it was intrusted to their Lordships to say, what was the common law of the land. He had now to submit, that the plea, showing that the act com-

plained of was done by the authority and command of the House of Commons, made it quite clear, that upon this record the defendants were entitled to their judgment. The question of privilege being raised directly, this Court had no jurisdiction to inquire into the existence of that privilege. Under a solemn protest that the question was not within their jurisdiction, he should contend, that if it were open to the Court to inquire into the existence of the privilege, the privilege did exist, and the Court was bound to give judgment for the defendants. It was admitted that what had been done had been so done by the authority of the House, and if that amounted to a justification, then the defence was complete. The House of Commons and its members enjoyed many privileges, but one of its general privileges was that of publishing documents for the use of its members, and of publishing them for the information of the constituent body. In the present instance the House of Commons had done no more than exercise its privilege, and had commanded this report to be printed. It was an act within the general jurisdiction of the House. The question then arose whether an action could be maintained against these defendants for this act, which was done by the authority of the House, in publishing these reports as parts of the proceedings of that House. It might just as well be averred that an action would lie against the Speaker; and his friend must not only admit that, but he must admit that all the members of the committee would be liable, and further, that all the members of the House who concurred in the vote would be liable to an action. Where must the line be drawn? If the defendants were liable, they were the officers of the House acting by the command of the House; if they were liable, the Speaker would be liable; if the Speaker would be liable, the members of the committee, who superintend the publication of these reports, would be liable, and he knew not where the line could be drawn, without saying that an action could be maintained against every member of the House of Commons who concurred; but he would contend that their Lordships were not permitted to consider whether the privilege existed or not. The next proposition was, that this question of privilege arose directly, over which no court of common law had any jurisdiction. In every case of commitment by the House of Commons, where the parties had applied to this Court, the Court had always held, that it could not interfere, because if it did, there would be a conflict between the courts of common law and the Houses of Parliament. The object of allowing privileges to the House of Commons was, that it might be independent of the Crown and the House of Lords.

(To be continued.)

COURT OF COMMON PLEAS—May 23.

PAGET v. CHAMBERS.

ATTORNEYS—Whether an Attorney shall be struck off the Rolls for having neglected to take out his Certificate, and applying to be re-admitted, without giving the usual notice of his intention to do so (a).

A rule nisi had been obtained on the 16th last April, calling upon an attorney to show cause why his name should not be struck off the roll of attorneys of this Court, and he now showed cause.

It appeared, from the affidavits, that he had been originally admitted an attorney of the Court of King's Bench in the year 1810, and paid the proper admission fees, &c.; but having neglected to take out his certificate, he thereby ceased to be an attorney of this Court. In the year 1823 he was re-admitted in the same Court, but again omitted to take out his certificate. In the year 1826 he was admitted an attorney of this Court, upon an affidavit of his having been regularly admitted an attorney of the Court of King's Bench, and forthwith took out his certificate, which he continued to do regularly every subsequent year. In Michaelmas Term, 1837, a rule was obtained against him in the Court of King's Bench, on the ground that he was not entitled to practise in that Court in consequence of his having omitted to take out his certificate forthwith after his re-admission in 1823, and certain bills of costs for business done for the defendant were referred to the Master, for the purpose of having so much of them as related to business done in that Court disallowed. Then the present application was made for a similar purpose in this Court; in reply to which he had made an affidavit, stating that his application to this Court in 1826 had been supported by an affidavit, stating the exact facts as they then stood, which affidavit had been submitted to the officer of the Court, and approved of by him in every respect as the proper affidavit on which to found the application. Upon this affidavit he was admitted accordingly; and the affidavit negatived all fraud on the occasion.

Lord DENMAN, C. J., delivered the judgment of the Court; and, after recapitulating these facts, said that the attorney having been admitted therefore under these circumstances, and taken out his certificate immediately afterwards, although it might be questionable whether or not he could have claimed to be admitted had the Court been aware of all the facts; still, he being admitted an attorney *de facto*, and there being no fraud in the case, the objection which was made to his

right to practise in the Queen's Bench could not apply to this Court. They were therefore of opinion that they were not called upon, in the exercise of their sound discretion, to order his name to be struck off the roll, and that consequently the rule must be discharged; but as there was some irregularity in the manner in which he had been admitted, the rule should be discharged without costs.

BAIL COURT.—May 6.

(Before Mr. Justice WILLIAMS.)

REGINA v. DIRECTORS OF THE EASTERN COUNTIES RAILWAY COMPANY.

Joint Stock Companies—*Mandamus*, to compel the Directors to perform the whole of the Contract which they had entered into with the public.

The Attorney-General said that he was instructed to make an application to the Court, the success of which would he hoped produce the most salutary consequences to the public, in respect of the company against which he applied, as well as all others of a similar description. The object of the application was to compel the defendants to perform the whole of the contract which they had entered into with the public, and to prevent them from picking out some particular parts of it, and executing only those parts, as being the only parts likely to be beneficial to themselves. It appeared that the company had been established in 1836 by the 6th and 7th William IV. chap. 106, and that the Act of Parliament was for laying down a railway from London to Norwich and Yarmouth, through Colchester, Ipswich, and several other intermediate towns. The undertaking, upon the supposition that it would be carried on throughout the whole of the line described in the Act, had met with great encouragement and support from the landholders of Norwich and Suffolk, and upon the same ground the landowners of Essex made no objection to its passing through their properties. It now appeared, however, that the directors wanted only to make the road from London to Colchester, and no further. If an application for that part of the original line had been made to Parliament in the first instance, it never could have succeeded. But the company having proposed to make a road from London to Yarmouth, now intended to stop at Colchester, which, as the learned counsel contended, was a manifest breach of faith with the landholders of Norwich and Suffolk, and with the general body of the shareholders. The manner in which the company proposed to effect their object was by plac-

(a) See this case reported *ante*, vol. I. p 393.

ing themselves in such a situation that they could not by law continue the line beyond Colchester. It appeared that some deviation from the original line between that point and the more northern parts were provided for by another Act procured by the company, the 1st and 2nd Victoria, c. 81, in the 2nd section of which Act it was directed, that unless such deviations should be laid out before the 27th of July, 1839, it should not be lawful for the company to proceed with that part of the line at all. The company, therefore, by merely omitting to lay out the line of the deviation, would place themselves in the position which they desired, and would have no power in law to proceed beyond Colchester. They had been called upon several times by parties interested in the undertaking, to mark out the deviation, but had refused to do so, for reasons which were sufficiently obvious from the statements which he (the Attorney-General) had addressed to the Court. The learned gentleman then referred to the case of "The King against the Severn and Wye Railway Company" (a), in which the defendants were commanded by this Court to make a road for the public accommodation. A railway was not a private way, but a common highway, and any other person as well as the company may travel upon it with his own engines, upon observing the necessary regulations. In the case referred to, it had been admitted by the Court that the defendants were liable to an indictment for not laying down the railroad; but, as such a proceeding, however it may afford the means of punishing the defendants, could not procure any accommodation to the public, the Court granted a *mandamus* commanding the company to do what was desired. The circumstances of the present case were exactly the same. The company had by their Act of Parliament, entered into a contract with the public, who could not have the advantage which the legislature intended they should derive from the proposed undertaking unless it were completed altogether. It was quite clear that the company could not legally stop at the end of half a mile, as the road would by that means become a public nuisance. They were, therefore, bound to proceed stage by stage until they arrived at the *terminus* appointed by the Act. The affidavit was from a great number of landholders in the neighbourhood of that part of the line which ran from Colchester to Yarmouth, a distance of about seventy miles. The other opponents were shareholders in the concern, and all swore that they, as well as the public, would be very seriously prejudiced unless the company should be compelled to complete their line according to the original plan. In these circumstances, his ap-

plication was for a rule calling upon the defendants to show cause why a *mandamus* should not issue, commanding them to proceed to point out the deviations referred to, so that the whole of that duty might be performed before the 27th day of July next.

Mr. Justice WILLIAMS observed, that the case was certainly one of great importance, and granted the rule.

COURT OF BANKRUPTCY.—May 13.

(*Sub-division Court.*)

FIAT AGAINST HAYMAN LEVIN.

Jurisdiction of the Court—whether it has power to enforce an order for a witness to withdraw till another witness shall be examined.

Mr Hindmarsh stated that at the examination of some witnesses a few days since, before Mr. Commissioner Holroyd, a witness had refused to withdraw, and the learned Commissioner (Holroyd) considering that he had the power to order the witness to withdraw, but could not enforce the order, it was prayed that the examination might be adjourned over to a sub-division Court, which Court had the power of enforcing its order; the prayer was granted. Under these circumstances he now asked Mr. Isaacs, the solicitor, with his clients, to withdraw till a witness whom he (Mr. Hindmarsh) should call was examined.

The CHIEF-COMMISSIONER said, before the examination was entered into, he wished to make a few observations. His brother Commissioner (Fonblanque) and himself had been informed of the nature of the sitting, and they had thought it their duty to make themselves acquainted with the acts of Parliament relating to this question. Their impression was the same as that of Mr. Commissioner Holroyd. The last Act placed the single Commissioner in this situation, that to enforce his order he must have recourse to a course at once extraordinary and inconvenient—a reference to a Court of Sub-division in those questions which could only occupy usefully the mind of one judge, the other two remaining idle. Looking at the original act (1 and 2 Willm. IV. cap. 56.) it appeared clearly that each commissioner was to possess the same powers as those formerly exercised by each list of commissioners, save and except that no one commissioner could commit; this power was distinctly given by the 7th section, which his Honour cited. In the full and free exercise of power, as the Commissioners believed themselves blessed, the question was brought to a test by one of the Commissioners inflicting a fine for contempt. It was disputed that he had the power, and brought on the memorable case of "Rex and Faulkner," in

(a) 2 Barn. and A. 646.

the Exchequer Court, where it was decided against the Commissioner; and then it was that the Commissioners found they had not the power to enforce the order they might make. To remedy this, was brought in a clause in the 5th and 6th William IV., cap. —, sec. 26, which placed them in this position, that the Commissioner sitting singly had not the power to enforce his own order, but (though very extraordinary) this statute gave power of reference to the Court of Review, though it was notorious that that Court did not sit for half the year, and at a very considerable distance from the Court of Commissioners. So the course thus pointed out was considered impracticable, and not at all facilitating the ends of justice. The anomaly of the situation consisted in this—that two additional Commissioners should be called in, who, if they interfered, would only tend to embarrass and entangle; and thus arose a case of gross and palpable inconvenience to the Commissioners as representing the public. It was a case, he was sure, which only required to be made known to the world, to be immediately remedied. But the duty must be done, inconvenient as it was, and they must sit there, though not to assist Mr. Commissioner Holroyd, who would discharge his duty much better alone.

Mr. Humphreys suggested, as the Court of Sub-division could make orders and enforce them, whether they could not make a general order relative to the withdrawal of witnesses when under examination before a Commissioner sitting singly; and, if such order was disobeyed, treat it as a contempt of the Sub-division Court.

The CHIEF-COMMISSIONER said, under the clause of the 1st and 2nd William IV., cap. 26, could there exist any doubt but that every single Commissioner possessed the powers of the old list, save of committal of witnesses under examination? Then came 5 and 6 William IV., which declared that the Commissioners should not have the power to commit for contempt of Court; and, with but that one exception, it left the powers conferred by 1 and 2 Will. IV., cap. 56, just where they were. Then the 5 and 6 Will. IV. went on to declare that the Sub-division Court should be a Court of Record, and the power of committal was inferentially given to the Sub-division Court, by allowing the adjournments to be made to that Court.

Mr. Humphreys had studied the case, as far as his authorities would allow him, and as it was one of the utmost importance to the public in general, would respectfully submit that on the *dictum* of the learned judges who had expressed their opinions in the case of *Rex and Faulkner*, the Court of Sub-division has the power to make rules and regulations, and could enforce them. That being the case, he contended that they could

make a general rule relative to the question then before the Court, which would have the effect of abolishing, in a great measure, the inconvenience necessarily now experienced. He respectfully craved the decision of their Honours on the point, and would put the case thus:—The Sub-division Court was the same as the Courts of Queen's Bench or Common Pleas, and the Commissioner sitting singly in the same position as a Judge at chambers. The Judge at chambers had not the power to commit for contempt, and, after the order of a Judge had been obtained for a certain amount, the parties could not be proceeded against till it had been made a rule of Court—i. e. in the sitting of the Judges.

Mr. Commissioner FONBLANQUE said that those who were acquainted with the machinery of the Bankruptcy Laws had thought that the sitting of the Commissioner proceeded from the Sub-division Court, whereas, on the contrary, those in its administration know, and but too well, that the sitting of a Sub-division Court arose from difficulties which a Commissioner sitting singly could not combat with.

Mr. Humphreys, in continuation, remarked, that the Judges at chambers had not power to enforce their orders till they had been made a rule of court, and the giving of full power to the Commissioner sitting singly had been much discussed, and it was well known there was a strong feeling against it. He was present when the case of "*Rex and Faulkner*" was in the Exchequer Court, and he thought that the opinions there expressed warranted him in suggesting what he had done. It would be a waste of words for him to proceed if their Honours felt they could do nothing in it; but he was sure they were as desirous as himself to have a remedy applied to this crying evil. There was no doubt that something must be done.

Mr. Commissioner FONBLANQUE remarked, that the very peculiar manner in which the examination of witnesses was carried on in the Court of Bankruptcy showed the absurdity in not vesting the Commissioner sitting singly with full power. The examinations often related to concealed property; perhaps a £4000. (sovereigns) pretended to be lost, but known as concealed. Was it not necessary in such a case that the parties not under examination should be ordered to withdraw? If not, was it not natural they should go out and say to the parties interested, "they've the clue, go and remove the money?" In such a case, to go to Lincoln's-inn-hall, or even over the way, would be to render the effect of the proceeding abortive.

Mr. Humphreys said it was the same in the present instance. The bankrupt had failed for £7000., and had absconded, and not one farthing had at present been received for the creditors;

and he had, on the fullest authority, reason to believe that could this examination be carried on in the way it could be wished, there were parties who, it could be proved, were mixed up in the fraudulent transaction, from whom could be recovered a greater part of the property.

The CHIEF-COMMISSIONER.—It was not for them to speculate as to what the Legislature would do, and still less would he declare or insist on the difference of opinion from the superior Court, to which they (the Commissioners) bowed. He now only wished to state the difficulties under which they were placed. The duties of a single Commissioner were well known, and it would be highly inconvenient if the course of those duties were often stopped by the necessity of referring to a Sub-division Court. If the power to exclude a witness existed either in one Commissioner or in the Sub-division Court, it would be seldom or never disputed in practice. As to the promulgation of a general rule, he thought the Sub-division Court was not able to make one. If it was, the Commissioner could not enforce the order or rule so made; but if it was once known that a Sub-division Court could only enforce the order, it would be constantly a source of evasion. The difficulty and inconvenience would be greater than persons not acquainted with the practice in bankruptcy could possibly conceive. Three commissioners might not be sitting at the time, or might not be present; and if so, the particular business of the one's Court would be interrupted, and that of the public delayed. The Court is asked to order a witness to retire, and then that the examination should go before Mr. Commissioner Holroyd; but if that was done, the same person might intrude again into the room, and Mr. Commissioner Holroyd could not remove him. The consequence was, that they, then sitting as a Sub-division Court, must go on with the examination till it was concluded. He now left the question open to any observations his brother Commissioners might think fit to make, especially Mr. Commissioner Holroyd, who understood the practice of the Court of Queen's Bench much better than he or his brother Commissioner Fonblanque.

Mr. Commissioner HOLROYD concurred with what had fallen from his brother Commissioner, and commented on the practice of the Court of Queen's Bench as compared with that of the Court of Bankruptcy.

Mr. Commissioner FONBLANQUE was satisfied with the expression of the opinions of his brother Commissioners, and would not add further observations.

GENTLEMEN CALLED TO THE BAR, Easter Term, 1839.

LINCOLN'S INN.

Sir Archer Denman Croft, Bart.
 Peregrine Dealtry.
 William John Phelps.
 Alexander Mc Neill.
 William Rose.
 Charles John Coote.
 The Hon. Henry Boyle Bernard.
 John Beames, jun.
 Frederick Fraser Carruthers.
 Henry Matthias Riddell.
 Thomas Carter Briggs.
 Richard Baxter.
 William Boteler.
 Thomas Bates.
 Francis Fisher.
 William Vizard, jun.
 Samuel Sampson.
 Edward Howes.
 Thomas Henry Allen Poynder.
 William John Johnson.
 Frederick Jones.

INNER TEMPLE.

John Hughes.
 William John Hamilton.
 Arthur Edward Somerset.
 Thomas Emerson Headlam.
 John Richard Westgarth Hale.
 Richard Griffiths Welford.
 Frederic Hitchcock.
 James Hill.
 George Hart Wortley.
 Richard Arabin.
 Edward Fitz Roy Talbot.
 Kenneth Macaulay.
 Sydney Smith Bell.

MIDDLE TEMPLE.

John Murray.
 Francis Henry Riddell.
 Steuart Macnaghten.
 Martin Archer Shee.
 Cateret John William Ellis.
 Henry Reeve.
 William Clifford.
 Robert Farie.
 George Robinson.
 Gillery Pigott.
 Paul Wilmot.
 John Price Williams.
 Henry Cory.

GRAY'S INN.

John Richard Cook.
 Thomas Teed.
 John Walter Huddleston.

**NEW ORDERS OF THE COURT OF
CHANCERY,**

Issued under the Stat. 1 & 2 Victoria, c. 110.

COURT OF CHANCERY, May 9, 1889.

I. That in all cases in which it shall be alleged that the plaintiff is prosecuting the defendant, in this Court, and also in some other Court for the same matter, the defendant in eight days after filing his answer, or further answer to the plaintiff's bill, shall be entitled, as of course, on motion or petition, to the usual order for the plaintiff to make his election in which Court he will proceed, with the usual directions in that behalf, unless the plaintiff shall, before the expiration of the same eight days, have delivered exceptions to the defendant's answer, or have referred his further answer on former exceptions. And in case the plaintiff shall have delivered such exceptions, or referred the defendant's further answer within such time, the defendant shall be at liberty, by notice in writing to be served on the plaintiff's clerk in Court, to require the plaintiff to procure the Master's report on such exceptions, within four days from the service of such notice. And if the plaintiff, being so served with such notice, shall not procure the Master's report in four days accordingly, or if the exceptions shall not be allowed, the defendant shall then be entitled, as of course, on motion or petition, to the usual order for the plaintiff to elect in which Court he will proceed, with the usual directions. But in either of such cases the plaintiff shall be at liberty to move that such order may be discharged on the merits confessed in the answer.

II. That the plaintiff in any injunction cause, having obtained the common injunction to stay proceedings at law, may (either before or after the answer of the defendant shall be put in, and whether such injunction shall or shall not have been continued to the hearing of the cause) obtain an order, as of course, for leave to amend the bill without prejudice to the injunction, but that such order shall contain an undertaking by the plaintiff to amend the bill within one week after the date of the order, and in default thereof the order shall become void. And that in case the bill shall be amended pursuant to such order, the defendant shall thereupon, and although he may not have put in his answer to the bill or the amendments thereof, be at liberty to move the Court on notice, to dissolve the injunction, on the ground that the bill as amended does not, even if the amendments be true, entitle the plaintiff thereto.

III. That in case an injunction to stay proceedings at law shall be prayed for by the bill,

and shall either not be obtained, or having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill, and the defendant shall not plead answer or demur to the amended bill within eight days after appearance, the plaintiff shall be entitled to move for an injunction, upon affidavit of the truth of the amendments.

IV. That foreclosure causes when ready for hearing, may be ordered to be advanced for hearing, under the same circumstances, and subject to the same rules as other causes may be ordered to be so advanced.

V. That in all cases in which it shall appear that certain preliminary accounts and inquiries must be taken and made before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff shall be at liberty, at any time after the defendants shall have appeared to the bill, to move the Court on notice, that such inquiries and accounts shall be made and taken, and that an order referring it to the Master to make such inquiries, and take such accounts, shall thereupon be made, without prejudice to any question in the cause, if it shall appear to the Court, that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto, and that the same is consented to by such (if any) of the defendants as being competent to consent have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon, the statements contained in the answers of, such (if any) of the defendants as have answered the bill.

VI. That whenever any order of course obtained from the Master of the Rolls in any cause marked for or set down to be heard before the Lord Chancellor pursuant to the general order of the 5th day of May, 1837, shall be alleged to have been irregularly obtained, any application to discharge the same for irregularity, shall in the first instance be made to the Master of the Rolls, and such cause and all other applications to be made therein, shall nevertheless continue subject to all the regulations of the said general order as if this order had not been made.

**COTTONHAM, C.
LANGDALE, M. R.
LANCELOT SHADWELL, V. C.**

(To be continued.)

SUFFOLK ASSIZES.

The London Gazette of Tuesday last contained an Order in Council that these Assizes shall be in future holden in the Summer at Ipswich, and in the Spring at Bury St. Edmunds.

ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNIES

In Michaelmas Term, 1839.

QUEEN'S BENCH.

Clerk's Name and Residence.

<i>Clerk's Name and Residence.</i>	<i>To whom articled or assigned.</i>
Anderson, Thomas Frederick, 16, Gray's-inn-square.	Anderson, George, Ludlow; assigned to Wilton, George Pleydell, Gray's-inn.
Adney, Frederick, 10, Compton-street, Brunswick-square; and Poole, Dorset.	Aldridge, Henry Mooring, Poole.
Arthur, Edward, 30, Surrey-street, Strand; and Plymouth.	Eastlake, George, Plymouth.
Allen, Benjamin Tuthill, 31, Wakefield-street, Burnham; and Chapel-street.	Whitaker, Alfred, Frome.
Awdry, Frederick, 46, Gloucester-street, Queen-square; and Chippenham.	Awdry, West, Chippenham.
Booth, Charles Brook, 6, Canterbury-buildings, Lambeth.	Holmer, George, Bridge-street, Southwark.
Bell, Adam, Stretford; and Manchester.	Lane, John, Manchester.
Brownell, James, Altringham.	Pass, William, Altringham.
Baines, John George Fuller, 6, Featherston-buildings; and Needham Market.	Hayward, Frederick, Needham Market.
Beaton, Charles, 45, Gower-place; and Bath.	Cook, Robert, Bath.
Bennett, William Woolley Leigh, 20, Judd-place, West, New-road; and Buckingham.	Hearn, Thomas, Buckingham.
Bluck, Edward, 25, Lincoln's-inn-fields; and Manchester.	Rodgers, Robert, Liverpool; assigned to Morris, John, Manchester.
Bullock, John Henry, Manchester.	Thompson, Alexander, Manchester.
Brown, William, Manchester.	Maychell, Richard, Bolton-le-Moors; assigned to Chew, William Christopher, Manchester; assigned to Myers, Wm. Hugh, Manchester.

(To be continued.)

COURT OF EXCHEQUER.

Trinity Term, 1839.

EQUITY Sittings, BEFORE LORD ABINGER.

Saturday, June 1.—Pleads, demurrers, exceptions, and further directions.

Tuesday, June 4.—Petitions and motions.

Friday, June 7.—Pleads, demurrers, exceptions, and further directions.

Saturday, June 8.—Petitions and motions.

Causes likely to occupy much time are not to be put into the paper for hearing till the Sittings after Term.

SUMMER ASSIZES.

The Judges have chosen their circuits for the ensuing Summer Assizes:

Home.—Lord Denman and Lord Chief Justice Tindal.

Midland.—Lord Abinger and Mr. Justice Littledale.

Norfolk.—Mr. Justice Vaughan and Mr. Justice Bosanquet.

Oxford.—Mr. Baron Alderson and Mr. Justice Williams.

Western.—Mr. Justice Coleridge and Mr. Justice Erskine.

Northern.—Mr. Justice Coltman and Mr. Baron Maule.

South Wales.—Mr. Baron Gurney.

North Wales.—Mr. Justice Pattison.

Mr. Baron Parke remains in town, and will attend business at chambers.

COURT OF QUEEN'S BENCH.

BUSINESS OF THE COURT.

May 30.

Sittings in Banco.

Lord DENMAN gave notice that after Term, the Court will hold Sittings in Banco, to commence the day after the term.

From the 13th to the 18th June inclusive, the Court will take the *New Trial paper*.

On the 20th and 21st June, the Court will take the *Special paper*.

On the 22nd June, the Court will take the *Crown paper*.

HOUSE OF COMMONS.**May 30.**

(Legal Business.)

SMALL DEBTS BILLS.

Mr. Brotherton moved that the ECKINGTON Small Debts Bill be read a second time.—
Ordered.

NOTICE AS TO SUING MINORS.

Mr. Greene gave notice that when the Small Debts Bills went into Committee, it was his intention in every instance to oppose a clause which he understood had been introduced into several of these Bills, rendering Minors liable to be sued.

Business of the Courts.**COURT OF CHANCERY.**

Eland v. Eland, appeal, for Judgment—Stone v. Commercial Railway, appeal motion—Comp-ton v. Hodge, ditto—Graffley v. Humpage, appeal—Case v. Drover, ditto.

VICE-CHANCELLOR'S COURT.

Short causes and unopposed petitions, after which, motions.

ROLLS' COURT

Motions, general paper after the motions.—Sainsbury v. Jones, part heard—Brooks v. Stuart, ditto—Scobell v. Victor, rehearing—Smith v. Biggs.

COURT OF QUEEN'S BENCH.*Sittings in Banco.***COURT OF COMMON PLEAS.***Sittings in Banco.***COURT OF COMMON PLEAS.**

London Common Juries.

Cooper v. Grant—Renshaw v. Smith—Williams v. Aspinall—Ottley v. Harrison—Lequeler v. White—Daniel v. Hendricks—Smith v. Gibson—Allen v. Simons—Smith v. Sandells—Nias v. Pennell.

COURT OF EXCHEQUER.*Sittings in Banco.***COURT OF EXCHEQUER.**

London Common Juries.

Martin v. Tombleson—Collins v. Williams—Burgh v. Legg—Harrison v. Wright—Horley v. Lee—Hall v. Popplewell—the Same v. the Same—Jones v. Collett—Crosby v. Palin—Brown v. Barry—Holloway v. Reed—Davies v. the Same—Lovewell v. Curtis—Smith v. Hendrie—Stevens v. Devin—Castle v. Tuck—Gothard v. Hart—Griffin v. Smithson.

NOTICE TO CORRESPONDENTS.

W. T. K. We really regret that you were *too late* with your communication. We had made our selection—try again—even your first failure will do you good.

A Subscriber. Our broad sheet is already filled with more *lists* than we approve of. Some of our Subscribers wish for them—some do not; our desire is to please ALL if we can, and between town and country we find this a very difficult task. We desired the list you require, to be sent us, but up to the time of our going to press, we have not received it.

R. P. Your Answer to Problem 2, has its merits. We direct your attention, and that of all our intelligent and worthy Correspondents to our last Problem. We neither spare pains or labour, and often have to exercise some patience; and when it is considered that we are practical men, and that this book greatly interferes with our daily practice, we have some reason to expect attention from our Subscribers, and diligence from our Correspondents, THE STUDENTS.

ERRATUM.

In our last Notice to Correspondents, p. 34, under the title "Our Questions," for Williams v. Saunders read Williams's Saunders.

Preparing for Publication.**PART I.**

PRECEDENTS in CONVEYANCING, adapted to the present State of the Law, with Practical Notes. By THOMAS GEORGE WESTERN, Esq. F.R.A.S., of the Middle Temple, Author of the Commentaries on the Constitution and Laws of England, dedicated, by special command, to Her Majesty; intended as a continuation of PRECEDENTS IN CONVEYANCING, by N. VALLIS BONE, Esq. of Lincoln's Inn, Barrister-at-Law.

This Part will contain
CONDITIONS OF SALE AND CONTRACTS.

JOHN RICHARDS and Co. Law Booksellers and Publishers, 194, Fleet Street.

The Subscribers to "Bone's Precedents in Conveyancing," and the Profession, are respectfully informed by Messrs. JOHN RICHARDS and Co. that no unnecessary delay shall take place in completing this work.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 1st June, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, JUNE 8, 1839.

[No. 6.

LAWS OF REAL PROPERTY.

(Continued from p. 67.)

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

Construction of Sec. 40, as to the application of the word "LEGACY" within the meaning of this section. Whether residuary property, bequeathed by will, is within the provisions of this statute.

A QUESTION was also raised in the Court of Exchequer, upon the construction to be placed upon sec. 40. In 1836, Sarah Freeman Tawney, by her will, dated the 19th July, 1780, gave her brother, James Horniblow, £300. upon trust, to pay the interest to her daughter, Elizabeth Barnes, for her separate use, and after her death to pay the interest, as a further help and assistance towards the support and bringing up of the testatrix's grand-children, Samuel Barnes and the plaintiff, until their respective ages of 21 years; and the testatrix thereby gave to her said grand-children the said £300. to be paid them, as they should respectively attain such ages, in equal shares and proportions; but in case her said daughter should survive her husband, then the testatrix gave her the sum of £100., part of the said sum of £300.; and the testatrix gave all the residue of her personal estate to her

said grand-children, to be equally divided between them, when they should attain the age of 21 years; and she appointed James Horniblow her executor.

The testatrix died in August, 1780, and James Horniblow proved her will, and died in 1791, leaving W. T. Horniblow, his executor, who also died in 1828, leaving the defendants his executors. Samuel Barnes attained 21, and died in 1802 intestate, and without having been married, and letters of administration were granted to the plaintiff. Elizabeth Barnes died in 1830, having survived her husband, Thomas Barnes.

Upon the death of Thomas Barnes, James Horniblow paid to the use of Elizabeth Barnes, £100., part of the £300., pursuant to the directions of the will; but the present bill, which was filed in June 1835, charged that neither James Horniblow nor his representatives ever paid more than the sum of £100., or ever duly accounted for the residue of the estate of the testatrix, and it prayed the usual accounts. The bill contained a charge, that the interest of £200. was paid to Elizabeth Barnes by James Horniblow, and his representatives, to the time of her death; also, that in the year 1784, some disputes having arisen between Elizabeth Barnes and James Horniblow, concerning the estate of the testatrix, those disputes were referred to arbitration, and that it was awarded, and declared that James

VOL. II.

Horniblow had in his hands £292. 12s. part of the said £300., and that he should proceed to get in the outstanding personal estate of the testatrix, and invest the same upon the trusts of the will. The defendants by their answer stated that it did not appear, however, that the award stated in the Bill was ever acted upon, but that all the matters afterwards were referred to a barrister, who awarded £206. 18s. as the total sum due from the estate of James Horniblow to the plaintiff; the defendants then expressed their belief that the plaintiff and her brother had long before that period attained their full age, and "that in or about the year 1803, with the consent of all parties interested, the said sum of £206. 18s. was paid to the said Elizabeth Barnes, Samuel Barnes, and the said plaintiff, or to some or one of them, with the privity of the rest of them, and that from that time none of those parties had any claims or rights against James Horniblow, or his estates, or representatives." The defendants then submitted that after the lapse of so many years, all claim of the plaintiff under the will must be presumed to be satisfied; and they insisted that the laches of the plaintiff was a bar to any relief in the Court of Equity, and they claimed the benefit of the statute of limitations.

For the plaintiff it was contended, that, as regarded the £200. in order to bar a legacy of that description, the statute must have run 20 years after the right to receive payment has accrued, and that here the right of payment did not accrue till the death of Elizabeth Barnes, the tenant for life, in Jan. 1830; that as to the residue, it might be questioned whether it was within the meaning of the statute, which did not, in terms, comprehend the residue, the reasons for which seeming to be that the 40th section of the statute only applied to liquidated sums. That a residue requires accounts to be taken, and other proceedings to be had, before it could be

ascertained; and supposing it to have been ascertained and agreed upon between the parties, it was probable that the words of that section would apply, but that here there was no evidence of an account being taken, or any settlement having taken place, and they had failed in proving a balance by the barrister's award. ALDERSON, B. at the hearing (*a*), considered that the case presented no difficulty as to the question of residue. His Lordship said, *It is clear that residuary property is within the Act;* and I think also within the known rules relating to present right of payment; because the party had an opportunity, as far back as the year 1800, or soon afterwards, of ascertaining what was the clear residue, and requiring payment of the amount. The Act says, that all suits for legacies must be instituted within twenty years next, after a present right to receive the same, shall have accrued to the party capable of giving a release for the same. Here the present right to receive the residue accrued thirty years ago; at all events it is not contended that any suit was necessary to ascertain it. The plaintiff's claim, therefore, is barred as to the residue. The legacy of £200. stands on a different foundation. As to that, his Lordship said, I have come to the conclusion that I ought to make a decree for the plaintiff. It is clear, that as there was no present right in the plaintiff to receive that money before the year 1830, when the mother of Mrs. Prior died, there can be no ground for considering the plaintiff in that respect as within the 40th sec. of the Act. It is said, however, on behalf of the defendant, that I ought to presume payment of the legacy in question, and the ground on which that opinion is sought to be supported, principally consists of a proceeding so long back as 1795, when a previous suit not having succeeded, and recourse having been

(*a*) S. C. Prior v. Horniblow, 2 Younge and Coll. 200.

then had to a reference, which was not acted upon, the parties were advised to institute a fresh suit, for securing the benefit of the will to Mrs. Prior and her two children. There was a decree in that suit, and the parties to that decree might have acted under it, for the purpose of causing the money in the hands of the then executor, to be paid into Court, so as to be put out to interest, the interest being paid to the mother for her life, and her two children, after the expiration of her life interest, receiving the £200. From that time, however, to the present, there is an absence of all legitimate evidence on the subject. What presumption, then, can be drawn from the apparent acquiescence of the parties since the year 1793? From the mere lapse of time, the only presumption that can be drawn is this—that what ought to have been done at the commencement of the period, has been done at the end. But no other conclusion can be drawn than that. The defendants insist that payment of this legacy may be presumed; but you cannot draw that presumption from mere length of time, because such payment is out of the ordinary course of transactions. When the parties came of age in 1801 or 1802, it was open to them to make an arrangement with the executor, which might be contrary to the presumed duty of the latter as executor.

They might have said, pay us now, what we are entitled to in *futuro*. We are competent to give you a release. That, however, is not to be presumed, but proved. It must be presumed, not that the executor has not followed the ordinary course of his duty, but the contrary. Here, if the legacy in question was paid by the executor, it was not paid in the regular course of his duty, because it could not be so paid till 1830. If what is suggested had been really done, or might be supposed, from the documents, to have been done, and the executor has done it, without taking proper proof of it, he has

nobody but himself to blame. And his Lordship made the decree, as to the £200., in favour of the plaintiff.

(To be continued.)

PROBLEM VI.

VOL. 2.

What are the Remedies for INJURIES to HOUSES?

Imperial Parliament.

—
HOUSE OF COMMONS,
—

May 31.

LEGAL BUSINESS.—COUNTY COURTS.

LORD JOHN RUSSELL moved the second reading of the County Courts Bill, and suggested that no discussion should be made until after the Bill had been referred to a select Committee upstairs.

MR. F. KELLY said he could not allow the Bill to be read a second time without entering his protest against the principle of the measure. There was this palpable objection to the Bill, that it went to repeal the whole law of England with regard to debts not exceeding £15. He should certainly feel it his duty to oppose the Bill whenever he could find an opportunity.

MR. PAKINGTON declared his opinion that much in the Bill was objectionable. Under the provisions of the Bill a very considerable number of appointments were contemplated, such as chairmen, receiver-general, clerk, and a variety of other officers, the salaries of all whom were to be defrayed, it was probable, from what was to be called the County Fee Fund. Now it was decidedly his own opinion, that this fee fund would be found quite inadequate, and he wished to know, therefore, whether the Noble Lord was prepared in that case to take any, and if so, what means to make up the deficiency?

THE SOLICITOR-GENERAL said he was anxious to express his opinion upon this most important subject. The question was, were they prepared to concede to the very strong and generally expressed opinion of their constituents a means of providing cheap and speedy justice? That was the whole question. Difficulties there

were in the way, no doubt, but difficulties inherent in the subject. If the fees were small, then they must have an inferior description of persons to administer justice in those courts. They were bound to this. If they determined to continue the present system of expense, it was the same thing as to say that they would shut the door of the courts to all but the wealthy classes. But what was all that had been urged by the hon. Members opposite considered as a reason against the second reading? They must run the risk of not doing such good justice by doing this cheap justice. They could not afford any thing better. It was better that injustice should be done than that no justice should be done. He was prepared to support this position, and he said that it was better that a poor man who had a debt of 5s. owing him, should go before a tribunal which should decide the question one way or the other, whether right or wrong, than that he should feel that he was utterly without any kind of redress—that they were beyond him. The present state of things made the poor man feel, and he feared with too much reason, that law was a luxury reserved only for the wealthy. The Bill, he trusted, though he confessed he had certain objections to parts of it, would effect a change in a state of things so much to be deplored.

Lord J. RUSSELL said, it was supposed that the fee fund would furnish sufficient means for the payment of the judges under the Bill. But he should say, if upon experience it were found that the fee fund were insufficient, that the measure was one of those in aid of which Government and the Parliament should see the propriety of incurring some expenditure.

Mr. T. DUNCOMBE begged to know why the county of Middlesex was excepted out of the Bill? This was the more inexplicable, because every one who knew the county must be aware that there was no county court in England, Ireland, or Scotland, in which the administration of justice was so objectionable as in the Middlesex County Court.

Lord J. RUSSELL said, the reason why the Middlesex County Court had been excepted was, that it had been intended to introduce provisions into the Metropolitan Police Courts Bill for the purpose of providing judges for that Court.

Lord J. RUSSELL proposed that a Bill should be sent to a Select Committee, after having been read a second time; if the House affirmed the principle of cheap justice, there could be no objection against sending the Bill up stairs.

The Bill was read a second time, and ordered to be committed.

COURT OF CHANCERY—May 29.

DR HOU梅LIN v. SHELDON.

Appeal from the Master of the Rolls.

Vendor and purchaser—Alien husband—Wife's estate—Purchase money arising out of land devised to trustees for sale—Whether the husband of one of the cestuis que trust, an English woman being an alien, is a sufficient objection to the title to the land sold by the trustees (a).

This was an appeal from an order of the Master of the Rolls, made on the 28th January last, overruling the exceptions taken to the Master's Report.

The *Solicitor-General* stated the case, which will be found fully reported in vol. 1. of this work. The question to be decided was, whether a good title could be made to Lord Radnor, who had purchased the lands. His Lordship, it appeared, was willing to complete his purchase if he could pay the purchase-money to the plaintiffs, *who were aliens*. It was contended that the policy of the law would be equally evaded if aliens were permitted to take the purchase-money, as it would if they were to take the land itself. The trustees and their *cestui que* trusts might in all cases agree together not to effect a sale, and thus lands might be held in perpetuity by aliens. The Master had reported that a good title could be made. He cited *Fourdrin v. Gowdey*, 3 Mylne and K. 383 (b).

Mr. Wigram, for the plaintiffs, submitted that the case was entirely different where money or the profits and rents of lands were taken, from that in which the lands themselves were sought to be held by aliens. The receipt of a sum of money could not interfere with the allegiance of a subject, the possibly conflicting duties of which formed the ground of the disability of aliens to hold lands. It had been decided that an alien could take the rents and profits of lands under an *elegit*, and this went far to prove the argument in favour of their clients. The right to sell was clear, and the Court would take care that the purchaser was protected in the payment of his money. (1 Sug., Vend. and Pur. 57.)

The *LORD CHANCELLOR* said, he would consider this case before giving judgment, but his Lordship intimated that in the mean time it might be proper to make the *Attorney-General* a party—that at present Lord Radnor was a willing purchaser, if a good title could be made, but the judgment ultimately to be given might

(a) See this case reported, ante vol. I. pp. 42, 218.

have the effect of discharging him altogether from his purchase.

(b) In the case here cited, an *alien* resident in *England* purchased an equitable interest in freehold lands, and also a lease for a long term of years, and *afterwards* obtained letters of denization, which in terms conferred upon him not only the power of acquiring lands in future, but of retaining and enjoying all lands which he had theretofore acquired.

By his will he directed all his property to be sold and converted into money, and after charging this mixed fund with the payment of his debts, and legacies to trustees upon trust for sale, he gave the residue to aliens resident in France, one of whom was his heir-at-law.

The MASTER of the ROLLS, in giving judgment said, the first question is whether the testator, by the letters of denization referred to, had acquired the power of devising the freehold and leasehold premises, previously purchased by him. By the express words of those letters, he was not only authorised to acquire lands by future purchase, but to retain and enjoy all lands which he had before purchased.

It is argued, that notwithstanding these express words, the right to retain and enjoy previously acquired lands was not conferred upon him; but no authority is cited to that effect. That the Crown had at common law a right to confer that privilege admits of no doubt; the practice of the Crown to insert such a clause in letters of denization, appears by the case in Goldsborough (Anon. 29. pl. 4.) and Leonard (1 Leon. 47. pl. 61. 4 Leon. 82. pl. 175.) to have prevailed as early as the twentieth year of the reign of Elizabeth, and the opinion of the judges at the time clearly was, that the title of the denizen to previously acquired lands was thereby fully confirmed. If the Crown does not now retain the right to confer that pri-

vilege, it must have been restrained by some subsequent statute, and no restraining statutes are referred to, except those which limit the right of the Crown as to the granting of lands. The privilege of the denizen to retain and enjoy lands, which he had previously acquired, is not to be considered as a grant of lands from the Crown. The Crown, indeed, had an inchoate title, by which it might have acquired those lands, but at the date of the letters of denization, it had not the lands to grant; and to give a construction to the statutes referred to which would reach this case, appears to me to be opposed to the principles applicable to the expounding of all statutes which concern the Crown.

Upon the best consideration, therefore; I am able to give this case, I am of opinion that the testator had power to devise the freehold and leasehold lands in question.

The effect of the testator's will is, to create a mixt fund, consisting of the produce of his real and personal estate, which he directs to be sold, and converted into money by his executors; and subject to his debts, and legacies, he gives such produce to his surviving brother and sister, who, at the time of his death, were *aliens*, resident in a foreign country. The freehold and leasehold premises retained their proper quality at his death, and passed by his will not as money, but as freehold and leasehold estate, and no interest in them can vest in his brother and sister, who were *aliens*.

To the general personal estate they were entitled under the will, and the rule now to be applied is the same as prevails in case of charities. The freehold and leasehold estate, and the general personal estate, must severally bear a proportion of the debts and legacies, according to their respective values, and it must be referred to the Master to ascertain such values; and after the payment of that proportion of the debts and legacies, which will be chargeable on the

general personal estate, the residue of that personal estate, belonging to the sister in her own right, and as administratrix of her deceased brother, and the residue of the general estate, arising out of the testator's interest in the lands, after discharging, in like manner, its proportion of the burthen, will belong to the Crown.—ED.

QUEEN'S BENCH.—April 27.

Sittings in Banco.

STOCKDALE v. HANSARD.

LIBEL.—*Breach of Privilege—Whether the House of Commons may order the publication of their proceedings, which contains matter of Libel against individuals, and that it is a high breach of privilege to bring such Libel in question before any Court of Judicature.*

(Continued from p. 73.)

The ATTORNEY-GENERAL continued.

One ground upon which he relied to show that the privilege belonged to the two Houses as courts of exclusive jurisdiction was, that the law of Parliament was different from the common law. Supposing this Court to overrule the privileges of the House, the privileges would be at its mercy. To what tribunal was to be the appeal? They might appeal to the King, who might summon such of his councillors to hear the arguments as would suit the politics of the day. The House of Lords was in the habit of ordering publications; and was there any distinction in this respect between the two Houses? They had co-equal and co-ordinate powers and authorities. My Lords, said the learned counsel, I grieve to say, that in the present day there have been publications derogatory to the privileges of the House of Commons. My friend has alluded to a noble and learned judge (Lord Brougham), for whose talents and learning I have the highest respect, but for whose opinion on this subject I have no respect. I can refer to a publication having the name of that learned and noble peer. My Lords, considering that that noble lord is a peer of Parliament, that he anticipates sitting as the judge upon this question now *sub judice*, for it has not yet arrived at their Lordships' house, I most deeply regret, that without hearing the arguments or having had the opportunity of considering the question in a judicial shape, he should have done what might have been considered as committing himself, and certainly having a tendency to that amount. In the introduction by the noble Lord

himself in his judgment to the case of "Wellealey and the Duke of Beaufort," and which really was a right decision, according to the law of Parliament, and which contains some doctrines not expressed in the guarded manner that might have been desired and expected, in the preface to his Lordship's judgment upon that occasion, he says, "That a new and extravagant claim has been asserted on behalf of the House of Commons to publish libels through irresponsible agents." This is, my Lords, from a judge who says he is to sit in judgment upon this very case. My Lords, I do not think that any judge of the Court of Queen's Bench, before the case came to be argued, would have put his name to such a publication. He was likewise pleased to say, "That there was no distinction between the House of Commons and the bar, and that each have the same privileges. The bar may inquire into the conduct of their members, so may the House of Commons; indeed, there seems no conceivable reason why the bar should not have made calls on a party, so as to inquire whether one of its members was rightfully imprisoned." Just saying, my Lords, that the House of Commons had the same right with the medical profession, or the legal profession, or any other trade which may exist. His Lordship says, "All rights are now utterly disregarded by the advocates of public privilege, except that of exposing their own short-sighted policy and inconsistency; nor would there be any safety for the people, if unhappily their power to do mischief bore any proportion to their disregard of what is politic or just." This, my Lords, from a judge who is hereafter to sit in judgment upon this very question, as he anticipates. But, my Lords, I am greatly comforted by finding that it is supposed there is no privilege at all. I think his Lordship goes so far, for he says, "Nor, may it be observed, is there a single argument urged in favour of privilege which would not serve as pretence for allowing Members of both Houses to rob and murder with impunity on the highway." My Lords, no doubt such arguments, if arguments they can be called, will not have any weight with your Lordships, but I do lament that they have a tendency to influence the public mind, and raise a strong prejudice against the proceedings of the House of Commons. I apprehend that the House of Commons is to be considered as the third estate of the realm; that the House of Commons is not the less to be respected since it has been reformed, and its members are more expressly the representatives of the people, for I believe that a prejudice in some quarters has been raised against the House of Commons, because it is now a more popular body than it was in former times when the question of privilege arose. The learned counsel

then argued that the House of Commons represented the whole community of the realm; that the acts of the House of Commons were to be considered as the acts of all the Commons of the United Kingdom. Lord Holt had said, that it was not to be doubted but that the Commons of England had a great and considerable share in the government, but the right was not exercised by them in their proper persons, but was exercised by representatives chosen by and out of themselves, who had the whole right of all the Commons of England vested in them. The House of Commons must, therefore, be considered as the whole commonalty of the realm.

(To be continued.)

May 27.

Sittings in Banco.

OWSTON v. COATES.

Judgment.

1 and 2 Vic. c. 110, s. 8.

ACT FOR ABOLISHING ARREST FOR DEBT—
Whether a surety in a bond given under this section, after the filing an affidavit, can render his principal and discharge himself
—*Whether the bond can be treated as a Bail Bond (a).*

Mr. Cresswell, in Easter Term, obtained a rule nisi to shew cause why the defendant should not be at liberty to render himself in discharge of his sureties, to a bond given under the provisions of sec. 8 of the statute, for abolishing arrest for debt on mesne process.

It appeared that the defendant had been arrested by the plaintiff before this statute came into operation, and had given bail to the Sheriff. After the act had commenced running, he, to have *exoneratur*, entered on the bail piece, which was granted. The plaintiff then filed an affidavit, under sec. 8 of the Act, and the defendant, with two sureties, gave the bond required. The defendant defended the action. The cause was tried, and a verdict went against him for £250. He then applied to a Judge at Chambers to surrender in discharge of his bail, and was referred to the Court, and upon hearing the application for this rule, the Court took

time to be informed as to the practice in cases of bonds of privileged persons, under 6 Geo. 4. c. 16; and upon a second hearing the COURT granted the rule, considering the point of importance and deserving discussion.

Mr. Addison now shewed cause against the rule. He stated that the trial took place at the last Spring Assizes, but no judgment had been entered, and he contended that the defendant could not now render; the alternation of the bond being that the defendant shall pay such sum as shall be recovered, or to render himself to the custody of the gaoler according to the practice of the Court (a); that the bond must not be treated as a bail bond, but as a bond of a limited nature, and that the render could only be made after judgment. That the statute *per se* did not enable him to render, but according to the practice of the Court. He cited Winstanley v. Gaitskell, 16 East Rep. 389; Glendening v. Robinson, 1 Taunt. 320; and Maude v. Jowett, 3 East, 145, to shew that the Court interfered only in favour of the bail, and not for the defendant. He also contended, that if the defendant rendered, the Marshal had no authority to detain him. He was not supposed to be in the custody of the Marshal, as in the case of an arrest and bail bond, and the statute did not give the sureties to this bond the same power of render as sureties in a bail bond, and that the sureties in bonds under 6 Geo. 4. c. 16, are not treated as bail for Members of Parliament.

Mr. Cresswell supported the rule, and contended that the authorities cited were not in point—that the “practice of the Court” was in the discretion of the Court, and it had only to make an order of render and the statute would be satisfied.

PATTESON, J. What do you do with the words “after judgment?”

Mr. Cresswell. That the render shall be “according to the practice of the Court after judgment, and according to the order of the Court before judgment.”

PATTESON, J. Then you apply the words *after judgment* to the time of the render, and not to the time when the Court is to exercise the power.

Mr. Cresswell. Just so.

LITTLEDALE, J. The number of days for the render may depend on circumstances, so that no general rule can be laid down.

Mr. Cresswell. The Court may suspend a general rule. The Court may order the Marshal to take the defendant into custody, *cur, adv. rult.*

(a) The condition of the bond required by this section is, that the debtor against whom the affidavit is filed, shall “pay such sum or sums as shall be recovered in any action which shall have been brought, or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been, or may be brought, according to the practice of such Court, or within such time, and in such manner, as the said Court or any Judge thereof shall direct, *after judgment* shall have been recovered in such action. ED.

(a) It was upon this sentence that the point seemed to dwel'. If the Act had stopped at the words to pay or to render, there could have been no difficulty, but the following words raised a question as to what was the practice of the Court.—ED.

Lord DENMAN this day gave the judgment of the Court. His Lordship, after recapitulating the facts of the case, said—The difficulty we felt was as to what was the practice of the Court in bonds of privileged persons, which are somewhat similar in nature to the present. Now the practice of the Court as to renders applies only to cases where defendants are at liberty upon bail bonds. The present case is not a render of that sort. The defendant here, under the authority of the 8th section of the Act, has given a bond to pay the money or to render according to the practice of the Court; and the question is whether he can be considered with reference to that practice to be in the same situation as if he had been arrested and had put in bail on the arrest. As to the right of the Marshal to detain the party, the rule of Court or the order of a Judge for that purpose would be a sufficient authority to the Marshal. We have then to consider whether the Court can, on the words of the section, make the order. Some doubts have been entertained on the words "after judgment." They appear however not to apply to a render "according to the practice of the Court," and do not restrict the application of that phrase now, as, according to the practice of the Court, the bail would have the opportunity of rendering after verdict and before judgment. So we think that the obligor in this bond would be at liberty to do the same. The rule must therefore be absolute.

BUSINESS OF THE COURT.

The Court had ordered that certain cases in the *special paper* should be argued before Mr. Justice Coleridge, in the BAIL COURT.

May 28.—This day Lord Denman said, that the Court upon looking into the Act upon the subject had reason to think that there was no power to enable the Judges to take cases out of the special paper of this Court and send them to the Bail Court for argument. The order therefore made on that subject must be reversed; the Court would, however, sit after term, and then these cases would be first disposed of.

The cases alluded to are the following:—Underwood v. Johnson, Calvert v. Moggs, Swann v. Sutton, Saunders v. Morgan, Hutton v. Parker, Jones v. Minard, Holmes v. Clifton, Fryer v. Coombes, The Grand Junction Canal Company v. Richards, Biddulph and others v. Best, Francis v. Baker, Peacock v. Gale, Allen v. Fricker, Skuse v. Davis, Randle v. Wheble, Millman v. Davies, Cleaton v. Papps, Macnair v. Cutmere, King v. Beaddon.

DEMURRERS.

The Court will take demurrers from the special paper on Friday, May 31; Saturday, June 1; Tuesday, June 4; Wednesday, June 5.

PEREMPTORY PAPER.

The Court will take this paper on Monday, June 4. All cases not ready will be struck out. Cases where the parties agree will be taken any day when there is time.

COURT OF COMMON PLEAS—*May 25.*

Sittings in Banco.

EDWARDS v. BISHOP OF EXETER.

Quare impedit. (a)—*Joint tenants of an Advowson—one Protestant the other Catholic.—Whether the Bishop can refuse to induct a Clerk presented by the Protestant proprietor alone, or whether the right of presentation was transferred by Statute to the University.*

A writ of Quare Impedit had issued against the defendant for disturbing the plaintiff in his right of presentation to a living.

The plaintiff and another person are joint tenants of the advowson in question, but the latter being a Roman Catholic, he is incapacitated by act of Parliament from presenting to the living, the right of a Popish patron being transferred by statute to one of the Universities. In the present instance, the presentation had been made by the plaintiff alone, and the Bishop refused to induct her clerk on the ground that a presentation by only one of two joint tenants was insufficient. No other presentation having been made within six months from the time at which the living became void, the Bishop claimed the right of presenting by lapse, and accordingly collated the other defendant to the living. The facts were turned into a special case, which was argued in the last term, when

Mr. Manning, for the plaintiff, contended that the statute did not deprive his client of her right of presentation, merely because her co-joint tenant was incapacitated as a Roman Catholic from exercising his; neither did the act in this case transfer a joint right to the University. All that the Legislature had provided for was, that a Popish patron should not have the power of presenting, and that to prevent the church from remaining void in consequence of such incapacity, the University might present instead; but they never contemplated giving that power to the University in a case where, although one joint tenant was incapacitated by his religion,

(a) As to the present state of the law in relation to this writ, see ante, vol. I. p. 178.

there was another who laboured under no such disability, and upon whose presentation, therefore, the church might be filled.

Mr. Kelly, for the defendants, argued that the right of presentation of every Popish patron was transferred by statute to the University, and that, consequently, whatever right the plaintiff's cojoint tenant possessed was vested in that body. The University, therefore, must be taken to stand in the shoes of that individual; and that being so, and the Bishop not being bound to induct upon the presentation of only one of two joint tenants, the defendant was justified by the omission of the University to join in the presentation of the plaintiff's clerk in refusing to induct him to the living. The church thus remaining void for six months, the Bishop acquired by lapse a right to present an incumbent of his own.

TINDAL, C. J. stated the opinion of the Court to be, that the Legislature had merely intended to transfer to the University the right of presentation in those cases in which, through the legal incapacity of Popish patrons, there would otherwise be no person to present at all, and the church would, consequently, be left vacant. But in cases where one of two joint tenants was a Papist, the Legislature either intended that the incapacity of the latter should have the effect of investing the other joint tenant with the sole right of presentation, or, if that was not their intention, then there being no words providing for such a case, this must be taken to be a *casus omissus* in the act, and the Court could not supply it by extending the intention of the Legislature beyond its actual provisions. Nor could any inconvenience result from this construction of the law on the subject, because, even in the case of joint tenants, neither of whom was incapacitated from presenting, the Bishop might, if he pleased, (although he was not bound to do so) induct upon the single presentation of one of them. The Court was of opinion that the Bishop ought to have inducted the clerk presented by Mrs. Edwards.

Judgment for the plaintiff.

BAIL COURT.—*May 27.*

(*Sittings at Nisi Prius, before Mr. Justice Coleridge and a Common Jury.*)

ANSELL v. ANDREWS.

BILL OF EXCHANGE—Liability of an acceptor where he had NOT WRITTEN the acceptance, but had avowed it.

This was an action by the endorsee against the acceptor of a bill of exchange. The acceptance had not been written by the acceptor him-

self, but, on its being shown to him, he avowed and adopted it.

On the part of the defendant it was suggested that the names of the drawer and acceptor were both forged, and several other acts of fraud and impropriety were suggested as connected with the transaction; but no evidence was given to support these statements, and

Mr. Justice COLERIDGE told the jury that the action was in substance undefended.

The jury found for the plaintiff for the amount of the note.

The statutes 3 and 4 Anne, cap. 9. sect. 4, and 1 and 2 Geo. IV., cap. 78, declare that no acceptance to an inland bill shall be valid unless made in writing; see *Downes v. Richardson*, 1 Dow. and Ry. 332; 5 Barn. and Ald. 674. Let us look how these statutes have operated upon the Courts of Law. In *Dufaur v. Oxenden*, 2 Mood. and Mal. 119, it was held that there is no absolute need of a signature at all to a bill, if the word "accepted" be written, and that the bill is not invalid under the 1 and 2 Geo. IV., cap. 78, sec. 2. See *Leslie v. Hastings*, 2 Mood. and Mal. 119, if the jury think the acceptor intended an acceptance.

An acceptance may be written with a pencil. See *Geary v. Physic*, 5 Barn. and Cress. 234.

In *Powell v. Morier*, 1 Atk. 611, an implied acceptance was held to be binding. See also *Harvey v. Martin*, 1 Camp. 425.

In the case of a forged bill, as set up in the case here reported, it has been held that if the acceptor acknowledges the signature to be his own, he cannot afterwards plead a forgery; *Leach v. Buchanan*, 4 Esp. 226. And he is even liable if he has paid similar forgeries by the same person; *Barber v. Gengil*, 3 Id. 00; and after such payment he cannot recover back from the indorsee. *Price v. Neal*, 1 W. Blacks. 390; 3 Burr. 1354.—EDITOR.

PREROGATIVE COURT—*March 19.*

RE GOODS OF ANN ALLEN, WIDOW, DECEASED.

New Will Act—Construction of sec. 9.(a)

The deceased in this case made her will, and signed it with a mark in the presence of one

(a) See *re Ayling*, ante, vol. i. p. 48.; *re Newman* id. 110.; *re Woodington*, id. p. 362.

witness, who subscribed his name as such. Subsequently this witness and the niece of the deceased, who was one of the executors and residuary legatees, were present with the deceased when she, in their presence, acknowledged her signature by the mark to the will, and the niece then also subscribed her name as a witness, in the presence of the first-named witness; and the question was whether this was a sufficient attestation under sec. 9. which requires that the signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time. In this case one witness attested it before it was acknowledged in the presence of the other.

Sir H. JENNER said, the natural construction of the words seems to be, that the signature being made, the witnesses shall *then* attest; not one at one time, and one at another. The words are all in the future tense; "*shall* be made or acknowledged," and the witnesses "*shall* subscribe the will, in the presence of the testator;" which means, that the deceased shall acknowledge her signature, in the presence of two witnesses, present at the same time; and that the two witnesses, shall attest it at the same time. The words of the Act are prospective.

Probate refused.

COURT OF REVIEW—May 22.

In re JOSEPH ROSE.

Act for abolishing Arrest for Debt on mesne process. Sec. 8.—Affidavits of debt, and consequent Act of Bankruptcy.

Mr. Swanston applied to the Court for an order, directing that an affidavit by Mr. Gibson, in a process under the 8th section of the 1st and 2nd Victoria, c. 110, commonly called the Act for the Abolition of Arrest for Debt on Mesne Process, should be taken off the file. The section declares that an affidavit of debt in the Court of Bankruptcy, with notice to the creditor, the latter failing payment, or not tendering sufficient security within 21 days, shall be deemed to have committed an act of bankruptcy, and subjected himself to the issue of a fiat, if a trader. Mr. Rose alleged that Mr. Gibson had harassed him by filing two affidavits of debt in the same matter. On the 20th ult. an affidavit was filed, alleging a debt to Mr. Gibson and partner in the amount of £100. and upwards, on certain bills of exchange; and on the 22nd the deponent was served with a copy of the affidavit, and notice of a demand for £3,612. Within the period required by the statute, security was tendered, and a bond for £200. approved by Sir C. Williams, one of the commissioners. On the 29th another affidavit was filed, alleging a debt to Messrs. Gibson and

Taylor to the amount of £3,612. with new notice for payment or security. It was now submitted that the second affidavit ought to be taken off the file, it having been made in reference to the same debt, and it being sworn that no other existed. The debtor had complied with the exigency of the statute, and ought to be relieved from the latter proceeding and the danger of any future result. It was a fixed principle that no man should be held twice to bail on the same action. The process of the Court ought not to be abused, neither ought this gentleman to be brought a second time from Manchester to give security before the commissioner.

Sir G. Rose said it was a question for the consideration of the commissioner when regulating the security to be given. The proceeding was open to objection as an act of bankruptcy; but there were no grounds for taking the affidavit off the file. If the act of bankruptcy should turn out to be good, it would stand: if not, it could be dealt with accordingly, either by action at law, or application for a *supersedeas*.

Sir J. Cross said, the application was on a first impression, and without precedent. The first affidavit, perhaps inadvertently, instead of specifying the whole amount, alleged only a debt of £100. and upwards. The commissioner could not require bail for "upwards," and having no legal evidence of a higher debt than £100. accepted a bond for payment of £200. or whatever amount might be found due. The creditor, finding that he had failed in his object as to security for the full amount, filed a new affidavit, and there was no law to prohibit him. No ground existed to warrant the Court in ordering the affidavit to be taken off the file. It might, perhaps, become questionable, whether the applicant was not entitled to costs on his first appearance, which proved to have been unnecessary.

Application refused, with costs.

INSOLVENT DEBTORS' COURT—May 24.

STEPHEN GOMME'S CASE.

Whether a person in custody for the amount of a verdict for Crim. Con. shall be admitted to bail under the stat. for abolishing arrest for debt on mesne process.

This insolvent applied to be admitted to bail. He was in custody for damages and costs in an action for criminal conversation. He was in custody at the suit of Mr. Walton, the plaintiff in the action.

For Mr. Walton it was urged that the Court had a discretionary power to grant or refuse the application, and it was submitted that this was not a case in which they would not entertain it.

The Chief Commissioner said it was the first

time such an objection had been urged. The objection, however, deserved consideration.

Mr. Commissioner BOWEN said, there was another circumstance to induce the Court to refuse the bail in this case, viz. that if there were a remand, the period which the insolvent had been on bail must be included in the remand.

The Chief Commissioner said, there was a *prima facie* case of remand. The Court must refuse the application for bail.

NEW ORDERS OF THE COURT OF CHANCERY.

Issued under the Stat. 1 & 2 Victoria, c. 110.

(Continued from p. 78.)

COURT OF CHANCERY, May 10, 1839.

The Right Honourable CHARLES CHRISTOPHER, Lord COTTONHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY, Lord LANGDALE, Master of the Rolls, and the Right Honourable Sir LANCELOT SHADWELL, Vice Chancellor of England, doth hereby order and direct in manner following; that is to say,

I. That every person to whom in any cause or matter pending in this Court, any sum of money or any costs have been ordered to be paid, shall after the lapse of one month from the time when such order for payment was duly passed and entered, be entitled by his clerk in Court to sue out one or more writ or writs of fieri facias or writ or writs of elegit of the form hereinafter stated, or as near thereto as the circumstances of the case may require.

II. That upon every such order hereafter to be entered, the entering clerk of this Court in whose division the same may be, shall, at the request of the party leaving the same, mark the day of the month and year on which the same shall be so left for entry, and no writ of fieri facias or elegit shall be sued out upon any such order, unless the date of such entry shall be so marked thereon as aforesaid.

III. That such writs when sealed shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior courts of Common Law belongs, and shall be executed by such sheriff or other officer as near as may be in the same manner in which he doth or ought to execute such like writs, and such writs when returned by such sheriff or other officer, shall be delivered to the clerks in Court, by whom respectively they were sued out, or be left at their respective seats, and shall thereupon be filed as of record in the office of the six clerks of this Court. And that for the execution of

such writs, such sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior courts of common law.

IV. That if it shall appear upon the return of any such writ of fieri facias as aforesaid, that the sheriff or other officer hath by virtue of such writ seized but not sold any goods of the person ordered to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs is payable, shall immediately after such writ with such return shall be filed as of record, be at liberty by his clerk in Court to sue out a writ of Venditioni exponas in the form herein-after stated, or as near thereto as the circumstances of the case may require.

V. That on every such writ of fieri facias and elegit so to be issued as aforesaid there shall be endorsed the words, "By the Court," and also thereunder the calling and place of residence of the party against whom such writ shall be issued, and also the name and residence or place of business of the solicitor at whose instance the same shall be issued, and the name of the clerk in Court issuing the same, and that every such writ be also endorsed for the sum to be levied according to the form used upon like writs issuing out of the superior courts of common law.

VI. That for every such writ of fieri facias or venditioni exponas so to be issued as aforesaid, there shall be allowed to the clerk in Court issuing the same the sum of eighteen shillings and seven pence, and for every such writ of elegit the sum of one pound ten shillings, and that there be allowed to the solicitor at whose instance any such writ of fieri facias, illegit, or venditioni exponas, shall be issued the sum of six shillings and eight pence for instructions for the said writ, and that there be also allowed to such solicitor the further sum of six shillings and eight pence for attending to procure a warrant, and for attending to instruct the officer charged with the execution of such writ.

FORMS OF WRITS.

No. I.

Writ of Fieri Facias, on a Decree or Order of the Court of Chancery for Payment of Money.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen. Defender of the Faith.

To the Sheriff of Greeting.
We command you that of the goods and

chattels of C. D. in your bailiwick you cause to be made the sum £ , which lately before us in our High Court of Chancery in a certain cause, or certain causes (*as the case may be*) wherein A. B. is plaintiff, and C. D. is defendant, or, in a certain matter there depending, intituled, "In the matter of E. F." (*as the case may be*), by a decree, or order, (*as the case may be*) of our said Court, bearing date the day of was decreed or ordered (*as the case may be*) to be paid by the said C. D. to A. B. And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum of £ , at the rate of £4. per centum per annum, from the day of (a). And that you have that money and interest before us, in our said Court, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree or order (*as the case may be*). And that you do all such things as by the statute passed in the second year of our reign, you are authorized and required to do in this behalf; and in what manner you shall have executed this our writ, make appear to us in our said Court, immediately after the execution thereof. And have there then this writ.

Witness ourself at Westminster the day of in the year of our reign.

(a) The day on which the decree or order was made, or if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

No. II.

Writ of Fieri Facias, on a Decree or Order of the Court of Chancery for Payment of Money and Interest.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of greeting.

We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made the sum of £ , and also interest thereon, at the rate of £4. per centum per annum, from the day of (a), which said sum of money and interest were lately before us in our High Court of Chancery, in a certain cause, or causes (*as the case may be*), wherein A. B. is plaintiff, and C. D. is defendant, or in a certain matter there depending, intituled, "In the matter of E. F." (*as the case may be*) by a decree or order (*as the case may be*) of our said Court, bearing date the day of , decreed or ordered (*as the case may be*) to be paid by the said C. D. to A. B., and that you have that money and interest before us, in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree or order (*as the case may be*). And that you do all such things as by the statute passed in the second year of our reign, you are authorized and required to do in this behalf, and in what manner you shall have executed this our writ, make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

(a) The day mentioned in the order.

ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNEYS

In Michaelmas Term, 1839.

QUEEN'S BENCH.

(Continued from page 79.)

Clerk's Name and Residence.

Bartlett, Robert Henry William, 29, Kenton-street; Shepton Mallett; New Millman-street; and Southampton-row.

Bonsall, John George William, 67, Lamb's-conduit-street; and Aberystwith.

Bartlett, Alfred Durling, 9, Victoria-terrace, Southwark; Reading; and Theobald's-road.

Briggs, William Sturgess, 55, Lincoln's-inn-fields.

Boyson, John Robert, 31, Beaumont-street, Marylebone.

Bailey, Elijah Crosier, Norwich.

To whom articled or assigned.

Craddock, Samuel, Shepton Mallett; assigned to Michele, Edward, Shepton Mallett.

Parry, John Thomas Herbert, and Attwood, John Jones, Aberystwith.

Bartlett, Robert, Reading.

Briggs, Thomas, Lincoln's-inn-fields.

Gatty, Edward, 2, Red-lion-square.

Winder, James, Norwich.

<i>Clerk's Name and Residence.</i>	<i>To whom articled or assigned.</i>
Bowden, James, 43, Lincoln's-inn-fields ; and Elm-court.	Tooke, William, Bedford-row ; assigned to Hunt, William Ogle, Whitehall.
Bramley, Thomas Charlesworth, 3, Camden-terrace, Kentish Town ; and South-square.	Shoubridge, Charles John, South-square.
Braithwaite, Francis, the younger, 7, Manchester-street ; and Liverpool-street.	Rawson, George, Nottingham ; assigned to Parke, James, Lincoln's-inn-fields.
Baker, John Howard, Birmingham.	Underhill, Richard, Birmingham ; assigned to Wills, William, Birmingham.
Cross, Seth, 16, Trinity-terrace, Southwark ; and Barnsley.	Newman, Edward, Barnsley.
Chesshyre, Charles John, Shepherd's Bush.	Fleetwood, John William, Penkridge, assigned to Manning, Frederick John, 2, Dyer's-buildings.
Colley, William, 16, Belgrave-street, St. Pancras ; and Boston.	Staniland, Meaburn, Boston.
Cooper, John Martin, Bishopwearmouth.	Thompson, Thomas, Bishopwearmouth ; Ranson, George Smith, Bishopwearmouth.
Clayton, Sykes, Sherburn and Kippax, York ; and Strand-on-the-Green.	Broch, Beauvoir, Loughborough.
Childe, Harry Joseph, Warwick.	Shipton, Joseph, Warwick ; assigned to Buck, William Edward, Warwick.
Charlesworth, Thomas Mitchell, 3, George Street, Tower Hill ; Wakefield ; and Horbury Bridge.	Sykes, Edward, Wakefield.
Cheshire, Barnabas the younger, 18, Tavistock Street, Bedford Square ; Birmingham ; and Alfred Place.	Rawlins, John, Birmingham.
Clevertown, Frederick William Pougett, 16, Garneau Place ; Plymouth ; Princes Street ; and Union Place.	Kelly, John, Plymouth.
Collyns, Davenport Welch, 39, Lamb's Conduit Street ; Exeter ; and New Millman Street.	Gidley, John, Exeter.
Capron, Thomas William, 9, New Burlington Street.	Capron, George, 9, New Burlington-street ; assigned to Loftus, Thomas, New-inn.
Coleman, Samuel, 75, Judd Street ; Norwich ; and Bucklersbury.	Ruckham, Matthew, Norwich ; assigned to Hudson, George, Bucklersbury.
Comins, Richard, 16, Huntley Street ; Great Portland Street ; and Witheridge.	Loosemore, Robert, Tiverton ; assigned to Clapham, William Henry, Great Portland-street.
Coulton, John James, the younger, King's Lynn.	Coulton, John James, the elder, King's Lynn.
Dewes, Henry, 3, Chrysall Road, Kennington ; Tolleshill near Coventry ; and Queen Street.	Dewes, Kichard, Coventry.
Davies, William Brissett, 63, Connaught Terrace.	Stephen, Sir George, King's-arms-yard.
Drew, Henry Richard, March.	Matthews, Richard, March.
Donald, John Reed, Liverpool.	Faircloth, George Frederic, Liverpool.
Downing, Francis, 16, Southampton Street, Bloomsbury.	Merriman, Thomas Hardwick, Southampton-street ; assigned to Smith, William Wyke, Southampton-street.
Dymock, Robert Myddleton, Ellesmere ; and Whitchurch.	Harper, George, Whitechurch.
Evans, John, the younger, 3, Charlotte Street West, Pentonville.	Davies, David, Leicester-square.
Ellison, Richard, 28, Chichester Place ; King's Cross ; Sheffield ; and Stone.	Haywood, Joseph, Sheffield.
Ebden, John, 3, Upper North Place, Gray's Inn Road ; Fressingfield ; and New Norfolk Street.	Hazard, William, Redenhall with Harleston.

Clerk's Name and Residence.

Eyre, George Lewis Phipps, 17, Great Russell-street, Bloomsbury; and Bishop's Waltham.
 Fairthorne, Edward Falkener, 44, Queen Square; Hemel Hempstead; and St. Albans's.
 Fairbank, David, Darlington.
 Francis, Frederick, 10, Hunter Street; and Bellicay.
 Gardnor, William, 29, Hart-street, Bloomsbury; Carmarthen; Soley-terrace; Goulden-terrace, and 40, Carey-street.
 Gibbs, Thomas, 4, Manchester-street, Gray's inn-road; and Bath.
 Gace, Langley, 3, Charlotte-street, Bloomsbury.
 Gillam, Edward, Worcester.
 Goode, Philip Benjamin, 7, Cork-street; and Howland-street.
 Hodgkinson, Grosvenor, 19, Judd-place; and Newark-upon-Trent.
 Hughes, Seneca, 7, George-street, Minories.
 Hillier, Henry Jenner, 16, Southampton-street, Bloomsbury; and Marlborough.
 Hunter, John, 6, Frederick's place, Old Jewry; and Newcastle-upon-Tyne.
 Hooper, Alfred Catchmayd, 31, Amwell-street, Clifton; and Sidmouth-street.
 Hussey, John, 104, Great Russell-street; Lyme Regis; and Poole.
 Hill, Alfred, Wither, Worthing.
 Hellawell, John Beaumont, Huddersfield.
 Hancock, John Cree, 30, Basinghall-street; and Exeter.
 Hopper, Edward Lythgoe, Elm-cottage, Thistle-grove, Old Brompton; and 21, Essex-street.
 Hope, Thomas, 1, Heathcote-street, Mecklenburgh-square; and Wells.
 Inglesant, Joseph, 95, York-road, Lambeth.
 Jacobs, William, 26, Gloucester-street, Queen-square; and the Charterhouse.
 Jessopp, Francis Johnson, 8, Charlotte-street, Bloomsbury; and 10, Down-street.
 Jervis, George Mathewman, 34, Claremont-square; and Sheffield.
 King, Davis Porter, 7, Rosoman-buildings, Islington; Buckingham; East-street, and River-street.
 Lowe, Francis, 11, Montague-street, Russell-square.
 Leighton, Thomas, 1, Soley-terrace, Lloyd-sq.; and Cheltenham.
 Longcroft, Charles John, 29, Arundel-street; and Hewant.
 Lee, Robert Paramor, Sandwich.
 Lawley, Frederick, Rugeley.
 Lowe, Richard, Sleaford; and Uttoxeter.

To whom articled or assigned.

Gunner, William, Bishop's Waltham.
 Day, Frederick, Hemel Hempstead; assigned to Fairthorne, Thomas, St. Alban's; assigned to Pocock, Thomas, Bartholomew Close.
 Allison, George, Darlington and Richmond.
 Shaw, George, Bellericay.
 Morris, Lewis, Carmarthen.
 Dowding, Frederick, Bath.
 Lucas, Frederic, Louth.
 Gillam, Robert, the younger, Worcester.
 Goode, Philip, Howland-street; assigned to Pike, John, Golden-square.
 Hodgkinson, George, Newark-upon-Trent.
 Hughes, William, George-street.
 Halcomb, John, Marlborough.
 Pybus, John Anderson, Newcastle-upon-Tyne.
 Osborne, Robert, city of Bristol.
 Parr, Robert Henning, Poole.
 Cole, John, Odiham.
 Barker, William, Huddersfield.
 Terrell, John Hull, Exeter; assigned to Terrell, Hull, Basinghall-street.
 Lythgoe, Joseph, Essex-street; assigned to Martin, Thomas, Essex-street.
 Hope, Benjamin, Wells: assigned to Meredith, James Beaven, Heathcote-street.
 Harrison, Thomas, Walbrook.
 Barbor, Robert, Fetter-lane; assigned to Gough, Francis John, East-street; assigned to Nation, Richard, Somerset-street.
 Burnaby, Thomas Fowke Andrew, Newark-upon-Trent; assigned to Tallents, William Edward, Newark-upon-Trent; assigned to Tallents, Godfrey, Newark-upon-Trent.
 Vickers, Henry, Sheffield.
 King, John, Buckingham; assigned to Kennedy, Thomas, Chancery-lane.
 Lowe, William, Tanfield-court.
 Newman, Edmund Lambert, Cheltenham.
 Longcroft, Charles Beare, Hewant; assigned to Bromley, William, Gray's-inn-square.
 Lee, William, Sandwich.
 Salt, Charles, Rugeley.
 Flint, Abraham, Uttoxeter; assigned to Blugg, Francis, Uttoxeter.

Clerk's Name and Residence.

Lowry, Joseph Stamper, 41, Ely-place ; George's Terrace ; Crosby-upon-Eden ; and Poland-street.
 Marratt, William, the younger, 36, Frederick-street, Gray's-inn-road ; and Doncaster.
 Morgan, James Arthur, 6, Highbury-place, Islington.
 Marsh, John Fitchett, 40, Sidmouth-street ; and Warrington.
 Metcalfe, Frederick, 5, Lincoln's Inn New-square ; 33, Portland-place ; and Fitzroy-sq.
 Moultrie, Charles, 35, Lincoln's-inn-fields.
 Macdonald, Henry Robert, 55, Hatton-garden ; Nottingham ; Buckingham ; and Leicester.
 Maples, Samuel, 51, Great Queen-street, Lincoln's-inn-fields ; and Nottingham.
 Nevile, Charles James, Boultham, Lincoln.
 Newman, Richard, 17, Jewin-crescent : and Guildford-street.
 Nicholson, John, 18, Tavistock-street, Bedford-square ; and Hawkshead.
 Nodes, Stephenson, 16, Upper Bedford-place, Russell-square.
 Oliver, John Bass, 2, Field-court ; Newark-upon-Trent ; and Great Russell-street.
 Ord, Charles Ovington, 39, Upper Stamford-street ; and York.
 Overton, James, 7, Charlotte-street, Bloomsbury ; and Fakenham.
 Philips, Charles Frederick, 24, Downing-street ; and Newnham.
 Pilgrim, John Thomas, 39, Gower-place, Euston-square ; and Atherstone.
 Pickering, Joseph Henry, Derby ; and 2, Old Millman-street.
 Parrott, William, 42, Spencer-street, Northampton-square ; Stony Stratford ; and Belgrave-street.
 Palmer, William Henry, 2, Old Millman-street ; and Doncaster.
 Preston, Charles, 17, Jewin-crescent ; and Yarmouth.
 Prothero, Charles, 23, Norfolk-street, Strand ; and Newport.
 Portmore, Charles Broadhurst, Derby ; Warwick court ; and Ashby-de-la-Zouch.
 Paxon, Francis, Hampstead.
 Polydore, Henry, Cheltenham.
 Pinckney, George Henry, East Sheen.
 Plews, Thomas, 16, Trinity-square, Newington.
 Percival, Andrew, 39, Wakefield-street ; and Peterborough.
 Roberts, Frederick Rowland, 14, St. Thomas-street, East Southwark ; and Aberystwith.
 Rayer, Edward, Cheltenham.
 Riccard, Russell Martyn, 43, Southampton-Buildings ; and South Molton.

To whom articled or assigned.

Jackson, Henry, Kirkby Stephen ; assigned to Carrick, William, Brampton.
 Mason, Thomas Blackwell, Doncaster.
 Carr, John, Bedford-row ; assigned to Tooke, Arthur William, Bedford-row.
 Wagstaff, Joseph, Warrington.
 Metcalfe, Thomas, New Square.
 Powell, John Allen, New Square.
 Rawson, George, Nottingham ; assigned to Hole, Richard, Leicester.
 Sculthorpe, Robert, Nottingham.
 Bridges, John, 23, Red Lion-square.
 Kingsbury, Matthew Brettingham, Bungay ; assigned to Cobbold, Jno. Chevallier, Ipswich ; assigned to Cobbold, Alfred, Chancery-lane.
 Slater, John, Hawkshead.
 Jones, John Oliver, John-street ; assigned to Philpot, John, Southampton-street.
 Burnaby, Thomas Fowke Andrew, Newark-upon-Trent.
 Clarke, Henry, Guisborough.
 Overton, John, Fakenham.
 James, John, the younger, Newnham ; assigned to Leman, James, Lincoln's-inn-fields.
 Power, Henry, Atherstone.
 Flewker, John, Derby.
 Southee, Robert, Ely-place ; assigned to Worsley, Edward Augustine, Stony Stratford.
 Palmer, William, Doncaster.
 Preston, Isaac, the younger, Yarmouth.
 Philips, Thomas, the younger, Newport.
 Fisher, Edward, Ashby-de-la-Zouch ; assigned to Dewes, William, Ashby-de-la-Zouch.
 Taylor, Gustavus Thomas, Featherstone-buildings.
 Newman, Edmund Lambert, Cheltenham.
 Hillier, Edward, Raymond-buildings.
 Lawrence, Edward, Bucklersbury.
 Gates, John, Peterborough.
 Hughes, Horatio, Aberystwith.
 Straford, Joseph Cooper, Cheltenham.
 Riccard, James Edward Jackson, South Molton.

Clerk's Name and Residence.

Robinson, Thomas, 20, Baker-street, Lloyd-square; Cockerton, near Darlington; and 36, Norfolk-street.

Rigge, Thomas, 20, Sidmouth-street.

Robinson, Henry, 2, Snow-hill; Sheffield; and Whittington.

Sherland, George Edward, Bath.

Stone, John, 6, Frederick's-place, Old Jewry; and Bath.

Salomon, Joseph Constant, 7, Windmill-street, Fitzroy-square.

Smith, James Knight, Gloucester; and Newnham.

Salmon, George, 14, Everett-street; Thornbury; and 1, Soley-terrace.

Stevens, Charles, the younger, 13, Clifford's Inn; and Kensington Gore.

Sheppard, Thomas James, 49, Spencer-street; Northampton-square; and East Stonehouse.

Sparde, Jas. Bird, 13, Warwick-court, Holborn.

Salmon, William, Bury Saint Edmund's; and Norfolk-street.

To whom articled or assigned.

Rymer, William, Darlington.

Moser, Robert, Kendal.

Thomas, Wotton Byrchinshaw, Chesterfield; assigned to Brown, John, Sheffield.

Physick, John, the younger, Bath.

Mant, Henry John, Bath.

Booth, George, 4, Newman-street; assigned to Addis, Charles, Great Queen-street.

Chadborn, Clement, Newnham; assigned to Elliott, Thomas, Newnham; assigned to Chadborn, John, Gloucester.

Lloyd, Edmund, Thornbury.

Dougan, James, Symond's Inn.

Wingate, Francis Phillip, East Stonehouse.

Goddard, Godfrey, Wood-street; assigned to Harrison, Frederick, Bloomsbury-square.

Munns, Sturley, Ixworth; assigned to Weyman, Harry, Bury St. Edmund's.

(To be continued.)

Business of the Courts.**COURT OF CHANCERY.**

Vigors v. Lord Audley, by order—Stone v. Commercial Railway, appeal motion—Munch v. Cockerell, two petitions, part heard.

VICE-CHANCELLOR'S COURT.

Short causes and unopposed petitions. After the petitions, Mortimer v. Fraser, two causes, part heard—Field v. Lambton.

ROLLS' COURT.

Franks v. Mainwaring, part heard—Blom-mart v. Player, further directions—Marr v. Ricketts, exceptions—Poole v. Pass—Bridge v. Rowcliffe, further directions and costs—Hawkes v. Baldwin, exceptions—Garland v. Littlewood, exceptions—Allday v. Fletcher, ditto—Christopher v. Christopher—Hammond v. Davy—Kemp v. Brown—Hooper v. Cook.

ERRATA.

P. 37, col. 1, line 8 from the top—for “prince,” read “prime.”

Same page, col. 2, line 24 from the top—for “or dispose or hold of it,” read “to dispose of, or hold it.”

P. 38, col. 1, line 81 from the top—for “demesnes,” read “demesnes.”

Same page and column, line 6 from the bottom—for “town,” read “town.”

Same page, col. 2, line 5 from the top—for “sooper-taker,” read “soapentake.”

Same page and col. line 20 from the top—for “fealt,” read “fealty.”

And for the signature B. C. read C. B.

PRECEDENTS in CONVEYANCING,
adapted to the present State of the Law,
with Practical Notes. By THOMAS GEORGE WESTERN, Esq. F.R.A.S., of the Middle Temple, Author of the Commentaries on the Constitution and Laws of England, dedicated, by special command, to Her Majesty; intended as a continuation of **PRECEDENTS IN CONVEYANCING**, by N. VALLIS BONE, Esq. of Lincoln's Inn, Barrister-at-Law.

This Part will contain
CONDITIONS OF SALE AND CONTRACTS.

JOHN RICHARDS and Co. Law Booksellers and Publishers, 194, Fleet Street.

The Subscribers to “Bone’s Precedents in Conveyancing,” and the Profession, are respectfully informed by Messrs. JOHN RICHARDS and Co. that no unnecessary delay shall take place in completing this work.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 8th June, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, JUNE 15, 1839.

[No. 7.

LAWS OF REAL PROPERTY.

(Continued from p. 83.)

The New Statute of Limitations relating to Real Property, 3 & 4 W. 4. c. 27.

WE shall, with the present number, conclude this Essay upon the New Statute of Limitations relating to Real Property. In expounding this Statute, and shewing the construction the Courts have given to many of its clauses, we have necessarily explained the new law (as it may be termed) of vendor and purchaser; and in taking a retrospect of our position as regards a legal title, we have found that great and important changes have been made, not merely in the periods previously fixed by the Law of Limitation, but in the principles which had long governed the application of that law.

We quite agree with another writer (*a*) upon the subject, that these are the results. According to the ancient law, adverse possession did not commence till the ownership was reduced to a right of entry at least; a state from which it gradually declined to a right of action, first on the possessory right, then on the mere right: and there were means by

which, independently of any statutory limitation, both the right of entry, and the right of possession, might be successively taken away; but none by which the mere right, though limited as to the remedy, could be finally extinguished. Now, however, enjoyment may be adverse without any disturbance of the *seisin*; the right of the owner, to be enforced by one and the same proceeding, will continue without change, for a *limited* period, and then, on ceasing to admit of being so enforced, cease to exist; and these effects will flow entirely from the statute. Again, under the old law, the necessary consequence of adverse possession, was incapacity on the part of the rightful owner to alien or devise. But now, as the enjoyment *may* be adverse without any suspension of the *seisin* (as where, for example, rent is wrongfully received, s. 9.) no such incapacity will be necessarily induced.

Rights of entry by 7 W. 4. and 1 Vic. c. 26. s. 3. may now be devised. This section extends, to the disposal, by devise, of all contingent, executory, or other future interests, in any real, or personal estate, whether the testator, may, or may not, be ascertained as the person, or one of the persons, in whom the same respectively may become vested, and whether he may be entitled thereto, under the instrument by which the same respectively was created, or

(a) Mr. Hayes—(see his Introduction to Conveyancing.)

VOL. II.

H

under any disposition thereof by deed or will.

This new Statute of Limitations expressly embraces *equitable* titles—the old Statutes were confined to legal titles, and many incongruities that existed under the latter are now removed.

There are gentlemen in the profession who *will* maintain that a title of 40 years is sufficient at the present day to any fee simple property. We have given the opinions of the leading Conveyancers upon this subject, and we need only add, that of the Real Property Commissioners, who say, in their first Report, that “to guard against the fabrication of fee simple titles by persons in possession under particular estates, it will still be requisite to investigate titles for a greater number of years than the period of limitation which may be prescribed.”—Until, therefore, some fixed rule shall be prescribed by the Courts, the old rule must remain in practice.

All the limitations are not contained in this Act. The Real Property Lawyer must still refer to the leading provisions of the 2 & 3 W. 4. c. 71; and to the 2 & 3 W. 4. c. 100.

PROBLEM VII.

VOL. 2.

Omnia presumuntur contra spoliatorem.

Illustrate this Maxim.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 13. VOL. 1.

SIR,—I beg to send you an answer to Problem 13, Vol. I. I think I have collected the greater part of the decisions that have been made from the passing of the Uniformity of Process Act to the present time, but you will see I have not gone on to state what

steps are to be taken if the defendant cannot be served with the summons; but if you desire the answer should embrace that proceeding, and will intimate your wish to me, I will most willingly send it to you.

I am, Sir, yours, obediently,
C. B.

Problem 13, vol. 1, p. 197.—Actions at Law.

“What is the mode of commencing an Action?—shewing what the Writs are to contain, and manner and time of service.

—The decisions that have been made upon defective Writs, or irregular service.”

The plan which I shall adopt in answering the above Problem, will be as follows:—
1st. To shew the several modes which are provided for commencing personal actions;

—2ndly. To explain the particulars necessary to be inserted in, and indorsed on the Writ of Summons, No. 1, in the Schedule to the 2 W. 4. c. 39.—3rdly. To explain the particulars necessary to be inserted in, and indorsed on, the Writ of Summons, No. 6, in the Schedule to the same Act (2 W. 4. c. 39).—4thly. As to issuing concurrent writs.—5thly. As to issuing alias or pluries writs.—6thly. As to the making out a praecipe of the writ.—7thly. As to getting the writ signed.—8thly. As to sealing the writ.—9thly. Other steps to be taken in obtaining the writ given in No. 6 of the Schedule to the 2 W. 4. c. 39.—10thly. As to the time, mode, and place of service, and on whom such service is to be made.—11thly. As to the indorsement to be made on the writ after service.

I. *The several modes which are provided for commencing personal actions.*—By the 2 W. 4. c. 39. three modes are provided for commencing personal actions at common law.—The first being where it is intended merely to bring the defendant into court to answer the plaintiff’s complaint, for which

purpose a Writ of Summons must be issued in the form prescribed in No. 1 of the Schedule to that Act; the second being cases in which it is intended to arrest the defendant and hold him to bail, for which purpose two other forms of writs are prescribed. And the third and last mode for commencing a personal action is in cases in which the defendant is a Member of Parliament, and a trader intended to be proceeded against according to the Bankrupt Act (6 G. 4. c. 16. s. 9 & 10.) in which case the defendant must be served with a copy of the Writ of Summons given in No. 6 of the Schedule to the Act 2 W. 4. c. 39. But by the 1 & 2 Vic. 110. it is enacted that all personal actions in the Superior Courts of Law at Westminster must be commenced by Writ of Summons (s. 2.); and that after the 1st of October, 1838, no person shall be arrested upon mesne process in any civil action (s. 1.), unless the plaintiff in such action shall obtain a Judge's order for that purpose (s. 3.) which may be obtained on shewing sufficient cause, at any stage of the proceedings, before final judgment has been obtained (s. 5.); in which case the plaintiff may sue out a Capias in form given in the Schedule to that Act (s. 3.).

From what has been stated of the enactments in the 1 and 2 Vic. c. 110. it will be seen that they impliedly repeal all the enactments contained in the 2 W. 4. c. 39. as to Writs of *Capias* and *Detainer*, but leave wholly untouched all the enactments relating to the Writs of Summons given in the Schedule to that Act.

It should be observed, that by the 2 W. 4. c. 39. s. 14. the judges were required from time to time to make such general rules and orders for the effectual prosecution of the Act, as they should deem proper; and that, in pursuance thereof, they afterwards met and promulgated several rules, some of which will be noticed in their proper places.

Having thus shown that all personal actions must be commenced, or at least be considered

as commenced, (a) by issuing and serving a Writ of Summons, in one of the forms given in the Act 2 W. 4. c. 39. I shall first consider the particulars necessary to be inserted in No. 1 of the Writ of Summons given in the Schedule to that Act, many of which will be applicable to the Writ of Summons No. 6 in the same Act, which will be considered afterwards.

II. *The particulars necessary to be inserted in, and indorsed on, the Writ of Summons, No. 1 in the Schedule to the 2 W. 4. c. 39.* are—1st. The name and title of the Queen for the time being, thus, “William the Fourth, &c.”; and should the name of a recently *deceased* King be inserted instead of his *successor*, it would be an irregularity. (*Drury v. Davenport*, 6 Dowl. P. C. overruling *Elivin v. Drummond*, 4 Bing. 278.—12 Moore, 523 S. C.)

2d. The Writ must be addressed to the defendant by his full christian and surname, and place of abode (as hereinafter explained), commanding him to cause an appearance to be entered for him to the action; or if the defendants are a Corporation aggregate, the correct *corporate name* should be stated; or if the defendants are the inhabitants of a Hundred, they should be described as “The Inhabitants of the Hundred of _____ in the County of _____,” especially as *women* as well as *men* are liable—(2 Saund. 374.—*Horton v. Inhabitants of Stamford*, 1 C. and M. 773. 2 Dowl. P. C. 96); as if the Writ be issued against only two of the inhabitants by name, it would be irregular, and could not be proceeded upon. (*Jackson v. Pearson*, 1 B. and C. 304.—2 Dowl. and Ryland, 439.)

But, should there be a misnomer in the

(a) If a Judge's order has been obtained for leave to issue a Capias and arrest the defendant, if he has not been served with a Writ of Summons previous to being arrested, he may, by the 1 and 2 Vic. c. 110. s. 5. be served with such summons at any time after such arrest has taken place.

defendant's name, he cannot plead it in abatement, but should take out a judge's summons, founded on an affidavit of the right name, who will cause the declaration to be amended at the costs of the plaintiff, by inserting the right name (3 and 4 W. 4. c. 42. s. 11.)

3d. The place and county of the residence; or supposed residence of the party defendant, or wherein the defendant shall be, or supposed to be, must be mentioned (2 W. 4. c. 39. s. 1.) ; but it is not necessary to state the number of the defendant's house, or the parish where it is situate, and, therefore, the following description was held sufficient, of "*Kant-street, in the county of Surry*" (*Webb v. Laurence*, 2 Dowl. P. C. 81.) ; and in a *capias*, the following description was held sufficient, "*of Morpeth-place, Waterloo-road, in the county of Surry*" (*Buffle v. Jackson*, 1 Dowl. P. C. 505—and see *Welch v. Lawford*, ibid. 408.)

If there be an improper description, or the addition of a *supposed residence* be wholly omitted, or be indorsed instead of inserted in the body of the writ or copy, or indorsed on the writ, but not on the copy, or vice versa (*Roberts v. Wedderburn*, 1 Bing. N. C. 4.; *Lindredge v. Roe*, ibid. 5.; *Rice v. Huxley*, 2 C. and M. 211.; 2 Dowl. 231. S. C. and rule 10. M. T. 3 W. 4.); or if, after the writ has been sealed, one county be substituted for another, without rescaling (*Siggers v. Samson*, 3 Moo. and S. S. C. 2 Dowl. 745.) the Court will set the writ aside for irregularity, under the rule M. T. 3 W. r. 10.

It is not necessary to insert the *degree* or *mystery* of a defendant, unless he be a peer or entitled to a name of dignity.

Since the 2 W. 4. c. 39. the Court of Queen's Bench and Exchequer have considered with reference to prior decisions, that upon a *general writ*, and not stating in which the plaintiff sued, or the defendant was sued, the plaintiff was afterwards at liberty to de-

clare specially in any particular character, or right, as *qui tam*, or as *executor, administrator*, or as *an assignee* of a bankrupt (*Ashworth v. Ryall*, 1 Bar. and Ad. 20.; *Ilsley v. Ilsley*, 2 Cro. and J. 30. 2 Tyr. 214. S. C.) ; and the C. P. have held that on such *general process* the plaintiff may declare against a defendant as *executor*, or *administrator* (*Watson v. Pilling*, 3 Bro. and B. 446.—6 Mo. 66. S. C.) And although the process has described the plaintiff or defendant generally as being *executor*, *administrator*, or *assignee*, without introducing any words, denoting that he sued as such, the plaintiff might declare specially in his own right, or against the defendant on his own liability, treating the description as a mere superfluous addition (1 Dowl. 97.—*Knorles v. Johnson*, 2 Dowl. 653—and see *Henshall v. Roberts*, 5 East. 150). But that by introducing into the writ any express statement that the plaintiff intended to sue in any particular character, as by using the word "as *executor*," or "as *assignee*," &c. then the plaintiff, having so expressly limited his proceedings could not declare generally (*Douglas v. Irlam*, 8 T. R. 416.; *Rogers v. Jenkins*, 1 Bos. and P. 383. 1 Dowl. 98, 99). But see *Ashworth v. Ryall* supra. Therefore, from the above cases, it would appear that it is not absolutely necessary to state in what capacity the plaintiff sues or the defendant is sued.

(To be continued.)

Imperial Parliament.

HOUSE OF LORDS—June 4.

EXCHEQUER OF PLEAS BILL.
This Bill went through Committee.

HOUSE OF COMMONS.

June 4.

JUDGMENT OF THE COURT OF QUEEN'S BENCH IN STOCKDALE v. HANSARD.

Mr. Gurney appeared at the bar, and presented a report of this judgment.

The Attorney-General moved that the report be printed.—Ordered.

June 10.

Lord HOWICK brought up a special report from the committee of privileges to which had been referred the consideration of the proceedings in the case of "Stockdale v. Hansard." The report stated that the Attorney-General had reported to the committee that notice had been that day given to the defendant of a writ of inquiry having issued to assess the damages sustained by the plaintiff in the action, and that it appeared to the committee, that while it was expedient to inquire into the circumstances under which the judgment was given, it was not expedient that on the assessment of damages the defendant should appear by counsel.

June 5.**LEGAL BUSINESS.—USURY LAWS.**

Mr. RICE moved for leave to bring in a Bill to make perpetual the Act 7 W. 4. and 1 Vict. c. 80, which exempts Bills of Exchange payable at or within 12 months date from the operation of the Usury Laws.

Leave granted.

COPYHOLDS ENFRANCHISEMENT BILL.

Sir E. SUGDEN said, he trusted the hon. and learned Member who had brought forward this measure would consent to its postponement, as he did not think that in its present shape it was likely to work well. He was favourable to enfranchisement, but he was unwilling to consent to the compulsory clauses in the present bill, and he objected also to a system of commissioners to be paid at the public expense. It was impossible to pass the bill this session, but if it was now withdrawn, and if it was maturely considered during the recess, he was persuaded, that if brought forward at an early period of next session, it would certainly be passed.

Mr. J. STEWART said, that if the compulsory clauses were objected to, they could be withdrawn, as the bill provided also for voluntary enfranchisement.

Sir G. STRICKLAND said, it appeared to him that even were the compulsory clauses struck out, the Bill would still be extremely objectionable, and he was, therefore, compelled to move that the further consideration of the report be postponed to that day six months. This was a measure which dealt with private property in a way which Parliament had never before dealt with it, for Parliament had never before attempted to take away the rights of private property, except when a case of great public utility required the adoption of such a course. He contended that the compulsory clauses would be productive of great

injustice, and he had the authority of the Chief Commissioner (Mr. Blamire) for entertaining that opinion. The other parts of the Bill were full of objectionable clauses. He particularly alluded to the clause for providing compensation to the stewards of manors: what was the intention of such a clause? Both the compulsory and the compensation clauses would, therefore, meet with his strongest opposition.

The Report was brought up, and the Bill ordered to be reprinted, and taken into further consideration on Wednesday next.

June 6.**BOROUGH COURTS' BILL.**

This Bill was read a third time, and passed upon the motion of the Solicitor-General.

June 12.**REVISING BARRISTERS.**

Upon the motion of Mr. C. BULLER, leave was given to bring in a Bill to create a COURT OF APPEAL from the decisions of the revising Barristers, which was read a first time

IRELAND.—June 10.**IMPRISONMENT FOR DEBT.**

Mr. LIDDELL inquired whether it was the intention of the Government to bring in a bill extending the principle of the abolition of the imprisonment for debt to Ireland, and if so, whether the bill will contain the same provisions as the English bill?

Lord MORPETH said, that he thought it would be desirable to introduce a bill for the purpose of applying to Ireland the same law as now existed in England in respect of imprisonment for debt, with such modifications as the circumstances of the country might render requisite.

Law Reports.**COURT OF CHANCERY—June 8.****FIAT AGAINST ROSS AND CO.
Ex parte Sandam.***Appeal from the Court of Review.*

BANKRUPTCY—Jurisdiction of the Court of Chancery upon facts not found by the Court of Review.—The informality and illegality of Registrars finding such facts.

This appeal, which arose upon a special case, the question in which was, whether the Crown was entitled to prove a debt against this estate came on for hearing, but

The LORD CHANCELLOR interfered, and stopped the case.—His Lordship said, he observed that the Court of Review had declared that it had adopted the report of Mr. Gregg, in the special case, who was one of the *Registrars*, but the *Court* of itself stated no facts. The Great Seal had *no jurisdiction* over any facts, but such as might be found by the Court. It was not competent for the Registrar to find them. His Lordship added, that to avoid the danger and inconvenience of introducing an objectionable precedent, he must (even if both parties admitted the facts) return the case to the Court of Review.

QUEEN'S BENCH.—April 27.

Sittings in Banco.

STOCKDALE v. HANSARD.

LIBEL.—Breach of Privilege—Whether the House of Commons may order the publication of their proceedings, which contains matter of Libel against individuals, and that it is a high breach of privilege to bring such Libel in question before any Court of Judicature.

(Concluded from p. 73.)

The ATTORNEY-GENERAL continued.

He (the Attorney-General) had the most unfeigned respect for the Court in which he had so long practised, and for those who administered justice there; but upon this subject, although the Court of Queen's Bench was the highest criminal court in the land under the House of Lords, although a writ of error laid in this Court from all inferior courts, although this Court had a right to grant a prohibition to inferior courts, and to award a *mandamus* to inferior courts to execute that duty which the law cast upon them, yet with regard to entertaining this action, this Court had no more power or authority than the lowest court in the land; even with regard to its high prerogative writs, it could not direct them to the House of Commons or House of Lords; it could not grant a prohibition to the House of Lords against hearing an appeal; they could not grant a *mandamus* to the House of Commons requiring them to grant a sum of money for public purposes, or to admit a member who said he had been duly elected. It was a very fine thing for his friend to talk of the Lord Chief Justice of England interposing for the liberty of the subject; but that learned person had no more jurisdiction or authority than the lowest practitioner in the law, who might sit in the county court, and represent the sheriff or the steward of any manor. The Parliament of England was supreme, subject to no appeal or control, and therefore what was done by either House of Par-

liament was not subject to the decision of a court of law. The privileges of the House of Commons were the privileges of the people, and must be carefully and anxiously watched. The privilege of Parliament was a protection against the Crown, and the privileges of the House of Commons were a protection also against the House of Lords. What would be the consequence if a court of law were to decide upon the privileges of the House of Commons? The question must ultimately come to be determined by the House of Lords, because there might be a writ of error, and thence it followed, that all the privileges of the Commons would be at the mercy of the House of Lords. There had been controversies between the two Houses, and there might be again—very likely there might be again.—The Constitution had survived those conflicts, and would continue long to survive them; but the House of Lords could not decide upon the privileges of the House of Commons, because they would be judges in their own cause: with every respect for that noble House, would it be right that the privileges of the House of Commons should be so dealt with? The House of Lords was wholly irresponsible—it was utterly above the control of the King; but the House of Commons was open to redress. One was an elective body, the Members of the other House were summoned *de jure*. Upon this question of privilege the liberties of England had depended. It was on account of the privileges that they had in the 17th century that we were indebted for the freedom we enjoyed; but it was now to be said that the privileges ought to have been referred to the officers of the Crown called judges, who then held under the power of the Crown, and then that they should be taken before the House of Lords, who were wholly irresponsible. He would, with the greatest respect, come to another topic—namely, that this *lex Parliamenti*, which was to be administered by the two Houses of Parliament, was not known to the judges of the common law courts, and that they had no means of judicially arriving at a knowledge upon the subject of privilege, for this must be considered as including the judges of the lowest courts in the kingdom. In another part of that publication to which he had used the freedom to refer, Lord Brougham had said that if there were such a thing as privilege the Houses of Parliament must have exclusive jurisdiction upon that subject. The question was privilege or no privilege. If there were no privilege, then the House of Commons had no more authority than any debating club or petty corporation; but if there were those privileges, then it was conceded that the Houses of Parliament could alone adjudicate upon the existence of their privileges.

June 3.

COLES AND ANOTHER v. THE BANK OF ENGLAND.

NEGLIGENCE—What shall be deemed such to make the Bank liable for Stock fraudulently sold out by one of the Clerks of that establishment?

This was an action on the case for negligence. The plaintiffs were the executors of a Mrs. Temperance Creed, and the action was brought to recover a sum formerly belonging to that lady, and invested in the government funds. It appeared at the trial, which took place before Lord DENMAN, that that lady had formerly been entitled to a sum of £2,220 16s. 9d. in the three-and-a-half per cents., and had been accustomed to go regularly every half year and to receive the dividend thereon. She had a nephew in the Audit-office of the Bank of England, and this nephew, on several occasions, introduced at the Transfer-office a female who represented herself as Mrs. Temperance Creed, and by whose order, on one occasion after another, different portions of Mrs. Creed's stock were sold out. On these occasions, if questioned as to her identity, this female answered, that it was not usual for such proof to be required when the person introducing the party was a clerk in the Bank. In this way fraudulent sales of the stock were effected. Mrs. Creed herself still continued to go half yearly to receive her dividends, and never made any objection as to their reduced amount. In her will she spoke of herself as still possessed of this property, and bequeathed it, with other things, to different individuals, and appointed her nephew one of her executors. The other executors claimed this stock at the Bank, an investigation was made at the Bank, the forgeries were discovered, and the nephew was apprehended. He was tried at the Central Criminal Court, the jury adopting the defence then set up for him, that the testatrix, by receiving, without objection, the reduced dividends, had recognised the transfers. The present action was then brought, and the answer to it was that the testatrix had negligently suffered the transfer of her property, and that the defendants had not been guilty of negligence. The jury had given a verdict for the defendants, finding that the testatrix had the means of knowledge, that there was no proof that she did not actually know of these transfers, and that she had been guilty of negligence, and that the defendants had not been guilty of negligence. A rule had afterwards been obtained to set aside this verdict, and have a new trial.

Lord DENMAN now delivered judgment, and, after citing the authorities as to the question what was the amount of negligence on one side or the other which would prevent a party from

recovering, in an action like the present, said, that the COURT did not feel warranted in disturbing the verdict.—Rule discharged.

COURT OF COMMON PLEAS—June 8.

Sittings in Banco.

GRAHAM AND OTHERS v. MUSSON.

Statute of Frauds—Goods—Whether the entry by a Commercial Traveller in his Book of an Order given by a Customer is sufficient to bind him (the Customer) within the Statute of Frauds, without his signature to the Order—Whether the Traveller is the Agent of both parties to satisfy the Statute.

This important commercial case came before the Court upon a question reserved for its opinion upon the Statute of Frauds, subject to which the jury who tried the cause had found a verdict for the plaintiffs.

It appeared that the plaintiffs are wholesale grocers; a traveller in their service, named Dyson, went to the defendant, a grocer at Gainsborough, and obtained an order for sugar. He entered the order in his book, and signed his name to it, but it was not signed by the defendant. The order was executed by the plaintiffs, but the sugar did not reach its destination, in consequence of its having been destroyed by the fire at Fenning's wharf. The plaintiffs brought their action to recover the value of the sugar so destroyed, and which had been consigned to the defendant, and the question was who was to bear the loss. The defendant insisted that the contract was void by the Statute of Frauds, because there was no memorandum of it in writing signed by him or an agent on his behalf. On the other hand the plaintiffs contended that their traveller Dyson, to whom the defendant gave the order, acted as his agent as well as theirs when he entered a memorandum of it in his book, and that consequently his signature to that memorandum was a sufficient compliance with the provision of the Statute of Frauds.

The COURT decided that the signature of Dyson was not sufficient to take the case out of the Statute, as he could not be considered as acting in any other capacity than that of agent for the plaintiffs alone, whose traveller he was, and on whose behalf he had solicited the order from the defendant. The defendant was, therefore, entitled to have a nonsuit entered.

June 10.

**THE LONDON GAS AND COKE COMPANY
v. TURNER.**

Illegal Contract in the way of trade—Whether performance can be enforced.—Demurrer.

The defendant had entered into a contract to supply the plaintiff with tar at a fixed price, and had failed in performing his contract, for which default the plaintiffs brought the present action.

The defendant pleaded that the tar was to be supplied for the purpose of being manufactured into turpentine, in quantities and on premises forbidden by an act passed in the reign of George III., and consequently the contract was illegal and void. To this plea the plaintiff's demurred.

The COURT pronounced judgment, which was that the subject matter of the contract was interdicted by the law of the land, and therefore the plea was good.

Judgment for the defendant.

COURT OF EXCHEQUER.—*June 10.*

Sittings in Banco.

BEVANS v. REES AND ANOTHER.

NEW TRIAL.

Bill of Exchange—What is a sufficient tender—Whether the precise sum must or must not be tendered?

This was an action upon a Bill of Exchange, to which a tender had been pleaded, and at the trial, which took place before Mr. Justice Cole-ridge, at the last assizes for the county of Pembroke, a verdict passed for the defendant on this plea of tender, and in last term a rule *nisi* was obtained to enter a verdict for the plaintiff on that issue.

The question raised was, whether that plea was supported by what would amount to a good tender in law. It appeared that the shopboy of the defendant had called on the plaintiff's attorney, and asked him to tell him what was due on the two bills, for principal and interest, as he had orders to tender the amount. To this he was answered, that there was a disputed shop account due from the plaintiff to the defendants, and that unless the defendants would agree to it as stated by the plaintiff, the tender would not be accepted. The shopboy, however, declined to enter into that question, and said, "Here are 150 sovereigns; if you won't tell me what is due to the plaintiff, will you take what is due out of this sum?" at the same time placing the money in view. This the attorney again refused, and so the matter ended for the time; but in the course of that day the writs were issued on the two bills,

while shortly afterwards a cross-action was brought by the defendant for the amount of his claim for goods sold to the plaintiff.

Mr. Evans now shewed cause, and contended that the plea of tender was made out. It was not necessary to tender the precise sum due to the party; all that was required was, that the tender should be unclogged with any condition. Ever since the time of Wade's case, 5 Co. 114 b. to the present time, it had been held to be a good tender to offer a gross sum to the creditor, from which he might take that which was actually due.

Mr. Chilton, on the other hand, urged that the evidence of the tender was not such as the law would hold to make out a legal tender. The distinction was, that in Wade's case the sum offered was tendered, while here the sum offered was not tendered, but something less, so that the plaintiff was called upon on the instant to say how much was actually due to him.

Lord AINGER thought, that under the circumstances of the parties, this was a good and valid tender.

Rule discharged.

2 VICT. CAP. XI.

SIR EDWARD'S SUGDEN'S ACT FOR THE BETTER PROTECTION OF PURCHASERS AGAINST JUDGMENTS, CROWN DEBTS, LIS PENDENS, AND FIATS IN BANKRUPTCY. [4th June, 1839.]

Whereas it is desirable that further protection should be afforded to Purchasers against Judgments, Crown Debts, and Lis pendens: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that no Judgment shall hereafter be docketted under the provisions of an Act passed in the fourth and fifth years of the reign of their late Majesties King William and Queen Mary, intituled "An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas, and Exchequer," at Westminster, but that all such dockets shall be finally closed immediately after the passing of this Act, without prejudice to the operation of any judgment already docketted and entered under the said recited Act, except so far as any such judgment may be affected by the provisions hereinafter contained.

II. And be it enacted, that no judgment already docketted and entered under the said recited Act of their late Majesties King William and Queen Mary shall, after the first day of August, one thousand eight hundred and forty-one, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless

and until such memorandum or minute thereof as is prescribed in an Act passed in the first and second years of her present Majesty Queen Victoria, intituled, "An Act for abolishing Arrest on Mesne Process and Civil Actions, except in certain cases; and for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the relief of Insolvent Debtors in England," shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to Judgments; and such officer shall be entitled for any such entry to the sum of five shillings.

III. And be it enacted, that in addition to the entry by the said last-mentioned Act, or by this Act, required to be made in a book by the senior Master, of the particulars to be contained in every memorandum or minute left with him of any judgment, decree or order, rule or order, he shall insert in such book, the year and the day of the month when every such memorandum or minute is so left with him.

IV. And be it enacted, that all judgments of any of the superior courts, decrees or orders in any Court of Equity, rules of a Court of Common Law, and orders in bankruptcy or lunacy, which, since the passing of the said recited Act of the first and second years of the reign of her present Majesty have been registered under the provisions therein contained, or which shall hereafter be so registered, shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance is again left with the senior Master of the said Court of Common Pleas, within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years before the right of such creditors accrued, and so, *toties quoties*, at the expiration of every succeeding five years; and the senior Master shall forthwith re-enter the same in like manner as the same was originally entered; and such officer shall be entitled for any such re-entry to the sum of one shilling.

V. Provided also, and be it enacted, that as against purchasers and mortgagees without notice of any such judgment, decrees or orders, rules or orders as aforesaid, none of such judgments, decrees or orders, rules or orders, shall bind or affect any lands, tenements, or hereditaments, or any interest therein, further or otherwise or more extensively in any respect, although duly regis-

tered, than a judgment of one of the superior Courts aforesaid would have bound such purchaser or mortgagee before the said Act of the first and second years of the reign of her present Majesty, where it had been duly docketted according to the Law then in force.

VI. Provided also, and be it enacted, that nothing in the said recited Act of Her present Majesty nor in this Act contained, shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect or prejudice any judgment as between the parties thereto, or their representatives, or those deriving as volunteers under them.

VII. And be it enacted, that no Lis pendens shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and the Court of Equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the Senior Master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such Lis pendens; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions herein-before contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of Lis pendens which shall be registered under the provisions of this Act.

VIII. And be it enacted, that no judgment, statute, or recognizance which shall hereafter be obtained or entered into in the name or upon the proper account of Her Majesty, her heirs or successors, or inquisition by which any debt shall be found due to Her Majesty, her heirs or successors, or obligation or specialty which shall hereafter be made to Her Majesty, her heirs or successors, in the manner directed by an Act passed in the thirty-third year of the reign of His late Majesty King Henry the Eighth, intituled "The Erection of the Court of Surveyors of the King's Lands, and the Names of the Officers there, and their Authority," or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages under the provisions of the Act passed in the thirteenth year of the reign of Her late Majesty Queen Elizabeth, intituled "An Act to make the Lands, Tenements, Goods, and Chattels of Tellers, Receivers, et cætera, liable to the Payment of their Debts," shall affect any lands, tenements, or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the

usual or last place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and also in the case of any judgment the Court and the title of the cause in which such judgment shall have been obtained, and the date of such judgment, and the amount of the debt, damages, and costs thereby recovered, and also in the case of a statute or recognizance, the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also in the case of an inquisition the sum thereby found to be due, and the date of the same, and also in the case of an obligation or specialty the sum in which the obligee shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office the name of the office and the time of the officer accepting the same, shall be left with the Senior Master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled "The Index to Debtors and Accountants to the Crown," in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute, or recognizance, inquisition, obligation, or specialty, or the acceptance of any office; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, and also the other book to be kept according to the provisions of the said recited Act of the first and second years of the reign of her present Majesty, or either of the said books, on payment of the sum of one shilling, whether one only or both of the said books shall be searched, and no multiplication of books is to increase the fee.

IX. And be it enacted, that whenever a quietus shall be obtained by a debtor or accountant to the Crown, and an office copy thereof shall be left with the Senior Master of the said Court of Common Pleas, together with a certificate, signed by the Accountant-General, that the same may be registered, the said Master shall forthwith enter the same in the said book of debtors and accountants to the Crown, in alphabetical order, by the name of the person whose estate is intended to be discharged by such quietus, with the date, and shall for any such entry be entitled to a fee of two shillings and sixpence.

X. And whereas it is expedient to make further provision for the discharge of an estate belonging to a debtor or accountant to the crown, from the claim of the crown in the hands of a purchaser or mortgagee, although the debt or liability shall not be fully discharged; be it therefore enacted, that it shall be lawful for the Commissioners of her Majesty's Treasury of the United Kingdom of Great Britain and Ireland

for the time being, or any three of them, by writing under their hands, upon payment of such sums of money as they may think fit to require into the receipt of her Majesty's Exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, to certify that any lands, tenements, or hereditaments of any such crown debtor or accountant shall be held by the purchaser or mortgagee or intended purchaser or mortgagee thereof, his or their heirs, executors, administrators, and assigns, wholly exonerated and discharged from all further claims of her Majesty, her heirs or successors, for or in respect of any debt, claim, or liability, present or future, of the debtor or accountant to whom such lands, tenements, or hereditaments belonged, or, in cases of leases for fines, to certify that the lessees, their heirs, executors, administrators, and assigns, shall hold so exonerated and discharged, without prejudice to the rights and remedies of the Crown against the reversion of the lands, tenements, or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements, or hereditaments shall respectively be held accordingly wholly exonerated and discharged as aforesaid, but in the cases of leases without prejudice as aforesaid.

XI. Provided also, and be it enacted, that any such certificate, or the discharge of any such lands, tenements, or other hereditaments by virtue of this Act, shall in nowise impeach, lessen, or affect the right or power of her Majesty, her heirs or successors, to levy the whole of any debt or demand which may at any time be due from any such debtor or accountant to the Crown out of or from any other lands, tenements, or hereditaments which would have been liable thereto in case no such certificate had been granted and no such discharge had been obtained.

XII. And whereas it is expedient that further provision should be made for the protection of purchasers against secret Acts of Bankruptcy and fiats in bankruptcy; be it therefore enacted, that all conveyances by any bankrupt *bond fide* made and executed before the date and issuing of the fiat against such bankrupt shall be valid, notwithstanding any prior Act of Bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed had not at the time of such conveyance notice of any prior Act of Bankruptcy by him committed.

XIII. And be it enacted, that no purchase from any bankrupt *bond fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an Act of Bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the Com-

mission against such bankrupt shall have been sued out within twelve months after such Act of Bankruptcy.

XIV. And be it enacted that this Act shall not extend to Ireland.

NEW ORDERS OF THE COURT OF CHANCERY.

Issued under the Stat. 1 & 2 Victoria, c. 110.

(Continued from p. 92.)

COURT OF CHANCERY, May 10, 1839.

FORMS OF WRITS.

NO. III.

Writ of Fieri Facias, on a Decree or Order of the Court of Chancery for Payment of Money and Costs.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of Greeting.

We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ , which said sum of money was lately before us in our High Court of Chancery, in a certain cause, or certain causes (*as the case may be*) wherein A. B. is plaintiff, and C. D. is defendant, or, in a certain matter there depending, intituled, "In the matter of E. F." (*as the case may be*), by a decree, or order, (*as the case may be*) of our said Court, bearing date the day of , decreed or ordered (*as the case may be*) to be paid by the said C. D. to A. B. together with certain costs in the said order mentioned, and which costs have been taxed and allowed by G. H. Esquire, one of the Masters of our said Court, at the sum of £ , as appears by the certificate of the said Master, dated the day of , and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ (a), together with interest at the rate of £4. per centum per annum, on the said sum of £ , (b) from the day of (c) and on the said sum of , (a) from the day of , (d) and that you have that money and interest before us, in our said Court, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree or order (*as the case may be*). And that you do all such things

(a) The Costs.

(b) The Money.

(c) The date of the order, or, if that were prior to the 1st October, 1838, say, "from the 1st day of October, 1838."

(d) The date of the Master's certificate, or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

as by the statute passed in the second year of our reign, you are authorized and required to do in this behalf; and in what manner you shall have executed this our writ, make appear to us in our said Court, immediately after the execution thereof. And have there then this writ.

Witness ourselves at Westminster the day of in the year of our reign.

No. IV.

Writ of Fieri Facias, on a Decree or Order of the Court of Chancery for Payment of Money, Interest, and Costs.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of greeting.

We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made the sum of £ , and also interest thereon, at the rate of £4. per centum per annum, from the day of (a), which said sum of money and interest were lately before us in our High Court of Chancery, in a certain cause, or certain causes (*as the case may be*), wherein A. B. is plaintiff, and C. D. is defendant, or in a certain matter there depending, intituled, "In the matter of E. F." (*as the case may be*) by a decree or order (*as the case may be*) of our said Court, bearing date the day of , decreed or ordered (*as the case may be*) to be paid by the said C. D. to A. B., together with certain costs in the said order mentioned, and which costs have been taxed and allowed by G. H. Esquire, one of the Masters of our said Court, at the sum of £ , as appears by the certificate of the said Master, dated the day of , and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ together with interest thereon at the rate aforesaid, from the day of (b) and that you have that money and interest before us, in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree or order (*as the case may be*). And that you do all such things as by the statute passed in the second year of our reign, you are authorized and required to do in this behalf, and in what manner you shall have executed this our writ, make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

(a) The day mentioned in the order.

(b) The date of the Master's certificate of taxation, or that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

QUESTIONS

PUT BY THE EXAMINERS TO APPLICANTS FOR ADMISSION AS ATTORNEYS AT THE EXAMINATION.—TRINITY TERM, 1839.

- I. PRELIMINARY.—AS USUAL.
- II. COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS.
4. Describe the commencement of an action at Common Law?
 5. How long does a writ of summons remain in force, and how may it be continued,—and on what days, and at what hours, can it be served?
 6. From what time is a declaration deemed to be filed?
 7. Within what time must application be made to a court or judge to set aside any proceeding for irregularity?
 8. What are the most common grounds for setting aside a declaration for irregularity?
 9. When a defendant is under the usual terms of "*pleading issuably, rejoicing gratis*, and taking *short notice of trial*," what is understood by those terms respectively? And what distance from London makes a country cause; and how does the notice of trial differ in a town and country cause?
 10. When it is sought to arrest or detain a defendant under the provisions of the act for the abolition of arrest on meane process, what is necessary to be stated in the affidavit?
 11. What, in such case, is the first process to be taken out?
 12. Must the affidavit to hold to bail, since the passing of that act, be entitled in the cause or not?
 13. Can any thing besides goods be levied or charged in execution under that act? and if so, state what and in whose hands, and by what form of proceeding?
 14. Can an infant execute a cognovit?
 15. What are the cases in which the courts grant a rule of interpleader at the instance of the Sheriff?
 16. What is the meaning of "*withdrawing a juror*?" and what effect has it?
 17. Within what time must a motion for a new trial be made?
 18. State some of the cases in which the courts will grant a new trial; and in actions for the recovery of debts what is the amount recovered under which a motion for a new trial is prohibited, and what is the rule on writs of trial before the Sheriff?
- III. CONVEYANCING.
19. What is an estate in joint tenancy, and what is a tenancy in common?
 20. What is meant by absolute covenants for title?
 21. In what respects do freeholds and copyholds principally differ in regard to alienation?
22. Is the assignee of a lease to any, and what extent, liable to the lessor under the covenants of the lessee?
 23. Is a sub-lessee to any, and what extent, liable to the original lessor under the covenants of the lessee in the original lease?
 24. State the principal points in which the law relating to wills was altered by a late statute.
 25. Is a rent-charge payable to the rector or vicar under the Tithe Commutation Act fixed, or does it vary? and if it varies, how is the amount to be ascertained?
 26. What is Simony?
 27. In what cases, and in favour of what persons, are bonds or covenants to resign a living legal?
 28. In what cases is enrolment essential to the validity of a grant of annuity, and in what cases not?
 29. State the advantages of some of the principal clauses in the late enactment with respect to judgments.
 30. How do indentures of lease and release operate to pass the legal fee?
 31. What are contingent remainders? and in what cases may they be defeated? and in what not?
 32. Does the word "grant" in a conveyance imply in all, or in any and what cases, a warranty of title?
 33. By what assurance, if any, can a married woman effectually dispose of her interest in real or personal estate?
- IV. EQUITY AND PRACTICE OF THE COURTS.
34. Within what time is a plaintiff, who has delivered exceptions to a defendant's answer for insufficiency, bound to obtain an order referring such exceptions to the master?
 35. What time has a defendant for referring the plaintiff's bill for impertinence?
 36. What time has a plaintiff for referring the answer of a defendant for impertinence?
 37. If the answer be found impertinent, within what time must the plaintiff deliver exceptions for insufficiency?
 38. Can a cause be set down for hearing on further directions by a defendant?
 39. If a person not a party take proceedings in a cause, and be ordered to pay to or receive from a party in the cause costs in respect to such proceedings, how are those costs recovered by or from such person?
 40. Must a subpoena ad testificandum be served personally on a witness, or will the mere leaving it at his house be sufficient?
 41. Are there any cases in which one party may

- examine another party to a suit as a witness ? If so, give instances in which such examination can take place, and to what extent ?
42. What affidavit must a plaintiff make on filing a bill of interpleader ?
43. Can a defendant move to dismiss a bill filed for discovery only, and not for relief ?
44. If a husband seek to recover property in right of his wife, will the Court impose any, and, if so, what terms on the husband in favour of the wife with respect to such property ?
45. Will or will not a Court of Equity decree a specific performance of an agreement for reference to arbitration ? and give the reason for your answer ?
46. A., being an attorney, agrees to sell his business to B. Is or is not this such an agreement as a Court of Equity will enforce ? and give the reason for your answer.
47. If a testator by his will charge his real estates with the payment of his debts, will or will not such a devise have any, and if any, what effect on a debt which had been previously barred by the Statute of Limitations ?
48. Will a tenant covenanting with his landlord to repair his premises (damage by fire excepted) continue liable on the covenant for payment of rent after the premises are destroyed by fire; or will a Court of Equity interfere by injunction to prevent the landlord from suing for the rent ?

V. BANKRUPTCY AND PRACTICE OF THE COURTS.

49. When, and by what means, were the Court of Review, and the present Commissioners' Courts established ?
50. What is the character and duty of an official assignee, and how is he appointed ?
51. What acts of a trader, with any and what intent concerning his creditors, are deemed Acts of Bankruptcy ?
52. What is the effect of a declaration of Insolvency, and within what time must a fiat founded thereon be issued ?
53. What evasions by a trader of his creditors are deemed *absenting*, within the meaning of the statute ?
54. Must the petitioning creditor's debt have been contracted before the act of bankruptcy ?
55. Will a debt barred by the statute of limitations support a fiat ?
56. What proceedings must be taken to obtain a fiat ?
57. In case a fiat be issued on an insufficient act of bankruptcy, can it be proceeded with on some other, and what act of bankruptcy ?
58. If a bankrupt be a debtor to the Crown,

- what steps should be taken to protect his property from process of extent ?
59. Are any and what notices to be given by either party in a suit of equity, where it is intended to dispute the validity of the fiat ?
60. State the steps to be severally taken, with a view to proof upon a bankrupt's estate, by *legal* and *equitable* mortgagees ?
61. Is the mortgagee of a bankrupt entitled in any and what case to carry on the computation of interest on his mortgage beyond the date of the fiat ?
62. Are there any and what contracts, made after an act of bankruptcy, that are deemed valid ?
63. In case a purchaser from a trader has had notice of an act of bankruptcy, will the transaction be valid after any and what length of time ?

VI. CRIMINAL LAW AND PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

64. For what offence is a private, as well as public, remedy afforded ?
65. In order to a conviction for murder, must the mode in which the offence is alleged to have been perpetrated be proved ?
66. Are there any and what cases of robbery punishable with death ?
67. To what counties does the Jurisdiction of the Central Criminal Court extend ?
68. Are the powers of the quarter sessions in the district of the Central Criminal Court restricted in any and what respects ?
69. What offences are within the jurisdiction of justices of the peace at quarter sessions ?
70. How many justices of the peace must be present to hold a court of quarter sessions ?
71. Can any and which of the decisions of the justices at quarter sessions be reviewed ? and how ?
72. Of what number must a grand jury consist, and how many must agree in finding a bill ?
73. What is the difference between an indictment and a criminal information ? and describe the different kinds of criminal information.
74. Are there any and what malicious injuries liable to summary conviction ; and is the punishment increased to any and what extent on the repetition of the offence ?
75. Are there any and what conspiracies regarding which any and what number of justices of the peace have jurisdiction ?
76. What is a riotous meeting, and of what number must it consist ?
77. What should be done by a justice of the peace in case of a riot ?
78. What is the mode of proceeding against

magistrates guilty of partiality in the administration of justice?

It appears that 108 attended this examination; 105 were considered qualified, and the remaining three were rejected.

GENTLEMEN CALLED TO THE BAR,
By the Honourable Society of the MIDDLE
TEMPLE,
Easter Term, 1839.

James Abraham Foot
Charles Egan.

Charles Douglas Stewart.
Charles Simpson.
Thomas Eaton.
William Speed.
John Glasgow Grant.
John Jones.
James Anderson.
John Nash Tyndale.
John Lawson Kennedy.
Alexander Crichton.
Thomas Young Prior.
William Maconbrey.
Charles Lloyd.
George Bowyer.
Edmund Welsh.

ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNEYS
In Michaelmas Term, 1839.

QUEEN'S BENCH.

(Concluded from page 96.)

<i>Clerk's Name and Residence.</i>	<i>To whom articled or assigned.</i>
Stevens, Frederic, 49, Old Broad-street; and Great Russell-street.	Stevens, William, Queen-street, Cheapside.
Strick, Edward, 26, Gloucester-street, Queen-square; and Swansea.	Williams, John, Swansea; assigned to Price, John Jackson, Swansea.
Snell, George Wells, Launceston.	Morgan, William Thalressen, Launceston.
Simpson, George Septimus, 39, Wakefield-street, Brownlow-street; and Peterborough.	Atkinson, Thomas, Peterborough; assigned to Morris, Evan, Temple.
Smith, Robert, 10, Chapel-place, Vere-street.	Dean, William, Guildford-street.
Twining, Daniel, the younger, Bedford.	Pearse, Theed, the younger, Bedford.
Thompson, John, 19, Compton-street, Shrewsbury; and 18, Castle-street.	Burley, Walter, Shrewsbury; assigned to Scarth, Jonathan, Shrewsbury.
Tuson, Henry, the younger, 15, Great Russell-street; and Northover.	Tuson, Henry, Northover.
Teale, William, 98, Upper Stamford-street; and Leeds.	Bar, Robert, Leeds.
Tillett, Jacob Henry, Norwich.	Staff, John Rising, Norwich.
Turner, Wm. Cullen, 31, Bartlett's-buildings; Wantage; Shepton-on-Sherwell; and Southampton-buildings.	Ormond, William, Wantage.
Tomlin, Ottiwell, the younger, 30, Mornington-place; and Richmond.	Tomlin, Ottiwell, the elder, Richmond; assigned to Williamson, Jas., Verulam-buildings.
Twisden, Thomas Edward, 50, Burton-street, St. Pancras; Halberton; Gloucester-street; and Woburn-buildings.	Partridge, James, Tiverton.
Vyner, Charles James, 33, Southampton-row; Wigan; Lincoln's-inn-fields; and Norfolk-street.	Becke, Simon Adams, Lothbury.
Wight, Thomas, Kinswinford; and Dudley.	Robinson, William, Dudley.
Wormald, William, Leeds.	Beaver, Timothy, Wakefield.
Wells, William, 52, Gloucester-street, Queen-square; Dursley; and Arundel-street.	Wells, William Bury, and Bishop, Henry, Dursley.
Williams, Lewis Walter, Walbrook.	Clare, Ambrose, Frederick's-place, and 5, Broad-street-buildings.
Walker, Willoughby Newton, 14, Bedford-sq.	Harrison, Edward, Southampton-buildings.
Worsley, Jonathan, Sanctuary, Westminster; and Woodbridge.	Carthew, Thomas, Woodbridge.

Watson, George Henry, York.

**Watson, Richard T. Rundle, 25, Princes-street,
Cavendish-square.**

**Yetts, Joseph Musket, 5, Warwick-court ;
Great Yarmouth; 3, Montpelier-row, South
Lambeth.**

Yockney, John, 20, Torrington-square.

Hodgson, Thomas, York.

Ogle, George, Great Winchester-street.

**Palmer, Nathaniel, Great Yarmouth; assigned
to Jackson, Robert, Bedford-row.**

Moseley, Thomas, 13, Bedford-street.

Sittings of the Courts.

QUEEN'S BENCH.

TRINITY TERM, 2ND VICTORIA.

The Court will sit *in banco* daily till the 22nd of June.

The London adjournment-day at *Nisi Prius* is fixed for Monday, June 24.

This Court will, on the 13th day of June next, hold Sittings, and will proceed in disposing of the business in the *New Trial paper* on the 13th, 14th, 15th, 17th, 18th, and 19th of the said month, and in the *Special paper* on the 20th and 21st, and in the *Crown paper* on the 22nd of June, and on the last-mentioned day will give judgment in cases previously argued.

COMMON PLEAS.

TRINITY TERM, 2ND VICTORIA.

The London adjournment-day is fixed for Tuesday, June 25.

The Court of Error from the Common Pleas to the Exchequer Chamber is fixed for Monday, June 24.

This Court will, on the 13th day of June instant, hold Sittings, and will proceed in disposing of the business now pending in the paper of *New Trials*, and in the *Special paper* of this Court on the same 13th, and on the 14th and 15th days of June following, and also on the 19th and three following days of the same month, commencing with the Country *New Trials*.

EXCHEQUER OF PLEAS.

Sitting in Middlesex and London, before the Right Hon. JAMES Lord ABINGER, Chief Baron of Her Majesty's Court of Exchequer, after Trinity Term, 1839.

MIDDLESEX.

Common Juries.—Thursday, June 13; Friday, 14.

Revenue and Common Juries (Customs).—Saturday, June 15.

Revenue and Common Juries (Excise).—Monday, June 17.

Special and Common Juries.—Tuesday, June 18; Wednesday, 19; Thursday, 20.

Common Juries.—Friday, June 21; Saturday, 22.

LONDON.

To Adjourn only.—Friday, June 14.

Adjournment-day, Common Juries.—Monday, June 24.

Common Juries.—Tuesday, June 25; Wednesday, 26.

Special and Common Juries.—Thursday, June 27; Friday, 28; Saturday, 29; Monday, July 1.

Common Juries.—Tuesday, July 2; Wednesday, July 3.

N.B.—The Court will not sit in London on Friday, June 14, but will be adjourned to Monday, the 24th.

This Court will, on the 13th day of June next, hold Sittings, and will proceed in disposing of the business in the *Special paper* on the same day, and on the following day, namely, the 14th of June; and on the same 14th day of June, and on the 15th, 19th, 20th, 21st, and 22nd days of the same month will proceed in disposing of the business now pending in the paper of *New Trials*.

QUEEN'S BENCH SITTINGS.

At *Nisi Prius*.—After Trinity Term, 1839.

MIDDLESEX.

Wednesday July 3 { Adjournment day, Common Juries.

Thursday . . . 4 }

Friday . . . 5 } Common Juries.

Saturday . . . 6 }

Monday July 8 }

Tuesday . . . 9 } Special Juries.

Wednesday . . 10 }

LONDON.

Friday June 14 { For Causes, with Judgment, if, &c. only.

Monday . . . 24 { Adjournment day, Common Juries.

Tuesday . . . 25 }

Wednesday . . 26 } Common Juries.

Thursday . . . 27 }

Friday . . . 28 }

Saturday . . . 29 }

Monday July 1 } Special Juries.

Tuesday . . . 2 }

Business of the Courts.**VICE-CHANCELLOR'S COURT.**

Short causes and unopposed petitions.

After the petitions—Peach v. Pigou, cause by order—Clough v. Lambert, ditto.

And motions.

ROLLS' COURT.

The Master of the Rolls will sit on Monday, June 17.

COURT OF QUEEN'S BENCH.

Sittings in Banco.

COURT OF COMMON PLEAS.

Middlesex Common Juries.

Broad v. Usher—Glenny v. Murray—Macdonald v. Weldon—Park v. Scott—M'Gregor v. The Same—Walkington v. Davis—Evans v. Moon—Harris v. Goodwin—Geils v. Hitchcock—Hayward v. Evans—Park v. Montagu.

COURT OF EXCHEQUER.

Middlesex Common Juries.

Harrison v. Francis—Blofield v. Goodridge—Soden v. Haskew—Kingston v. Armstrong—Pugh v. Kerr—Bond v. Carter—Lyddon v. Barrett—Pentey v. Arundell—White v. Bugg—Mully v. Slater—Thames Haven Dock Company v. Hull—Arnott v. Ongley.

EQUITY EXCHEQUER.

For Judgment.

Keys v. Williams, further directions.

Petitions.

Re Eastern Counties Railway—Re Commercial Railway—Essington v. Viveash—Unett v. Proctor—Re Chester and Crewe Railway (2)—Re Midland Counties Railway—Brown v. Williams.

After the petitions, motions.

NOTICE TO CORRESPONDENTS.

F. J. C.—The Covenant does *not* run with any land.

Adolphus.—Under consideration.

C. B.—We think that your answer to Prob. 13, Vol. 1. will be more complete if it be made

to embrace the necessary proceedings where a defendant cannot be served with process.

STOCKDALE v. HANSARD.

Our limited space compels us, much against our wish, to give the whole of these interesting and important proceedings in a very disjointed state. We have at length concluded the speech of the Attorney-General, and we shall follow it up with the judgment and subsequent proceedings.

Just Published, price £1. 5s. bds.

Dedicated by Command of, and recently presented to, Her Majesty Queen VICTORIA,

COMMENTARIES on the CONSTITUTION and LAWS of ENGLAND, incorporated with the Political Text of J. L. DE LOUME, LL.D. Advocate.

By THOMAS GEORGE WESTERN, Esq., F.R.A.S. Of the Middle Temple.

Subscribers.—Her Majesty; H. R. H. the Duchess of Kent; H. I. H. the Grand Duke Alexander of Russia; the Duke of Somerset; the Duke of Grafton; the Duke of Newcastle; the Earl o' Neill; Lord Byron; Field Marshal Lord Viscount Beresford, D. C. L.; Lord Vernon; Lord Barham; Lord Rodney; Lord Teignmouth, F. R. S.; Lord de Saumarez; the University of Oxford; the University of Cambridge.

"The more the English Constitution is investigated, the better it will be understood; and the better it is understood, the more it will be valued. All ranks and classes of persons should get at a knowledge of its fundamental principles, because every Englishman is interested in the preservation of the government: without that knowledge, he exposes himself to the censure and inconvenience of living in society without understanding his own relation to it, and hence political discontents. With it, he will be convinced that England is the favoured soil which early received the seeds, gradually nourished the plant, and, at length, matured the only TREE of LIBERTY that has been found to shelter beneath its branches, person, property, and life, from the scorching beams of every kind of tyranny."—AUTHOR'S Preface.

JOHN RICHARDS and Co. 194, Fleet Street; MILLIKEN and SON, Dublin; M'LACHLAN: and STEWART, Edinburgh.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 15th June, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, JUNE 22, 1839.

[No. 8.

LEX LOCI DOMICILII.

We observed, in a former part of this work, (a) how imperfectly this law was understood by the profession, and how little was even a knowledge of it looked after by its members. It is true, that its operation has not been of very frequent occurrence, yet from the connections made by British subjects, with those of other nations; by British subjects becoming domiciled in foreign countries; and from various other contingent circumstances, occasions must more often occur where this law must be resorted to for the disposition of property, and it therefore becomes a necessity that the Lawyer should at least comprehend it, if he does not desire thoroughly to understand it. Lord Langdale very truly observed in *Chameau v. Riley*, (b) that the question of domicile was one of great complication and difficulty—hence the disinclination of gentlemen to study it. We now take up the subject in redemption of the promise we made in the early part of this work. (c)

For the purpose of fully, and intelligibly explaining the general principles that govern this law, we propose to consider it, in two parts, under the following heads.

PART 1. LEGITIMACY.

PART 2. ILLEGITIMACY.

(a) Vol. I. p. 51. b. Ante Vol. I. p. 89.

(c) Ante Vol. I. p. 54.

VOL. II.

PART 1. LEGITIMACY.

In entering upon this Part we will enquire,

First—By what Law, shall the personal property situate in England, of a British born subject dying domiciled in Scotland, or any of the British Colonies, and intestate, be governed.

Secondly—Whether the same rule does not apply to British born subjects, dying intestate, domiciled in Foreign states.

Now it is universally admitted, that where a British born subject dies, domiciled intestate in Scotland or the Colonies, the law of Scotland, or the law of the Colony in which he died, shall govern the distribution of the personal property, and the right of administration too; for though we find that Mr. HARGRAVE once doubted whether, though the property was to be distributed according to the *Lex loci domicilii*, the administration must not be decreed according to the statute, yet we are quite satisfied, that both by law and practice, the statute would not *non* be held applicable, but the administration would, in such a case, be granted to him who would be entitled to it by the *Lex loci domicilii*.

So far as related to the personality in England, of a British born subject dying domiciled intestate in Scotland, or in any part of the British Empire, Sir John Nichol, in his judgment in *Curling v. Thornton*, 2d Addams, Rep. admitted the *Lex loci domi-*

cili to apply, but he denied that the same law applied to a British born subject dying domiciled in a foreign country intestate, or that the question of testacy or intestacy was to be tried by the *Lex loci domicili*.

The effect of applying the *Lex loci domicili* to the personality in England of a British born subject dying intestate, domiciled in Scotland or the Colonies is, that such personality, is distributed according to the law of Scotland, or the law of Holland, the law of Spain, or the law of France, according as such British born subject may die domiciled in Scotland, Ceylon, or Demerara, in Trinidad, or St. Lucie.

It is admitted, also, that the personality in England, of a foreigner dying intestate in his own country, will be administered and distributed according to the *Lex loci* of his domicile.

And here it becomes expedient to consider *What is the true import and meaning of the true Lex loci DOMICILI?*

How far and in what respects it is applicable to personal property? If we mistake not, it will turn out, on investigation, that the *Lex loci domicili* of the owner, governs the disposition of personal property, without regard to the *domicilium originis* of the owner, or the *Lex loci rei sitae*, and by the term disposition, we mean title to personal property by transfer, during life, by will, or by succession, *ab in testato*. Some exceptions there may be, but we think the authorities will shew the general principle. We think LORD LOUGHBOROUGH, in the case of *Sills v. Worswick*, 1 H. Black, 690, has expressed the true principles which govern personal property. First, it is a clear proposition, not only of the law of England, but of every country in the world, where law has a semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner.

With respect to the disposition of it—with

respect to the transmission of it—either by succession, or by the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, which will regulate the succession.

It is, we conceive, perfectly manifest, from the context, that LORD LOUGHBOROUGH, in stating that personal property is subject to that law which governs the person of the owner, referred to the *Lex loci domicili* of the owner, and not the *Lex loci originis*; for that learned Judge could never have been guilty of the absurdity of supposing, that the personal property of a Frenchman by birth, domiciled in England, and carrying on trade here, should not be governed by our Bankrupt Laws, but by the laws of France, nor *vice versa*, that the personal property of an Englishman by birth, domiciled in France, and carrying on trade there, should be governed by our Bankrupt Laws.

(To be continued.)

PROBLEM VIII.

VOL. 2.

LIGHTS.

What is the Law, that governs the free access of Light over another's Land? and what are the remedies for Injuries to Lights?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 18. VOL. 1.

(Continued from p. 100.)

Problem 18, vol. 1, p. 197.—Actions at Law.

“ What is the mode of commencing an Action?—shewing what the Writs are to contain, and manner and time of service. —The decisions that have been made upon defective Writs, or irregular service.”

4th. By the first general rule of M. T. 3 W. 4. it is ordered, that every Writ of Sum-

mons shall contain the names of all the defendants (if more than one) in the action, and shall not contain the name or names of every defendant or defendants in more than one action. But although all the several defendants must be named in one writ, if any of them reside in different counties, there must be as many *concurrent* writs, precisely alike, as there are counties.

5th. The name of the Court in which the action is brought must be correctly stated.

6th. The cause of action must be correctly stated, (2 W. 4. c. 39.) and if the subsequent declaration should vary from the form of action expressed in the writ, such variance would be deemed a fatal irregularity, and entitle the defendant to move to set aside the declaration, and perhaps also the writ (*Edwards v. Dignam*, 2 Dowl. 240; *King v. Sheffington*, 1 C. and M. 363; 2 Dowl. 606. S. C. and see *Barker v. Weedon*, 1 C. M. and R. 396; and *Richards v. Stuart*, 10 Bing. 319.)

7th. The *christian and surname* of the plaintiff must be inserted in that part of the writ, stating at whose suit the action is brought, and if a writ name only one defendant and the declaration two, the declaration would be set aside for irregularity, (*Rogers v. Jenkyns*, 1 B. & P. 383; *Lewin v. Smith*, 4 East, 589); or if a writ be issued at the suit of a husband, there cannot regularly be a declaration at the suit of husband and wife, (*Reeks & ux. v. Robins, Barnes*, 887.) But a misnomer of a plaintiff cannot be pleaded in abatement (1 Arch. Pr. K. B. 3rd edit. 443.)

8th. It has been decided, that the prescribed form of a Writ of Summons, repeating the letters A. B. in that part of the writ impliedly requires the repetition of the christian and surname of the plaintiff, who, in default of the defendant entering his appearance, will enter an appearance for him, and that the blank in the printed form must be filled up accordingly; and where the name was omitted in that part of the writ,

and the word *plaintiff* substituted, PARKE, J. held the omission fatal (*Smith v. Crump*, 1 Dowl. 519.)

9th. The 2 W. 4. c. 39. s. 12, expressly requires that all the writs issued by authority of that Act shall be tested by the C. J. or C. B. out of which such writ is issued; or in the case of a vacancy in those offices, then in the name of the senior Puisne Judge, and the non-observance would be an irregularity (Semble, 2 W. 4. c. 39; rule M. T. 3 W. 4. r. 10.)

10th. The 2 W. 4. c. 39. s. 12. also requires that every writ issued by authority of that Act, shall bear date on the day on which the same shall be issued, although in the vacation. And if not dated at all, or if dated on a day different to the very day on which it was actually issued, it would be irregular, (see rule M. T. 3 W. 4. r. 10.) and the omission would not be cured by any *indorsement* on the writ. (Anon. 1 Dowl. 654.)

11th. The 2 W. 4. c. 39. prescribes, that a Memorandum shall be subscribed at the foot of the Writ of Summons, stating that it will be in force only four calendar months. The omission of, or deviation from, the prescribed form might constitute an irregularity under the rule M. T. 3. W. 4. r. 10.

12th. By the 2 W. 4. c. 39. certain Indorsements must be made upon every writ and copy thereof served, and which indorsements are enforced by rule 3 W. 4. r. 10. which declares that any omission shall be deemed an irregularity to be set aside by the Court or a Judge.

The following are the indorsements required by the Act :

"This Writ was issued by E. F. of — Attorney for the said A. B." or "This Writ was issued in person, by A. B., who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and No. of the house of the plaintiff's residence, if any such]"

Indorsement to be made on the Writ after service thereof— Digitized by Google

"This Writ was served by me, X. Y. on _____ on _____ day of _____ 18 .—X. Y."

And in addition to those, it is ordered, by rule 5 of M. T. 3 W. 4. that when an action is strictly for a debt, the amount of the debt and costs claimed shall be indorsed, with a notice, that if the defendant pay the amount within four days, no further proceedings will be had. But this latter indorsement not being required by statute, but only by a rule, the Court will in general permit an amendment, (*Cooper v. Waller*, 3 Dowl. 167; *Urquart v. Dick*, ibid. 17; *Shirley v. Jacobs*, 5 Mo. and Sc. 67; 3 Dowl. 167. S. C.; *Hooper v. Waller*, 1 C. M. & R. 437.) But see *Gale v. Winks*, (5 Dowl. 348; 3 Bing. N. C. 294.; 3 Scott 667); where the Court set aside a Writ of *Distringas*, because the amount claimed by the plaintiff was not indorsed. It is advisable, however, to indorse the correct amount in all cases, for where the plaintiff indorsed a larger sum than was due, by which the defendant was misled, and prevented from settling the action, the Court stayed the proceedings on payment of the real debt, with costs of the writ only; but the application must be made promptly. (*Elliston v. Robinsons*, 2 C. & M. 343; and see *Hale v. Baker*, 2 Dowl. 125.

The rule M. T. 3 W. 4. r. 9. further ordered, that when the attorney actually suing out any writ, shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the writ.

If there be no indorsement of the name and abode of such attorney or attorneys, the Court would set aside the proceedings for irregularity, (*Sheppard v. Shum*, 2 Tyr. 742) as an omission of a matter directed by 2 W. 4. c. 39. s. 12., and contrary to rule 10 M. T. 3 W. 4. And where the name of a person who was not an Attorney of the Court of Exchequers, out of which the writ had been issued, was indorsed, the Court, on

motion for that purpose, stayed proceedings until the name of some other proper attorney should have been substituted; and ordered the attorney whose name was so indorsed, to pay the costs of application. (*Constable v. Johnson*, 1 C. & M. 38; 3 Tyr. 231; 1 Dowl. 598.) But where the indorsement was "Poole and Gamben, Gray's Inn, London," it was held a sufficient description, as well of the attorney issuing the writ, as of his residence. (*Engleheart v. Eyre*, 2 Dowl. 145; and see *King v. Monkhouse*, 4 Tyr. 234; 2 Dowl. 221; 2 C. & M. 314. S. C.; *Jelks v. Fry*, 3 Dowl. 37; and *James v. Swift*, 4 B. & C. 681.) Although there can be but one attorney on the record, and although Gray's Inn is in Middlesex, and not in London, (ibid.); and although the christian name of both the attorneys was omitted, (ibid.) and a description of the attorney's place of abode, as of "Ely Place," was held sufficient, (*Engleheart v. Edwards*, 2 Dowl. 145.) where the description is as good as can be given under the circumstances of the case it is sufficient (*King v. Monkhouse*, 2 C. & M. 314; 4 Tyr. 234. S. C.)

The word *of* is not synonymous with *resides*, and therefore where a writ was indorsed "This writ was issued by Chas. Lewis, of No. 6, Barnard Street, Brunswick Square," it was held irregular. (*Lewis v. Davison*, 3 Dowl. 272, 273.)

III. Now, with respect to the particulars necessary to be inserted in, and indorsed on, the Writ of Summons, No. 6, in the Schedule to the 2 W. 4. c. 39., and which writ is to be issued when the defendant is a M. P. and a trader, and it is intended to proceed against him according to the Bankrupt Act, 6 G. 4. c. 16. s. 9 & 10.

1st. 2d. 3d. This writ, like the one just described, commences with the name and title of the Queen for the time being, and is also addressed to the defendant by his full christian and surname, and place of abode, in the same manner as before mentioned;

the reader is therefore referred to the former part of my answer for any explanation he may require respecting these points.

4th. But this writ, unlike the former one, requires the degree of the defendant to be inserted, the form of which is thus prescribed in the Act—" To C. D. of C.—, Esquire, having privilege of Parliament;" and should these words be omitted, the writ may be rendered irregular, as an omission under rule 10 M. T. 3 W. 4.

5th. 6th. 7th. The reader is referred to what has been before stated, as to the name of the Court in which the action is brought—the cause of action—and the christian and surname of the several plaintiffs.

8th. On reference to the form of the writ given in the Schedule to the Act, it will be seen that the amount of the debt for which the writ is issued is required to be inserted in the body of the writ, and the defendant is informed that unless he pay, secure, or compound for the debt sought to be recovered, or enter into such bond as by the Bankrupt Act is provided, and cause an appearance to be entered for him within one calendar month from the service of the writ, he will be deemed to have committed an act of bankruptcy from the time of such service.

9th. 10th. 11th. This writ is to be tested by the C. J. or C. B. or *Puisne* Judge, and to bear date and have the same Memorandum subscribed at the foot thereof, as the writ I have before described, and it will therefore be unnecessary to add any thing further relating to these requisites than merely to refer the reader to what has been before stated.

(To be continued.)

Imperial Parliament.

HOUSE OF LORDS.—June 18.

LEGAL BUSINESS.

COURTS OF CHANCERY AND COMMON PLEAS.

The *LORD CHANCELLOR* laid on the table two Bills— one for the better regulation of proceed-

ings in the Court of Common Pleas, the other relating to the Court of Chancery. Read a first time, and ordered to be read a second time on Friday.

HOUSE OF COMMONS.—June 13.

LEGAL BUSINESS.

ACT 1 & 2 VICT. c. 110. FOR ABOLISHING ARREST FOR DEBT ON MESNE PROCESS.

The House went into Committee on this Bill.

Mr. SHEPPARD moved that it be an instruction to the Committee to introduce the following amendment:—" And be it further enacted, that the judgment required by the aforesaid Act, previous to a debtor's discharge, subjecting any property that may otherwise accrue to the debtor, at any period (exclusive of all assets, prospects, and claims set forth in his schedule), shall cease to be of effect beyond the term of three years from the date of the discharge of the debtor."

The ATTORNEY-GENERAL felt it his duty reluctantly to oppose the honourable member for Frome. It must be remembered that this was not a general Bill to revise the law of Imprisonment for Debt; but merely a bill brought in for the specific purpose of doing away with the great grievance to newspaper proprietors, which compelled them to insert advertisements relating to insolvent debtors at 3*s.* each, without reference to the length to which those advertisements might extend.

Mr. SHEPPARD withdrew his motion.

Mr. BAINES moved as an instruction to the Committee the introduction of the following clauses:—

" And whereas it is expedient that persons residing at a distance greater than ten miles from the Court House in Portugal Street, who may be willing to enter into recognizances of sureties for the due appearance of insolvent debtors before the Court, or before Commissioners on their circuits, or before Justices of the Peace in Berwick-upon-Tweed, should be enabled to enter into such recognizances without the necessity of appearing for such purpose before the Court itself at its usual and ordinary place of sitting: Be it therefore enacted, that the Chief Commissioner, and other the Commissioners of the Court for the Relief of Insolvent Debtors for the time being, shall, and may be, by one or more commission or commissions under the seal of the said Court from time to time, as occasion shall require, empower such and so many fit and proper persons as they shall think necessary in all and every the several towns and counties within England and Wales, and the town of Berwick-upon-Tweed, to take and receive all and every the recognizance or recognizances of sure-

ties into which any persons shall be willing to enter for the due appearance of insolvent debtors, according to such several and respective recognizances, and in such form as the Court, in pursuance of the statute in that behalf, may and shall direct and require.

" Be it further enacted, That in any case of a prisoner whose estate and effects shall have been, or shall hereafter be by order of the Court for Relief of Insolvent Debtors, vested in the provisional or other assignee, and who shall be confined in the gaol of any county, town, or place, other than in London, Southwark, Middlesex, or Surrey, and who shall have filed his schedule in the said Court, according to the statute in that behalf, it shall and may be lawful for any person or persons who may be willing to enter into such recognizances as before mentioned, whose usual and ordinary place of residence shall be distant more than ten miles from the Court House in Portugal Street, London, to appear before a person duly appointed and empowered in manner aforesaid, and there to enter into and acknowledge such recognition of sureties for the due appearance of the insolvent, according to such forms and in such terms and manner as shall or may be prescribed by the said Court, which said recognizances of sureties so taken as aforesaid, shall be transmitted and filed in the said Court, with an affidavit of the due taking of the said recognizances of such sureties by some credible person present at the taking thereof, upon payment of such fees as have been usually received for the taking of recognizances in the said Court, which recognizances so taken, transmitted, and filed, shall be of the like force and effect as if the same were taken before the said Court; for the taking of every such recognition of sureties, the person or persons so empowered shall receive only the sum or fee of two shillings and sixpence, and no more.

" And be it enacted, That the Commissioners of the said Court shall make such rules and orders, regulating the amount, and for the taking of such recognizances, as to them shall seem meet, so as such sureties be not compelled to appear in person in the said Court to justify themselves, but the same may and is hereby directed to be determined before the said Court, or a Commissioner thereof, by affidavit or affidavits, duly taken before the person or persons so empowered as aforesaid, who are hereby empowered and required to take the same.

" And be it enacted, that any Commissioner of the said Court, on his circuits, shall and may take and receive all and every such recognizances of sureties, as any person or persons shall be willing to make and acknowledge before him, which being transmitted, shall, without oath, be filed in manner aforesaid, upon payment of the usual fees.

" And be it enacted, that as soon as such sureties have justified by affidavit, in manner aforesaid, and such recognizances as hereinbefore mentioned shall have been filed, the said Court shall thereupon issue a warrant to the gaoler for the discharge of such insolvent from custody accordingly, and who shall have such and the like privileges, and be subject to such and the like liabilities as the statute in that behalf directs."

The ATTORNEY-GENERAL seconded the motion, the instruction was agreed to, and the report was ordered to be received to-morrow.

June 15.

STOCKDALE v. HANSARD.

Lord HOWICK presented the following Report of the Select Committee on Printed Papers in this case; with the Minutes of Proceedings.

The Select Committee appointed to inquire into the proceedings in the action of Stockdale *v.* Hansard, and who were empowered to report their opinion thereupon from time to time to the House, have proceeded in the consideration of the matter to them referred, and have agreed to the following report:—

" Your committee have applied themselves with all the diligence in their power to the consideration of the important subject referred to them; but the difficulties which attend it, and the delay which necessarily occurred in their obtaining a correct account of the proceedings in the Court of Queen's Bench, have rendered it impossible for them to be as yet prepared to lay a full and complete report before the House,—such a report they trust that they may shortly be enabled to present; but in the mean time it is their duty to submit to the House a practical question, of which the decision cannot be postponed, while it will necessarily have a very material influence upon the future proceedings of the House in this matter.

" In their former report your committee have apprised the House that a writ of inquiry had been issued for the assessment of damages in the case of Stockdale *v.* Hansard. They have now to state, that under this writ damages to the amount of £100 have been awarded against Messrs. Hansard, and that in the ordinary course of law execution may be had, and these damages may be levied on Tuesday next.

" Referring to the resolutions of the House of 30th May, 1837, your committee consider it an imperative duty to report this circumstance to the House, in order that the House may have an opportunity of determining what course it may be advisable to pursue, with reference to the contemplated proceeding of the sheriff in execution of the judgment of the Court of Queen's Bench.

" Your committee will proceed to submit to the House the different courses which have occur-

red to them, as courses one or other of which it might be competent for the House to adopt, and will then state which of them has appeared to the majority of your committee least liable to objection.

" 1. A writ of error might be sued out, and the decision of the Court of Queen's Bench might thus be brought under the review, in the first instance, of the Exchequer Chamber, and ultimately of the House of Lords.

" 2. Mr. Stockdale might be suffered to receive the damages awarded, but a bill might at the same time be brought in, for the purpose of declaring, for the future, the right of the House to publish its proceedings.

" 3. Instead of attempting to pass a declaratory act, a Bill might be brought in, enabling both Houses of Parliament to publish such papers as they might think necessary.

" 4. The House may avail itself of the constitutional powers it possesses to prevent the execution of the judgment obtained against Messrs. Hansard. If this course should be followed, the sheriff and his subordinate officers would be prohibited by the House from levying the damages which have been awarded, and any failure on their part to yield obedience to this prohibition would be treated as a contempt, and dealt with as such in the ordinary manner.

" 5. The House might allow the damages awarded in this case to be paid, but might at the same time declare that it would permit no further actions of the same kind to be brought, and that it would immediately commit for contempt any parties by whom such actions should be commenced or promoted.

" These are the only modes of proceeding which have been suggested to your committee, and which appear to them to be brought under the consideration of the House; and they will now endeavour to state shortly the opinion which they had formed on these different courses.

" 1. With respect to the first, the proceeding by writ of error, your committee cannot but apprehend that its adoption might be construed to involve a new and exceedingly dangerous recognition of the principle, that the privileges of the House of Commons are subject to the determination of the courts of law, and ultimately of the House of Lords. They also conceive that as the result of an appeal must be doubtful, while its failure might greatly increase the difficulty of a subsequent assertion by the House of its right of publishing its proceedings, they would not be justified in recommending to the House to take a step which would expose to such serious hazard its future possession of a power which they believe to be absolutely indispensable for the due discharge of its duties.

" 2. The second course which has been sug-

gested is open to the same objections, with this addition, that the House of Lords might object to pass a declaratory act, for the purpose of overruling a unanimous decision of the Court of Queen's Bench, which had not been appealed from in the ordinary manner, and which had been allowed to be carried into effect.

" 3. The passing of an act to enable the House for the future to publish its proceedings without having them questioned in a court of law, would, in the opinion of your committee, be a virtual abandonment of the right which they have no doubt now belongs to this, in common with the other House of Parliament, and which ought not, as they conceive, to be surrendered.

" 4. Should these objections to the modes of proceeding above described appear to be well founded, the next course to be considered is that of resisting the execution of the judgment obtained against Messrs. Hansard, by committing (if necessary) for contempt, the ministerial officers of the court by which this judgment has been pronounced. Your committee are not insensible to the many difficulties which might probably arise in thus adopting measures of an extreme kind, to which for many years the House has not been compelled to resort; but at the same time they have to remark, that it is chiefly by using this power of commitment for contempt against the magisterial officers by whose agency other authorities of the state have invaded the rights claimed by this House, that some of those which are now its most undoubted privileges, have in former days been asserted with success; and they are, upon the whole, of opinion, that this would be the course most consistent with ancient parliamentary usage, and with the dignity of the House.

" It is, however, the duty of your committee to state that although a majority of their number have concurred in this opinion, they are well aware that the course recommended is one not likely to be successful, unless it should meet with very general concurrence and support; and they must not therefore conceal the fact, that some even of those members of the committee who are most deeply persuaded of the necessity of maintaining the valuable privilege of the House, which has been disputed, are yet of opinion that in the present instance it is too late to do so in the manner which has just been recommended. These members of your committee conceive that the House, by directing the Attorney-General to appear in the action and to defend Messrs. Hansard, has placed itself, so far as regards this particular case, in a situation in which it will be better to abide by the result of the trial which has been permitted to take place, and to allow the damages to be paid, determining at the same time that any future proceedings of the same nature should be

arrested in their earliest stage, by committing, for a contempt of the House, not only the parties by whom similar actions may be brought, but the agents and counsel they may employ.

" Having anxiously considered this important matter, your Committee have come to the conclusion, that if the House should be resolved to trust ultimately to the exercise of its own powers for the assertion of the privilege it claims, the objections urged to resisting the execution of the judgment of the Court in the present action are not of such force that they ought to prevail against those which in that case exist to any further concession; and that they are of opinion, that upon a comparison of the difficulties by which either line of conduct must be attended, the advantage will be found to be on the side of not deferring to a later period the stand which must at last be made, unless the right of the House is to be surrendered. In giving this as the opinion of the majority of their number, your Committee must at the same time state, that they feel it to be a very nice and difficult question which line of conduct should, under all the circumstances of the case, be preferred; and they therefore submit it with all deference to the determination of the House.

" In conclusion, your Committee beg leave to express their regret that the haste with which this Report has been unavoidably prepared, has compelled them to present to the House what they are sensible is a very imperfect view of the important subject of their inquiry; but they trust that the necessity under which they were placed of bringing the course now to be pursued under the immediate consideration of the House, will be deemed a sufficient apology for their not having been as yet enabled to enter upon a fuller and more comprehensive examination of the whole matter referred to them."

June 17.

On the order of the day being read, Lord JOHN RUSSELL proposed two Resolutions for the adoption of the House.

1. "That it is the opinion of this House that under the special circumstances of the case, it is not expedient to adopt any proceedings for the purpose of staying the execution of the judgment." Amendment proposed to leave out from the word "That," to the end of the question, in order to add the words "an acquiescence in the judgment pronounced in the case of Stockdale v. Hansard, will create, on the part of the House, great impediment in the future necessary exercise of the parliamentary authority in vindication of its privilege, and therefore it is necessary that the House shall forthwith declare that the prosecution of the said action, and the attempt to

levy any damages upon the defendant for the publication by him, in pursuance of its orders, directly impedes the effectual exercise of their parliamentary functions, and is a high contempt of the privileges of the House; and that the House will visit with its severe displeasure, all officers, ministers, and others, who shall act or aid in any manner in enforcing the judgment in such action, or otherwise troubling or molesting the said defendant for such publication; and that a copy of this resolution be served upon the Sheriff of London and Middlesex," instead thereof (Mr. Warburton)— Question put, "That the words proposed to be left out stand part of the question."

The House divided—ayes 184, noes 168.

2. "That this House, considering the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, an essential incident to its constitutional functions, will enter into the consideration of such measures as it may be advisable to take in consequence of the recent judgment of the Court of Queen's Bench, for the maintenance and protection of that power, as soon as the Committee shall have made that full and complete report on this important matter which they have declared it to be their intention to make in the commencement of their second report."

The House divided—ayes 183, noes 36.

His Lordship enforced the propriety of the House acceding to these resolutions on various grounds, the chief of which were, that they did not preclude the House from adopting, in any similar case, such measures as they might think fit for the maintenance of their privileges,—and that it would be considered an act of injustice if the House, after having directed the Attorney-General to appear and plead to the action, were to obstruct the Sheriff in the execution of the writ. The House, having remitted the question to the Judges, were bound to abide by the result. At the same time, his Lordship dissented from the judgment pronounced by the Court of Queen's Bench, and endeavoured to show that it was an erroneous one.

Law Reports.

COURT OF CHANCERY—May 22.

LLOYD v. WAIT.

APPEAL from the VICE-CHANCELLOR.
PRACTICE.—*Power of the Masters in Chancery to dispense with or relax the General Orders of the Court.*

The Bill in this cause was filed in June 1838. Both defendants put in their answers, one in De-

ember last, the other in January. No exceptions were taken, and the time for the answers being deemed sufficient under the New General Orders in Chancery had expired. The plaintiff being advised to amend his bill, (after the time for leave to amend as of course had expired,) on the 12th of April applied to the Master for leave to amend, who refused the application on the 29th of April. On the 22d of April, the defendants gave notice of motion for the 28th of April to dismiss the bill for want of prosecution. The plaintiff gave notice of appeal from the Master before the Vice-Chancellor. The two motions were heard together before the Vice-Chancellor on the 8th of May, and his Honor "ordered that the plaintiff be at liberty to amend his bill without costs within three weeks, undertaking to amend the defendants' office copies, and not to require further answers;" but he declined to make any order on the motion to dismiss the bill, except that the costs of that application be costs in the cause.

Mr. Roupell, for the defendant John Wait, moved (as an appeal from the Vice-Chancellor) that the bill be dismissed for want of prosecution with costs, and that his Honor's order allowing leave to amend be discharged.

Mr. Wakefield took a preliminary objection—first, as to the Vice-Chancellor's second order, that the Lord Chancellor had no jurisdiction to reverse or discharge it; for by the act 3 & 4 W. 4, c. 94, s. 13, it was enacted that the Masters shall hear and determine all applications for time to plead, answer, or demur, and for leave to amend bills, &c.; and that it shall be lawful for either party to appeal by motion from the order made on such application to the Lord Chancellor, Master of the Rolls, or Vice-Chancellor, and that the order made on such application be final and conclusive." Secondly, he objected that there being two separate orders made on two separate motions there should be two separate notices of appeal wherever the defendant included both in one notice.

Mr. Roupell contended, the motion to dismiss the bill, of which notice had been first given, ought to have been first heard, in which event it should have been allowed, and that under the New Orders in Chancery the time to apply for leave to amend had expired; but the Vice-Chancellor was of opinion that the Master had a discretion to deal with these orders.

The LORD CHANCELLOR.—I have decided quite the contrary in the case of *Smith v. Webster*. (1)

Mr. Roupell.—The Vice-Chancellor held in several cases that the Master had a power to dispense with the strictness of the orders. The plaintiff's motion was argued before the Vice-

Chancellor as an appeal from the Master, but the defendant's original motion had priority.

Mr. Wakefield.—The Vice-Chancellor held in *Milbanke v. Stevens*, (2) that the Master had jurisdiction under the 13th sec. of the act 3 & 4 W. 4, c. 94, to make an order to amend after the time limited by the 13th general order of 1831. At all events, the order of the Vice-Chancellor, whether right or wrong, upon an appeal from the Master, was "final and conclusive," under the act of parliament.

The LORD CHANCELLOR, said the defendant was quite regular in his application to dismiss the bill, the time required by the 16th order, after the answer was deemed sufficient, having expired. The Master had no jurisdiction to give leave to amend contrary to the general orders. And when the defendant gave notice of his motion to dismiss, there was no proceeding then before the Court to prevent him from so applying. It would therefore be going too far to deprive the defendant of what he was justly entitled to at the time of his notice of motion. But as the plaintiff had obtained his order to amend, let that order stand upon his giving an undertaking to speed the cause.

(1) *3 Mylne and Cr.* 244. In that case the Lord Chancellor said—The Master has *no power* over the General Orders of the Court. The object of those Orders is to regulate the proceedings in the Master's Offices, but they would be useless for that purpose if it were supposed that the Masters had the power of dispensing with them. If the delay in obtaining the Master's report has arisen from the defendant's being unprepared to proceed, I will not allow him afterwards to get rid of the report upon the ground of the delay which he has himself occasioned; and I will set the parties right; but it must not be in such a way as shall give the Masters *any power* to dispense with the orders. I think the proper course will be to make no order on this motion (which was on appeal from the Master of the Rolls who had refused that the Report should be taken off the file for irregularity—the object of the motion), but I wish it to be understood that I do not refuse this application upon the ground that the Master had the power of doing what he has done (who had

granted time after the time for making the Report had expired by the terms of the General Orders), but I refuse it upon the ground that the Court will not allow a party to take advantage of a delay which has been allowed for the sake of his own convenience, and his Lordship gave the defendant three weeks time to answer the exceptions.—ED.

(2) 8 Sim. 160. The doctrine in this case, as to the Master's power of dispensing with the orders, seems at variance with that laid down in the case.—ED.

ROLLS COURT.—June 17.

DRAKE v. MARTYN.

Liabilities of Executors.

In this case, Mr. Drake, the testator, by his will, made in 1823, appointed the Rev. Thomas Martyn, together with the testator's wife, to direct the execution of his will, and he also nominated Nicholas Pallmer, Esq., and Sir George Ricketts, executors in trust of the property for the use of his three grandchildren. The directing executors allowed certain sums to remain in the hands of bankers, who failed and became bankrupt in 1825, and the money was lost. A sum of £5,557 stock bequeathed for the benefit of the grandchildren was transferred to the joint names of the trustees. Sir George Ricketts shortly afterwards left the country, and the executors (the parties appointed to direct the execution of the will) gave a power of attorney to Mr. Pallmer alone to receive the dividends on the stock, under which he received £416. He afterwards became insolvent, and the money was lost.

The parties beneficially interested filed the present bill against Mr. Martyn and Mrs. Drake, to account for the money so lost.

Lord LANGDALE.—If it had been necessary for the executors, for the purposes of the estate, to have had a cash balance, and they had kept it in a banker's hands in good credit, there would have been some excuse, but he understood the facts were not so, for that the debts and legacies had all been paid. Mr. Martyn had done what he considered was right, and what he thought would have been done by the testator; but, as he was acting in the character of executor, he was as such responsible, and the estate of Mr. Martyn, as well as that of Mrs. Drake, was liable to make good the loss. The two persons who had been intrusted by the testator with the execution of his will, instead of giving the power

over the stock to both Pallmer and Ricketts, as directed by the will, unfortunately gave the power to one who, instead of carrying the trust into effect, wholly defeated it. The executors, and not Sir George Ricketts, were consequently liable for the money. It was a distressing case, but might have been prevented if the parties had come to the Court sooner.

BAIL COURT.—May 4.

EXPARTE DUKES.

ATTORNEYS.—*Effect of a mistake being made in the Notice for Admission as an Attorney, by inserting a wrong Christian Name.*

This was an application to the Court by Henry Clifton Dukes, who had been articled in the country, and had sent instructions to his London Agent to give the usual notice of his intention to apply for admission as an Attorney.

The London Agent did give the required notice, but instead of giving it in the right name of the applicant, gave it in the name of Henry Charles Dukes, instead of Henry Clifton Dukes; and he now applied for leave to have the notice amended, and that it should take effect as if no such mistake had been made, from the time of its service.

WILLIAMS, J.—You may amend.

COURT OF EXCHEQUER.—June 13.

Sittings at Nisi Prius.

TUBBLEWHITE v. M' MORRIS.

JOINT STOCK COMPANIES.—*Liability of Contractors for Shares to loss occasioned by their refusal to accept and pay for them.*

It appeared from the evidence that on the 12th of September, 1838, the defendant, through the instrumentality of a share-broker named Townley, contracted that fifty shares of the London and Brighton Railway Company should be transferred and delivered to, and paid for by him, before the 1st of March, 1839, and that if the shares were not paid for by that day, they should be sold at the defendant's risk. The plaintiff did not complete his purchase within the stipulated period, and the shares by that time were at a discount of £5. 2s. 6d. The loss on the shares, which were sold at par, was £255. and this sum the plaintiff now sought to recover.

The defendant endeavoured to show that the plaintiff was not the proprietor of the shares when he offered to transfer them, that no legal transfer could have been made by the plaintiff,

and that the particular shares in question were, in fact, the property of a Mr. Pritchard, and stood in his name in the company's books. It appeared that at the period when the offer was made, two calls of £3. each were due on the shares, and that, according to the practice in the office of the company, the shares could not have been transferred from Mr. Pritchard's name until the calls were satisfied.

The jury finally returned a verdict for the plaintiff. Damages £255.

June 15.

PUGH v. KERR.

SHERIFF'S LAW.—*What shall be considered negligence so as to render the Sheriff liable for the debt.*

This was an action against the sheriff of Merionethshire for a false return.

It appeared that a writ of *capias ad satisfaciendum* was placed in the sheriff's hands on the 14th of June, to arrest a person named Roberts, against whom the plaintiff had a claim to the amount of £65. The sheriff issued his warrant to one of his bailiffs, and on one occasion the bailiff not only got scent, but got sight of the debtor, and was about to approach in order to arrest him. The debtor also got sight of the bailiff, and being on horseback, he contrived to ride away, on which the officers returned to their homes, and relinquished the pursuit. It was stated that Roberts, between that period and the 3d of September, was frequently seen attending at markets and other public places, and might have been arrested if ordinary diligence had been pursued, but that the sheriff's officers had neglected to take the necessary steps for his apprehension.

GURNEY, B. left it to the jury to say whether there had been any negligence on the part of the sheriff.

Verdict for the plaintiff—damages £65.

SPECIAL JURY.

CROWFORT v. SIR FREDERICK FOWKE, BART.

Issue from the Court of Chancery.

Contracts—Nuisance—Whether a house of ill fame is a sufficient nuisance to relieve a party from an Agreement for taking adjoining premises, of which he was ignorant at the time of making the Contract.

It appeared that the defendant had treated with the agent of the plaintiff for a house, No. 16, in York-place, Baker-street, at the corner of David-street, which runs out of York-place;

when, after looking over the house, the defendant asked the Agent "if there was any objection to the house,—whether there was anything objectionable about it?" to which he received for reply "none whatever;" and soon after a written agreement was entered into, by which the defendant bound himself to take the house furnished from that time, November 14, 1838, for two years, at a rent of 375 guineas. Not long after the execution of this paper, however, the defendant heard, to his surprise, that the next house in David street, and adjoining that in question, was a house of ill fame, and of such an open and undisguised character, as to render it quite impossible for him to think of taking his lady and family, consisting of young persons of both sexes, into such a vicinity. In consequence of this discovery, the defendant refused to fulfil his contract, and the plaintiff having filed a bill against him in Chancery, the present issue was ordered to this court, to ascertain whether there was such a nuisance, and whether, in the language of the plea, the defendant had been induced to enter into the agreement by the fraud, concealment, and misrepresentation of the plaintiff in that particular.

Mr. *Thesiger* addressed the Jury, observing that this was a mixed question of fact and of law—of fact, inasmuch as the Jury would be called on to say whether this house in David-street was of the character spoken to by the defendant's witnesses, which lie, for one, would admit to some extent; and of law, for it would then be the province of the learned Judge to say whether, under the circumstances, the defendant was to be released from the obligation of the agreement. He commented on the meaning properly to be attached to the term "about the house," which he contended ought to be applied solely to the internal arrangement of it, and not the vicinity. The Agent was not bound to tell all that might or might not be objectionable about the house in the latter sense, for it was the duty of the defendant to satisfy himself upon that subject before he entered into such an agreement.

Lord *ABINGER* left it to the Jury to say what could have been the meaning of the defendant's question, and the Agent's reply, for by that must they be guided. The defendant had seen the house, and there would seem to have been no reason for asking such a question; the only suggestion he could supply, and it was simply as such, was that the defendant was surprised to hear so low a rent asked for the house in that vicinity, and must have imagined that there was some objection to it, and so asked the Agent, from whom (when he had received the assurance, that there was none,) he took the house; that if the plaintiff knew there was a

nuisance connected with the house, and concealed it from the defendant, he must be held to have imposed upon the latter.

The Jury found a verdict for the defendant.

COURT OF THE SHERIFF OF MIDDLESEX.

June 11.

Before Mr. Under-Sheriff BURCHELL.

STOCKDALE v. HANSARD.

LIBEL.

Mr. Carrington stated that this was a writ of inquiry to assess damages in a cause, in which John Joseph Stockdale was plaintiff, and Luke Hansard and others were defendants. The declaration alleged the publication of a libel by the defendants against the plaintiff, who had been for years a publisher, and who had published a certain scientific work in 1827, treating of anatomical subjects, and illustrated by anatomical plates.— The defendants, in a report of the Inspectors of Prisons, stated the work to be of a most disgusting nature, and obscene in the extreme.— There was no plea asserting that any portion of the libel was true. In the state of the record the libel must therefore be taken to be entirely false. But the defendants pleaded that the Inspectors of Prisons, Messrs. Crawford and Whitworth Russell, made a report to the House of Commons, who had passed a resolution that all their reports and papers be printed and published for general circulation, that the defendants were ordered to publish for sale the report in question, and that the House of Commons had resolved that the power of publishing such of its papers as they deemed necessary was conducive to the public interest, and was an essential incident to the constitution of the Commons House of Parliament. The plaintiff demurred to this plea that it was not good in point of law, because the established laws of this realm could not be superseded, suspended, or altered, by any resolution of the House of Commons, which could not create a new privilege inconsistent with the known laws of the land. The question had been solemnly argued before the Court of Queen's Bench; who decided that the plea was bad, and that the defendants had no justification for the publication. The present writ was issued to the Under Sheriff and the jury, to inquire and assess the damages received by the plaintiff, by reason of this unjustifiable publication.

Mr. Curwood said the jury were now called upon to discharge their duty in one of the most important cases which had occurred for the last 150 years. The question of law which had been decided was no less than this:—whether the laws

and liberties of this country could be subject to the resolution of the House of Commons. In stating this, it was not with a view to inflame the minds of the jury; but on the contrary, to warn them, notwithstanding all that had taken place, that they were legally to confine themselves to the awarding such damages as they thought the plaintiff had sustained. What had the House of Commons assumed? He wished not to speak disrespectfully of that House; they had acted on the report of a committee of learned lawyers, but the result had proved that they had rashly adopted their opinion of the question. Never had there been a case more solemnly argued in the Queen's Bench. The Queen's Attorney-General had consumed three days in endeavouring to convince the Court that the power which the House of Commons had claimed was legal—the jury could do no better than read the luminous judgment of Lord Denman and the other judges, who had held that the law must triumph over one branch of the Legislature. Nothing could so deeply interest Englishmen; and this judgment stood unequalled, and unrivalled.

The *Under-Sheriff* said this had nothing to do with the question which the jury had to decide. It was quite true that the present action had given rise to the trial of a very important public question, but he concurred with the learned counsel, who, with so much moderation and temper, had opened his case; and if the learned counsel had not stated it, it would have been his (*the Under-Sheriff's*) duty to tell the jury that they had nothing to do with that topic. They were simply called upon, in virtue of the writ from the Queen's Bench, to assess the damages which in their opinion the plaintiff had sustained by the libel complained of. The nominal defendants, the printers, as in most cases, though the law supposed malice, could scarcely be imagined to have been actuated by any ill feeling towards the plaintiff; but the plaintiff was entitled to recover such damages against them as, in the judgment of the jury, he had suffered. The declaration alleged no special damage, which it might have done, by affirming that certain customers had, since the libel, ceased to deal with him. The jury, therefore, had to estimate, looking to the nature of his business as a bookseller and publisher, what he had probably suffered, and was now likely to suffer, in consequence of the libel. He (*the Under-Sheriff*) felt bound to tell the jury that they had nothing to do with any indemnification of the defendants by the House of Commons, even had it been proved; for the law made the defendants responsible, and upon the verdict of the jury execution might be taken out against them.

The jury returned a verdict for £100 damages.

**NEW ORDERS OF THE COURT OF
CHANCERY.**

Issued under the Stat. 1 & 2 Victoria, c. 110.

(Continued from p. 107.)

COURT OF CHANCERY, May 10, 1899.

FORMS OF WRITS.

No. V.

*Writ of Fieri Facias, on a Decree or Order
of the Court of Chancery for Payment of
Costs.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of Greeting.

We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made the sum of £ , for certain costs, which were lately before us in our High Court of Chancery, in a certain cause, or certain causes (*as the case may be*) wherein A. B. is plaintiff, and C. D. is defendant, or in a certain matter there depending, intituled, "In the matter of E. F." (*as the case may be*), by a decree or order, (*as the case may be*) of our said Court, bearing date the day of , decreed or ordered (*as the case may be*) to be paid by the said C. D. to A. B. and which costs have been taxed and allowed by G. H. esquire, one of the Masters of our said Court at the said sum £ , as appears by the certificate of the said Master, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick, you further cause to be made interest on the said sum of £ at the rate of £4. per centum per annum, from the day of , (a) and that you have that money and interest before us, in our said Court, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree or order (*as the case may be*). And that you do all such things as by the statute passed in the second year of our reign, you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness ourself at Westminster the day
of in the year of our reign.

No. VI

*Writ of Eject^t, or a Decree or Order of
the Court of Chancery, for Payment of
Money, or Money and Interest.*

Victoria, by the Grace of God of the United
Kingdom of Great Britain and Ireland Queen,
Defender of the Faith.

To the Sheriff of greeting.

Whereas, lately in our High Court of Chancery, in a certain cause or certain causes (*as the case may be*) there depending, wherein A.B. and others are plaintiffs, and C.D. and others are defendants, or in a certain matter there depending, intituled, "In the matter of E.F." (*as the case may be*) by a decree or order (*as the case may be*) of our said Court, made in the said cause or matter (*as the case may be*) and bearing date the day of , it was decreed and ordered, or ordered (*as the case may be*) that the said C.D. should pay unto A.B. the sum of £ (if interest be given by the order, say "together with interest thereon, after the rate of £4. per centum per annum, from the day of ".) And afterwards, the said A.B. came into our said Court of Chancery, and according to the form of the statute in such case made and provided, chose to be delivered to him, her, or them (*as the case may be*) all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments, of copyhold or customary tenure in your bailiwick, as the said C.D., or any one in trust for him, was seized or possessed of on the day of in the year of our Lord (a) or at any time afterwards, or over which the said C.D. on the said day of (a) or at any time afterwards had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ , together with interest thereon, at the rate of £4. per centum per annum, from the said day of (b) shall have been levied. Therefore, we command you that, without delay you cause to be delivered to the said A.B. by a reasonable price and extent, all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C.D.,

(a) The date of the Master's certificate, or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

or any person in trust for him, was seized or possessed of on the said day of (a) or at any time afterwards, or over which the said C. D. on the said day of (a) or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit. To hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Chancery aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness ourself at Westminster, &c.

- (a) The day on which the decree or order was made.
 (b) If the order be for money and interest, the day mentioned in the order. If for money only, the day on which the decree or order was made, or in case it was made prior to the 1st day of October, 1838, say, "from the 1st day of October, 1838."

No. VII.

Writ of Elegit, on a Decree or Order of the Court of Chancery for Payment of Costs.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of greeting.

Whereas, lately in our High Court of Chancery, in a certain cause or certain causes (*as the case may be*), there depending, wherein A. B. and others are plaintiffs, and C. D. and others are defendants, or in a certain matter there depending, intituled, "In the matter of E. F." (*as the case may be*), by a decree or order (*as the case may be*) of our said Court, made in the said cause or matter (*as the case may be*), and bearing date the day of , it was decreed and ordered, or ordered (*as the case may be*), that C. D. should pay unto A. B. certain costs as in the said decree, or order (*as the case may be*), mentioned, and which costs have been taxed and allowed by G. H. esquire, one of the Masters of our said Court, at the sum of £ , as appears by the certificate of the said Master, dated the day of . And afterwards the said A. B. came into our said Court of Chancery, and according to the form of the Statute in such case made and pro-

vided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold, or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seized or possessed of, on the day of , in the year of our Lord , (a) or at any time afterwards, or over which the said C. D. on the said day of (a), or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ together with interest thereon at the rate of £4. per centum per annum, from the said day of

(b) shall have been levied. Therefore we command you, that without delay, you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold, or customary tenure, in your bailiwick, as the said C. D. or any person or persons in trust for him, was or were seized or possessed of, on the said day of , (c) or at any time afterwards, or over which the said C. D. on the said day of , (c) or at any time afterwards, had any disposing power, which he might, without the assent of any other person or persons, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ , together with interest as aforesaid shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Chancery aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness ourself at Westminster, &c.

- (a) The date of the Master's Certificate of taxation.
 (b) The date of the Master's Certificate of taxation, or if that were prior to the 1st day of October, 1838, say, "from the 1st day of October, 1838."
 (c) The date of the Master's Certificate of taxation.

Sittings of the Courts.*After Trinity Term, 1839.***COURT OF CHANCERY.**

AT LINCOLN'S INN.

Saturday, June 22 { First Seal—Appeal Motions and Appeals.

Monday .. 24

Tuesday .. 25

Wednesday.. 26

Thursday .. 27

Friday .. 28

Saturday .. 29 } Appeals and Causes.

Monday, July 1

Tuesday .. 2

Wednesday.. 3

Thursday .. 4

Friday .. 5

Saturday .. 6 } The Second Seal—Appeal Motions and Ditto.

Monday .. 8

Tuesday .. 9

Wednesday.. 10

Thursday .. 11

Friday .. 12

Saturday .. 13 } Appeals and Causes.

Monday .. 15

Tuesday .. 16

Wednesday.. 17

Thursday .. 18

Friday .. 19

Saturday .. 20 } The Third Seal—Appeal Motions and Ditto.

Monday .. 22

Tuesday .. 23

Wednesday.. 24

Thursday .. 25

Friday .. 26 } Appeals and Causes.

Saturday .. 27

Monday .. 29

Tuesday .. 30

Wednesday.. 31

Thursday, Aug. 1 } The Fourth Seal—Appeal Motions and Ditto.

Friday .. 2 Petitions.

Such days as his Lordship is occupied in the House of Lords excepted.

The Court will not sit after Saturday the 10th August.

VICE CHANCELLOR'S COURT.*After Trinity Term, 1839.*

AT LINCOLN'S INN.

Saturday, June 22 The First Seal—Motions.

Monday ..	24
Tuesday ..	25
Wednesday..	26
Thursday ..	27
Friday ..	28
Saturday ..	29

Pleas, Demurrs, Exceptions, Causes, and Further Directions.

Monday, July 1	1
Tuesday ..	2
Wednesday..	3
Thursday ..	4
Friday ..	5

The Second Seal—Motions.

Monday ..	8
Tuesday ..	9
Wednesday..	10
Thursday ..	11
Friday ..	12

Pleas, Demurrs, Exceptions, Causes, and Further Directions.

Monday ..	15
Tuesday ..	16
Wednesday..	17
Thursday ..	18
Friday ..	19

The Third Seal—Motions.

Monday ..	22
Tuesday ..	23
Wednesday..	24
Thursday ..	25
Friday ..	26

Pleas, Demurrs, Exceptions, Causes, and Further Directions.

Monday ..	29
Tuesday ..	30
Wednesday..	31

Thursday, Aug. 1 The Fourth Seal—Motions.
Friday .. 2 Petitions.

The Court will not sit after Saturday, 10th August.

Short Causes and Unopposed Petitions on Friday the 14th June, and every Friday during the Sittings, previous to the General Paper of Causes, &c.

N.B.—The Vice Chancellor will hear Motions at Lincoln's Inn Hall after the last day of Term until the First Seal.

COURT OF EXCHEQUER.

Sittings in Equity in Serjeant's Inn Hall, after Trinity Term, 1839.

Before Lord ABINGER.

Thursday, June 13	{ Pleas, Demurrs, and Exceptions, and Further Directions.
Friday .. 14	Petitions and Motions.
Saturday .. 15	Further Directions and Causes.

Business of the Courts.

JURORS' MEMORIAL.

June 27.—The jurors called the attention of the Court to a memorial which they had presented on the subject of their attendance. They stated that forty-eight gentlemen were summoned for each of the Courts, for each sitting of the Court. The consequence was, that these forty-eight persons had to attend, day after day, for ten or twelve days successively, to the manifest injury of their business. Some of the parties who had their places of business in the city, and resided elsewhere, were liable to be summoned once in the year to Guildhall, and again in the same year to Westminster-hall, and to those who had not partners or other competent persons to attend to their business in their absence, the inconvenience and injury were very great. What the jurors suggested was, that instead of summoning forty-eight persons for the sittings, a new set of jurors, consisting of forty-eight (if necessary), should be summoned every day, and that no juror should be compelled to attend two days successively.

LORD ABINGER informed them that it should have his consideration. He was the more inclined to see whether any arrangement could be made to meet the wishes of jurors, as he thought he perceived an increasing indisposition to make the personal sacrifices which were indispensably necessary in order that justice should be administered according to the laws of this country.

One of the jurors assured his Lordship that he and his fellow-jurors were all satisfied that some personal sacrifice was necessary, and they wished to know if his Lordship thought their object could be attained by the introduction of a short Bill in Parliament.

LORD ABINGER said, if any Bill were introduced on the subject, it should be with the approval of the Government.

The jurors said that they should adopt his Lordship's suggestion by an application to the Home Office, but that they hoped for his Lordship's assistance.

LORD ABINGER repeated the expression of his anxiety to carry into effect the wishes of the jurors by any means in his power.

VICE-CHANCELLOR'S COURT.

Short causes and unopposed petitions.

After the unopposed petitions—Houghton v. Gadchall, petition by order—Swabey v. Swabey, ditto—Reed v. Baillie, further directions—Wilson v. Wilson, ditto—Mortimer v. Fraser, part heard.

ROLLS' COURT

Goodwin v. Chewley—Baddeley v. King—Simmons v. Hicks—Greenwood v. Wakeford—Adams v. Fisher—Smith v. Morris—Walker v. Cunningham—Curtis v. Lakin—Brederman v. Seymour—Wedd v. Reeve—Robley v. Robley—Ansell v. White.

COURT OF QUEEN'S BENCH.

London Special Juries.

Williams v. Panton—Evans v. The same.

London Common Juries.

Myers v. Marns—Yates v. France—Cowell v. Bulley—Evans v. Norris—Webb v. Meade—Harper v. Janson—Crew v. Rowley—Syer v. Baker. The last cause is No. 61 on the list.

COURT OF COMMON PLEAS.

London Common Juries.

Alsager v. Simmonds—Meymott v. Hunt—Pile v. Mills—Robinson v. Harris—Crouch v. Priest—Collins v. Walsh—Tranby v. Bennett—Pinnell v. Roberts—Hughes v. Garner—Cotton v. Partridge—Liley v. Jenkins—Cunliffe v. Park. The last cause is No. 107 on the list.

COURT OF EXCHEQUER.

London Special Juries.

Solarte v. Pirie—Cashmere v. Duncombe—Hodgson v. Pulley.

London Common Juries.

Chilcott v. Jay—Cannon v. Gadderer—Lawrence v. Clark—Abbott v. Hendriks—Slatterie v. Porley—Studwick v. King—Kelly v. Slowman.

The last cause is No. 92 on the list.

EQUITY EXCHEQUER. Petitions & Motions.

NOTICE TO CORRESPONDENTS.

VERAX.—Your query is unintelligible. What sort of mortgage was made by A. and B.? Was it a conveyance of the Fee, subject to redemption? Has the time for redemption expired?

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 29th June, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, JUNE 29, 1839.

[No. 9.

LEX LOCI DOMICILII.

PART I.

IN CASES OF LEGITIMACY.

By what law shall the personal property, situate in England, of a British born subject domiciled in Scotland, or any of the British Colonies, and intestate, be governed?

(Continued from p. 114.)

ILLUSTRATED by Cases in BANKRUPTCY, whether, or not, the personal property abroad, of a Bankrupt in *England*, passes to his Assignees, if there be no positive law, in the foreign country, to the contrary?

THAT personal property must be governed by the laws of that country where the owner is domiciled, was expressed in the clearest terms by Lord KENYON, in *Hunter v. Polts* (*a*). In that case the question raised was, whether or not property in Rhode Island, North America, passed to the assignees of a bankrupt in England, in the same manner as if the owner (the bankrupt) had voluntarily made an assignment of it, and Lord KENYON held that it did so pass, unless there were some positive law of that country to prevent it. His Lordship said, every person having property in a foreign country, may dispose of it in this; though, indeed, if there be a law in that country directing a particular mode of conveyance, that must be adopted.

The Bankrupt Statutes have expressly enacted that the Commissioners may assign all the property of the bankrupt in the most extensive words; and therefore, on the general reason of the thing, if there be no positive decision to the contrary, no doubt could be entertained, but, that by the laws of this country, uncontradicted by the laws of any other country, where personal property may happen to be, the commissioners of a bankrupt may dispose of the personal property of a bankrupt, resident here, though such property be in a foreign country. The decision of *Lord Hardwicke* in *McIntosh v. Ogilvie* (*b*) agrees with this opinion. There the plaintiff was the assignee of a bankrupt; the defendant, a creditor, who before the bankruptcy went into *Scotland*, and made arrests on debts due to the bankrupt from persons there. Upon an affidavit of the defendant having got this money into his hands, a *ne exeat* was granted. And he moved to discharge it, upon a supposition that he had a right to the goods as creditor, by his arrests. The *Lord Chancellor* asked, whether he had sentence before the bankruptcy, and being answered in the negative, his Lordship said, "Then it is like a foreign attachment, by which this Court will not suffer a creditor to gain priority, if no sentence were pronounced before the

(a) 4 Term Rep. 192. (1791.)

(b) H. 21 Geo. 2. Chan. see 4 Term. Rep. 193. n.

upon the English Jurists, to commence his work with what he terms "Notices," wherein he says, "The following brief notices of some of the most interesting books and celebrated authors, whose labours are quoted or referred to in this work may not be uninteresting; and the only Englishmen we find honoured in these notices are Bracton, St. German, Dr. Halifax, Lord Holt, Sir Wm. Jones, and Dr. Wood. For the present we will leave this gentleman and his works, and resume our Essay. We will take him in hand again as he comes in our way."

Foreign Jurists of ancient times have given various opinions upon the Law of Nations, and they all considered the *Lex domicilii* to be adopted under restrictions.

VATTEL says, (a) that immovable property follows the disposition made by the Laws of that State wherein it is situated; but the succession and disposition of moveable property, is regulated, not by the Law of the Country in which it is locally situated, but by that of the owners *patria* or *domicile*, whence he came, and whither he intends to return.

HUBER (b) gives three *axioms* by which it is to be decided, how far the law of one country shall be received in another—the subject he introduces with this observation *Sæpe fit ut negotia in uno loco contracta, usum effectumque in diversi locis imperii habeant aut alibi dijudicanda sint*:—His axioms are—

1st. That the law of every country holds only within the limits of its own jurisdiction.

2nd. That all persons are to be considered as subjects of a state who are resident within it, whether their residence be temporary or not.

3rd. That Governments so far act with confidence to each other, that they will recognize each other's laws, provided they do

not clash or interfere with their own, or injure their own subjects.

Foreign laws, however, and the decisions of Foreign Courts cannot be allowed to prevail in England; indeed, it is in England a well settled doctrine at the present day, that if a Scotchman, domiciled in *England*, dies intestate, his personal property, wherever located, must be distributed according to the Laws of England. LORD HARDWICKE held that personal property follows the person, and is distributable according to the law or custom of the place where the intestate lived; and that no foreigner could deal in our funds, but at the peril of his effects going according to our laws, and not those of his own country (c). And if we extend our survey of the laws from that time to the days of LORD TENTERDEN, we find the same doctrine, that Personal Property has no locality. His Lordship said, it is not correct to say that the law of England gives way to the law of a foreign country, but that it is part of the law of England that Personal Property shall be distributed according to the *jus domicilii*. So, upon the question of marriage; it is a part of the law of *England*, that the law of the country where the marriage is solemnized shall be adopted. It is not against our law that a foreign marriage, however solemnized, should be held good. We adopt the laws of all Christian countries as to marriage, but it by no means follows that we are to adopt all the consequences of such marriages which are recognized in foreign countries; it is sufficient if we admit all such consequences as follow from a lawful marriage solemnized in England. LORD COKE says (d) our common laws are aptly and properly called the Laws of *England*, because they are appropriated to the kingdom of *England* as most apt and fit for the government thereof, and have no dependency

(a) B. 2. c. 7. s. 85.—c. 8. ss. 109, 110.

(b) *De conflictu legum*, b. 1, tit. 3.

(c) *Pipon v. Pipon*, *Amtl. 27.*

(d) *2 Inst.*

upon any foreign law whatsoever; no, not upon the civil or canon law, other than in cases allowed by the law of *England*. In *Scotland*, where the Canon and Roman Laws prevail, a child born there before marriage, of persons domiciled there, who afterwards marry according to the laws there in force, becomes legitimate, and capable of inheriting lands—not so in *England*.

The case of *Sheddon v. Patrick*, originally decided in the Court of Session in *Scotland*, and the judgment, in which was subsequently affirmed by the House of Lords (a) (1808), embraced the following facts—though not relating to *personal* property. W. *Sheddon*, of *New York*, in *America*, entered into a regular marriage, according to the law of *America*, with a woman who had previously borne to him two children, William and Jane, she died a few days afterwards, leaving an estate in *Ayrshire*, not disposed of by will or settlement. Such marriage had not the effect of rendering the children legitimate in *America*. It was held, that the son William could not inherit the *Ayrshire* estate, because his legitimacy or illegitimacy must be determined according to the laws of *America*, where his parents were domiciled, and himself born; and by the laws of that country he was illegitimate. So in the case of the *Strathmore* peerage, where the son of the then late Lord, born in *England* before marriage, of parents domiciled in *England*, and who had subsequently intermarried there, was held not to be entitled to the Scotch title and estates. So that the LEGITIMACY of a child must be tried according to the law of the country in which it was born, according to the condition of the mother of whom he was born, and according to the Status of his father.

The Law of ADULTERINE BASTARDY has undergone two important changes without

the intervention of any Act of the Legislature; and the principle of *certainty* upon which it formerly proceeded, and which the great lawyers of past ages considered it sound wisdom to uphold, no longer exists. Until the year 1717 that principle was so rigidly acted upon, that a child born in wedlock could not be bastardised, unless the parties were separated by a sentence of divorce, by evidence of the husband's impotency, or of his absence from the realm where it was begotten. But as reason and common sense shewed that it might be as impossible, physically, and morally, in many cases, for the husband to have begotten the child, as if he had been beyond the seas, the maxim of the *quatuor maria* fell into desuetude. The next and most important innovation was, to allow the presumption of sexual intercourse to be rebutted by whatever evidence a Court or Jury may consider sufficient to prove that it did not take place, at a time, when, if it occurred, the person whose status is in dispute, might have been the fruit of such intercourse; and which, to judge from recent decisions, is now the law on the subject. (b)

(To be continued.)

PROBLEM X.

VOL. 2.

COVENANTS IN LEASES

NOT TO CARRY ON CERTAIN TRADES.

What Acts amount to a Breach of this Covenant?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 13. VOL. 1.

(Continued from p. 189.)

Problem 13, vol. I., p. 197.—Actions at Law.

“What is the mode of commencing an Action?—shewing what the Writs are to contain, and manner and time of service.

(a) Printed case laid before the House of Lords in the *Strathmore* Peerage case.

(b) *Nicholas*, p. 280.

—The decisions that have been made upon defective Writs, or irregular service."

AS TO THE PROCEEDINGS NECESSARY TO BE ADOPTED IN CASES WHERE THE DEFENDANT CANNOT BE PERSONALLY SERVED WITH THE WRIT OF SUMMONS.

Having before stated the manner in which service of the Writ of Summons must be made, in cases where the defendant can be personally met with, I will now briefly state the mode of procedure in cases where personal service cannot be effected. (a)

The writ having been perfected in the manner before stated, the person intrusted with the service thereof must make at least three (*Fisher v. Goodwin*, 2 Crom. and J. 94.) separate calls at the defendant's residence; but all the three calls need not be made by the same person, nor are any stated periods mentioned for making the same; but they must be either at the defendant's house, or his lodgings, and not merely at the house of his employer where he is a clerk; (*Thomas v. Thomas*, 2 Mo. and S. 730.) and at hours when, on each call, it is most probable he will be met with there. On each call, application should be made to see the wife, relation, or most confidential clerk or servant, being an inmate of the defendant, and residing there with him; and the party should produce the writ and copy on each occasion, (see the observations made by *Bayley*, B. in *Street v. Lord Alvanley*, 1 Dowl. 638.; *Anon.* id. 513.; *Hill v. Mould*, 3 Tyr. 162.; 2 Dowl. 10.) and also request to see the defendant; and he should fully communicate to such wife or other person, the particulars of the writ, and distinctly state that the object of the call is to serve the defendant personally with a copy of the writ, at the suit of

the plaintiff, naming him (*Johnson v. Rouse*, 1 C. and M. 26.; 1 Dowl. 641.); and such person should carefully note down all the conversation that passes between him and the person at the defendant's residence. At the first call, full enquiries should be made of the wife or other inmate at the defendant's residence, when it is most likely, within a short period, the defendant will be at home, or where else; and an appointment made to meet him accordingly, (see *Hill v. Mould*, and *Street v. Lord Alvanley*, *supra*; *Balgay v. Gardner*, 2 Dowl. 52.; *Turner v. Smith*, 1 Mo. and P. 557.; *Johnson v. Disney*, 3 Dowl. 400.; *Wills v. Boman*, ib. 413.; *Simpson v. Lord Greaves*, 2 Dowl. 10.) and such appointment should be punctually kept, (*ibid*.); and on this second call, the like formal proceedings should take place, and another appointment, at the most probable time of meeting the defendant, should be made; and such appointment also should be punctually kept.

On the last of the three calls, the like enquiry to see the wife or other inmate of the defendant's residence, and also to see him, should be made, and the purpose of the call should be again fully stated; and if an exact copy of the writ of summons and indorsements thereon, has not been delivered to the person communicated with at the defendant's residence, at one of the previous calls, it must now be delivered to the defendant's wife or other inmate at his residence, with a request that the same may be immediately delivered to the defendant, or forwarded to him by the earliest safe conveyance. (*Hill v. Mould*; *Street v. Lord Alvanley*; *Balgay v. Gardner*; *Turner v. Smith*; *ubi supra*.)

What has been before stated as to omissions and mistakes in the writ or copy, will also apply here.

After such three unsuccessful attempts to serve the writ of summons, the plaintiff's attorney must wait at least *eight days* from the time of the last call, when the copy of the

(a) No provisions appear to be made for cases where the defendant is a M.P. subject to the Bankrupt laws, and the process issued is a writ of summons in the form No. 6. in the Stat. 2 W. 4. c. 39. but the defendant cannot be personally served.

writ was left, and on or after the *ninth day*, the plaintiff's attorney must search at the proper office of the Court for the defendant's appearance; and if, on such search, it should be found that the defendant has not appeared, an affidavit must be made, stating that such search has been made, and that no appearance has been entered by or for the defendant.

After these steps have been taken, a very full affidavit should be made and sworn, stating in general the proceedings before suggested, and whether the house at which the deponent attended, was the defendant's house or lodgings, and its precise situation, (*Pitt v. Eldred*, 1 Cro. and J. 147.; *Bonser v. Austin*, 2 id. 145.; *Scarborough v. Evans*, 2 Dowl. 9.) and the deponent, in swearing the defendant keeps out of the way, must not merely swear to his *belief* that the defendant keeps out of the way, but must *shew the very cause or ground of such belief*, in order that the Court or Judge may ascertain their sufficiency, (see *Turner v. Smith*, 1 Mo. and P. 557; *Hornby v. Bowling*, 11 Moore, 371.; *Anon.* 1 Dowl. 513. 641.) The affidavit then states that the deponent, in due time, and when, in pursuance of the rule of Court, endorsed the time of leaving the writ at the defendant's residence; and if the same deponent has searched the office for the defendant's appearance, the affidavit concludes with a statement of the time of the ineffectual search.

The plaintiff will now be in a situation to act according to the provisions of the 2 W. 4. c. 39. s. 3. by which it is enacted, "That in case it shall be made appear, by affidavit, to the satisfaction of the Court out of which the process issued, or in vacation, of any judge of either of the said Courts, that any defendant has not been personally served with any such writ of summons [Form No. 1] as hereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled to do so without some more efficacious process, then

and in any such case it shall be lawful for such Court or Judge to order a *Writ of Distringas* to be issued, directed to the Sheriff of the County wherein the dwelling-house or place of abode of such defendant shall be situate, or to the Sheriff of any other County, or to any other officer to be named by such Court or Judge, in order to compel the appearance of such defendant."

In term, this affidavit, with a brief thereon, is delivered to counsel, and the court require the plaintiff's counsel to declare (*Fraser v. Case*, 9 Bing. 464.) his election either to move for a distringas, so as to enable a plaintiff to enter an appearance for the defendant, in case he (the defendant) should not appear, or in order to proceed to outlawry according to the provisions of the 2 W. 4. c. 39. which will be stated hereafter; and the Court will not grant a rule in the alternative (*ibid.*) ; and as a general rule, it may be here stated, that if the defendant has no known residence or place of abode, or of business, nor good to be distrained upon, or if it can be sworn that he is abroad with intent to delay his creditors, in such cases the Court will not grant a rule for a distringas in order to enable the plaintiff to enter an appearance for the defendant, but he must, in such cases, proceed to outlawry. (*Fraser v. Case*, supra; *Simpson v. Lord Greaves*, 2 Dowl. 10; *Morgan v. Williams*, Price's G. P. 53. note.) If the Court consider the affidavit satisfactory and sufficient to authorize them to issue a distringas so as to empower the plaintiff to enter an appearance for the defendant, then they grant a rule which is absolute in the first instance. In vacation, the practice is to lay the affidavit before a Judge at his chambers, and if he be satisfied he will then make his order.

Doubts have been entertained whether a *præcipe* for the writ of distringas is required to be filed in the Court of Exchequer, in accordance with the before-mentioned rule, as the rule or order for the distringas must be

left with the signer of the writ; and in order to guard against mistakes, perhaps the best course to adopt would be to file such *præcipe* as is required by the rule of Court before mentioned.

The form of the writ of distringas is given in the Schedule to the Act. The writ is to be tested of the day when it is issued, whether in term or vacation, thus—"Witness _____ at Westminster, the _____ day of _____ in the _____ year of our Reign," but must be returnable in term, and have at least fifteen days between the *test* and return day, exclusive of the former, (2 W. 4. c. 39. s. 3.) and if made returnable on a *dies non*, it would be void. (*Kennworthy v. Pappiat*, 4 B. and Al. 288.) A note is also subscribed at the foot of the writ, for the particulars of which the reader is referred to the form given in the before-mentioned Schedule, and should the plaintiff elect to outlaw the defendant, instead of entering an appearance for him, it must be so stated. (See *Fraser v. Case*, supra.)

The enactments and rules before stated, as to the endorsement of the name of the plaintiff's attorney and his agent, and as to the endorsement of the amount of the debt and costs on writs of summons, also apply to the writ of distringas.

(To be continued.)

Imperial Parliament.

HOUSE OF LORDS, ENGLAND.

July 1.

LEGAL BUSINESS.

COMMON PLEAS REGULATION BILL.

On the motion that this bill be read a third time,

Lord LANGDALE said the practice in the Court of Common Pleas being formerly confined to sergents, was, by an order issued five years ago, opened to all barristers. The bill now before the House proposed to open it only partially, by confining the power of moving for new trials to causes tried on the circuit, and excluding those tried in London and Middlesex. As the greater number

of causes tried by the Common Pleas were in the latter division, of course barristers were shut out in a proportionate degree. He thought, then, it would be more conducive to the public service if the act were more extended in its operation. As this bill was, however, brought in for the purpose, as he understood, of reconciling differences, and as it was in all probability well considered, he should not further oppose it.

The Lord CHANCELLOR said that the reason that this privilege was confined to the circuit, was, because the sergeants did not go there, whereas they were always to be found in London and Middlesex.

After a few words from Lord WYNFORD, in approval of the limited alteration proposed, the bill was read a third time and passed.

Law Reports.

ROLLS COURT.—June 13.

EGERTON v. EGERTON.

PRACTICE—COSTS—Whether the Commissioners of Stamps have the power to take a gross sum for Legacy Duty, and to discharge the Testator's Estate from all future claims for duty.

Mr. Pemberton stated the case. Mr. Egerton, the late bookseller at Charing Cross, died worth about £30,000, and by his will gave two sums of £50. each per annum, Long Annuities, to his two brothers for their lives, and bequeathed his property to such of his grandchildren as should be living at their death. The testator had a great many children, and grandchildren had been born since his death. They had as yet no certain interest, for one of the testator's brothers was dead, but the other was living. Inquiries had been directed what grandchildren had been born or had died, and one of the present inquiries now sought for was as to the grandchildren since the 23rd of January last, the date of the Master's last report. Unfortunately, nearly all the parties claiming under the testator's will had raised money on their shares, and the incumbrancers had obtained stop orders from the Accountant-General. From the births of grandchildren and other causes, many applications to the Court had become necessary, and their expense was greatly increased from the necessity of notice to all these incumbrancers. The Stamp-office had proposed to take a fixed sum in gross for the legacy duty, and to discharge the estate from all future duties. There were debts to the amount of upwards of £2,000 due, but barred by the statute, but from which something was expected. The proposal of the Stamp-office was

considered advantageous by the petitioners, who prayed to refer it to the Master.

Lord LANGDALE.—The Commissioners have the power.

Mr. Pemberton.—The parties will be satisfied with their discharge. There was a complaint from those who had not incumbered their interest that they had to pay costs of the necessary applications to the Court in the same proportion as those who had done so, although the costs were greatly increased from the necessity of making the incumbrancers parties.

Lord LANGDALE.—I cannot alter that, but the parties might, by appointing one solicitor for them all.

Mr. Anderdon, for the incumbrancers, complained that the testator's funds were wasted in unnecessary inquiries.

Lord LANGDALE.—If the conduct of the cause was complained of, the complaint should be brought forward in a regular manner. When parties, having the conduct of important and intricate causes, came forward with a fair and *bond fide* intent for the good of all, he could not make them pay the costs. There must be a reference to inquire if the proposal respecting the legacy duty would be beneficial. It was unfortunate that the parties had not agreed to appoint a common agent. They had certainly a right to appear separately, but then they must not complain of the expences occasioned by their so doing.

QUEEN'S BENCH.—May 31.

Sittings in Banco.

STOCKDALE v. HANSARD.

JUDGMENT.

(Continued from p. 137.)

The case of *Burdett v. Abbot*, in 1810, was an action brought against the Speaker himself, for an act done by him in Parliament, by order of the House of Commons.(a) The plaintiff questioned his right, and by seeking redress in this Court, eventually submitted their Privilege to the decision of the House of Lords. At this very moment, the defendant, as acting by order

of the House of Commons, prays our judgment in this question of Privilege, and the House of Commons instructs the Attorney-General to appear as his counsel before us. He tells us, indeed, that we can only decide in his favour; but if we do, the House of Lords may reverse that judgment next week. Such is the practice of the 19th century. Yet we are gravely told, that in the dark ages of our history, the Commons were too enlightened to allow any discussion of their Privileges in any court whose judgment may be questioned in the Lords.

The old text writers affirm the law and custom of Parliament, although a part of the *lex terræ*, to be *ab omnibus quæsita a multis ignorata*. This and other phrases repeated in the law books have thrown a kind of mystery over the subject, which has kept aloof the application of reason and common sense. Lord Holt in terms denied this presumption of ignorance, and asserted the right and duty of the courts to know the law of Parliament, because the law of the land, on which they are bound to decide. Other judges, without directly asserting the proposition, have constantly acted upon it, and it was distinctly admitted by the Attorney-General in the course of his argument.

I do not know to whom he alluded as disputing the existence of any Parliamentary Privilege. No such opinion has come under my notice. That Parliament enjoys Privileges of the most important character, no person capable of the least reflection can doubt for a moment. Some are common to both Houses, some peculiar to each; all are essential to the discharge of their functions. If they were not the fruit of deliberation in *Aula Regia*, they rest on the stronger ground of a necessity, which became apparent at least as soon as the two Houses took their present position in the State.

Thus the Privilege of having their debates unquestioned, though denied when the Members began to speak their minds in the time of Queen Elizabeth, and punished in its exercise both by that Princess and her two successors, was soon clearly perceived to be indispensable, and universally acknowledged. By consequence, whatever is done within the walls of either assembly, must pass without question in any other place. For speeches made in Parliament by a Member to the prejudice of any other person, or hazardous to the public peace, that Member enjoys complete impunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the

(a) See WESTERN'S COMMENTARIES, B. 2. c. 9. s. 2. "The publication of any matter tending to disturb the public peace is a criminal offence, even should the matter relate to *foreign governments and magistrates*. It was upon this principle of preserving the public peace, and as a part of the common law of the land, that the present Lord Chief Justice ruled in the recent action brought against the Printers of the Reports of the House of Commons for an alleged libel (contained in those Reports), that no man is privileged to publish and offer for general sale matter which is libellous, notwithstanding such matter be printed for a Report to the House of Commons." Id. p. 332.

Speaker, by authority of the House, order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executes it, than King Charles's warrant could justify his revenue officer for levying ship-money.

The Privilege of committing for contempt is inherent in every deliberative body invested with authority by the constitution. But however flagrant the contempt, the House of Commons can only commit till the close of the existing Session. Their Privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every court in Westminster Hall, and every judge of all the courts, would be bound to discharge him by *habeas corpus*.

Nothing is more undoubted than the exclusive Privilege of the people's representatives in respect of grants of money and the imposition of taxes; but if their care of a branch of it should induce a vote, that their messenger should forcibly enter to inspect the cellars of all residents in London possessing more than a certain income, and if some citizen should bring an action of trespass, has any lawyer yet said, that the Speaker's warrant would justify the breaking and entering? The Commons of England are not invested with more of power and dignity by their legislative character, than by that which they bear as the grand inquest of the nation. All the Privileges that can be required for the energetic discharge of the duties inherent in that high trust, are conceded without a murmur or a doubt. We freely admit them in all their extent and variety. But if on a resolution of guilt, voted by themselves, this grand inquest should not accuse but condemn, should mistake their right of initiating a charge for the privilege of passing sentence and awarding execution, will it be denied that their agent would incur the guilt of murder? I will speak but of one other Privilege, the Privilege from personal arrest, which is both undoubted and indispensable. The learned counsel for the defendant dwelt on a distinction which has been sometimes taken, but in my opinion does not exist in law, between one class of Privileges, as necessary for performing the functions of Parliament, and another as a personal boon. Both classes are, as I apprehend, conferred on grounds of public policy alone. The proceedings of Parliament would be liable to continual interruption at the pleasure of individuals, if every one who claimed to be a creditor could restrain the liberty of the Members. In early times their very horses and servants might require protection from seizure under legal process, as necessary to secure their own attendance. But when this Privilege

was strained to the intolerable length of preventing the service of legal process, or the progress of a cause once commenced against any Member, during the sitting of Parliament, or of threatening any who should commit the smallest trespass upon the Member's land, though in assertion of a clear right, as breakers of the Privilege of Parliament, these monstrous abuses might have called for the interference of the law, and compelled the courts of justice to take a part. Suppose then, in the celebrated case of Admiral Griffin, that one who claimed a right of fishing in his ponds, had brought an action here against the officer who seized him, who justified the imprisonment under the Speaker's warrant, alleging his high contempt in daring to fish in a Member's pond, near Plymouth, would not the Court of Queen's Bench have been bound to inquire as to the Privilege, and to declare that it did not and could not extend to such a case?

I desire to put the further question, whether the decision of such cases could be at all varied by the House declaring, with whatever of solemnity or menace, that it was the ancient and undoubted Privilege of Parliament to do each and every one of the abusive acts enumerated?

Examples might be multiplied without limit. But the examples are said to be abuses, and to prove nothing against the use. It is also urged that abuse is not to be presumed, that the only appeal lies to public opinion, and that outrages like these would authorize resistance and amount to a dissolution of the Government. I answer, that cases of abuse must be supposed to test the truth of the principle now under discussion. I say further, that it is only in cases of abuse that the principle is required; that though the maxim be, *ab abusa ad usum non valet consequentia*, it cannot apply where an abuse is directly charged and offered to be proved, that no presumption can be made against a fact established or admitted. Need I go on to add, that the appeal to public opinion, however successful, comes too late after the injury has been effected; and that to talk to an innocent sufferer of his right to consider the social compact as broken towards him, to throw off his allegiance and resist the outrage perpetrated in the name of Parliament, is language at least novel in a court of law.

(To be continued.)

COURT OF EXCHERER, June 25.

Sittings at Nisi Prius.

MARKS v. BENJAMIN.

PRACTICE — PENAL ACTIONS. — Whether a Plaintiff in a Penal Action, after RETAINING AN ATTORNEY, can revoke it before the Trial.

In this case the plaintiff, in person, addressed

the Judge, and said, that he had unwarily signed a paper to Mr. Norton, the attorney, to bring this action, and that having done so, he had been stigmatized by his former friends and associates as a common informer, on which account he now begged to express his desire to withdraw the case from the jury.

Lord ABINGER.—Do you wish your cause to be dropped altogether.

Marks.—Yes, my Lord, I do.

Lord ABINGER.—What does your counsel say?

Mr. Kelly here interposed, and, having consulted the attorney, stated, that the plaintiff having given a regular retainer to that gentleman to commence these proceedings could not now revoke it at this moment, when, perhaps, he had entered into some arrangement behind the back of his advisers with the defendant, and so settled the action and deprived his attorney of his lien on the judgment thereon, which he might otherwise have obtained. The case was one of much suspicion, but being a penal action, in which full costs were given, as well as the penalty of £100., his Lordship would be aware that it was out of the power of the plaintiff to stop it.

Lord ABINGER.—If it is a penal action, I cannot interfere, and the case must go on.

Mr. Kelly then stated that this was a *qui tam* action, brought against the defendant, who is the landlord and occupier of Howard's Coffee-house, situate in St. James's-place, Duke's-place, Aldgate, to recover the penal sum of £100. under the provisions of the 25th of George II. c. 36. s. 2. by which a right of action for that sum, with full costs, was awarded to any one giving information against any persons keeping what, in the language of the act, was a disorderly house, in allowing public music and dancing therein without a proper license, as specified in that act. The result of the case was, that this house would seem to have been used and frequented by members of the Jewish persuasion of the highest rank, for the purpose of holding fancy fairs and charity balls, at some of which Sir Moses Montefiore was known to have presided; while the humbler members of that faith used it on occasions as a private room, for which they paid 30s. per night, and wherein they gave balls, &c. Among these it came out, on examination, the plaintiff himself was the originator of one; but, some disturbance having taken place, the police were called in, and he was taken to the station-house and given in charge for an assault on the defendant. Then it was that he was introduced to Mr. Norton, and then in all probability it was that he determined to institute this action, from which he now seemed rather inclined to swerve.

Lord ABINGER said that he was clearly of opinion there was no ground for the action. The defendant's house had been spoken of by all the witnesses as a most respectable house, and well conducted in every respect; and all that the plaintiff proved was, that one of the rooms in it had been used on several occasions for private parties and public balls, and masquerades, on the speculation of strangers. This, in his opinion, did not constitute the defendant's house a "disorderly house" within the meaning of the act, which speaks of such as "kept for the purpose of music and dancing." It was true that there was no license under 25th George II., c. 36, for music and dancing, but it had been sworn that not one house in the city had a license of that nature, and it would be very hard to say that the citizens should be deprived of all means of amusement. As for himself, he (Lord Abinger) had frequently attended balls at the London Tavern and elsewhere; and if this action was well brought, they were just in the same situation as the defendant, and were liable to penal actions. In his opinion, therefore, the plaintiff had failed to make out his case, and the defendant must have the verdict.

The jury accordingly found for the defendant.

Sittings in Equity.

June 26.

BEFORE MR. BARON ALDERSON.

HUGHSON v. COOKSON.

PRACTICE.—Want of parties—Whether an account can be taken against one of two Executors, the other Executor having been originally a party, and committed for want of answer, and discharged under Sir Edward Sugden's Act.

The facts of the case were, that George Brooks, of Horfield, in the parish of Tarvin, in Cheshire, by his will, dated the 21st of November, 1824, after directing the payment of his debts, funeral expenses, &c., gave to his daughter Martha £150., and to his daughter Ellen £300. to be paid to them when his youngest daughter should attain the age of twenty-one; but if his daughter Martha should die leaving no issue before his youngest daughter attained twenty-one, then her share was to be divided amongst his other children in equal shares, share and share alike; but if she should have either child or children, then the £150. was to be applied towards bringing them up, and after devising his real estate in manner therein mentioned, testator gave the residue and remainder of his personal estate to his wife, Mary Brooks, for her own use, and he nominated his wife, and Thomas Cookson, executrix and executor of his will. George

Brooks, the testator, died soon afterwards, leaving his wife, the above two daughters, and a son, surviving him. Martha died on the 10th of May, 1831, leaving no issue, and before Ellen attained the age of twenty-one, which she did on the 19th of April, 1833, whereby the legacy to Martha became divisible between the plaintiff Ellen and Thomas Brooks, as the only surviving children of the testator. The widow and Thomas Cookson proved the will, and took possession of the estate, and paid the plaintiff Ellen £50. on account of the legacy of £300. The bill then, after charging that the residue of the personal estates, after payment of debts, &c., was more than sufficient to pay these legacies, prayed for an account of what was due to the plaintiffs in respect of the legacy of £300., and a moiety of the legacy of £150. with interest, and that the defendants might admit assets in their hands for the payment of what should be found due, or that an account might be taken of the testator's personal estate and effects, and of the application thereof, and that the residue might be applied in payment of what should be found due.

The original bill was filed by John Hughson (who in January, 1833, married the testator's daughter Ellen) and Ellen his wife, against the executors, Thomas Cookson and the widow of the testator (who had again married Charles Smith) and her present husband Charles Smith.

The defendants Charles and Mary Smith, by their answer, denied that the surplus was sufficient for the payment of the legacies in question, and that £73. 11s. 8d., and not £50., was the sum which they had paid the plaintiffs.

Mr. Simpkinson, for Mr. and Mrs. Smith, objected on the ground of want of parties, and said that the Court would not direct an account to be taken against one only of two executors. Here Cookson, one of the executors, although an original party to the bill, was not now before the Court. Neither would the Court direct an account as to a moiety of a legacy in the absence of the person entitled to the other moiety. This was not a bill generally to administer assets, but merely for a specific legacy.

Mr. Spence and Mr. Dizon, for the plaintiffs, said, with respect to Cookson, he was originally a party to the bill, to which he appeared, but not answering, he was taken on an attachment, but the plaintiffs having neglected to bring him up under Sir E. Sugden's Act (the 11th George IV. and 1 William IV., c. 36.), he was discharged. Under these circumstances, as he could not be taken on a fresh attachment, it became necessary to proceed *de novo* against him, which was done by filing a supplemental bill against Cookson only, to which he appeared, but again having omitted to put in his answer, he

was taken on an attachment, and the bill was afterwards taken *pro confesso* as against him, when it was referred to the Master to take the account sought by this bill. Therefore the decree to be now pronounced would be so far special as it would recite the decree against Cookson. In "Williams v. Townsend," 6 Sim., 296, where a defendant had been taken upon an attachment for want of appearances, and was discharged before plaintiff got an appearance entered for her under 11th George IV. and 1 William IV., c. 36. It was held, that though a fresh subpoena might be issued against the defendant, no attachment could be taken out upon it. The very same point was raised there as in this case. This objection must consequently fail. Then as to the other objection—this was a bill for a specific legacy, which they had a right to file without making the other person entitled to a moiety a party; for, although it was a legacy of a moiety, yet it was of a moiety of a specific sum.

Mr. Baron ALDERSON overruled both the objections, and decreed in the terms of the prayer of the bill.

Sittings at Nisi Prius.

July 1.

Special Jury.

COMMERCIAL CASE.

CONTRACTS.—Whether a contracting party can treat the Contract as null on the refusal of the holder of the Article to deliver the entire quantity, he having a lien upon it, and for which he refused to deliver a sufficient part in value as would cover his claim.

The facts appeared to be that, on the 15th of Dec. 1838, the defendants, who are merchants at Gloucester, Birmingham, and Bristol, contracted for the purchase of a cargo of wheat from the plaintiffs, who are also merchants at Gloucester and Birmingham, and on the 16th of March last another contract was entered into between the same parties. By the terms of the second, the defendants agreed to accept "the said cargo of wheat, per Active, from Odesa, as per contract of 15th of December last, on its delivery to them," reserving to themselves a claim against the plaintiffs for their alleged violation of the first contract. The proper instructions were then sent to the respective agents of the parties at Bristol, where the Active lay; and on their being received, Mr. V. Hellicar, on the part of the plaintiff, informed Mr. Holmes, the representative of the defendant, that he had not got the bill of lading, but would receive it the next day, and that the wheat might be had. Mr. Holmes then saw the captain, made him acquainted with

his instructions, and said that he should commence discharging without delay. On the 16th of March all the preparations necessary to discharge were made by Mr. Holmes, who also gave fitting instructions for the discharge of the cargo on the following Monday. On the Monday it appeared that the freight had not been paid; upon which the defendant told the captain that they were prepared to receive the cargo, and inquired whether he was prepared to deliver the wheat, to which the captain replied by a refusal to deliver the whole till he had been paid the freight. On which Mr. Philpotts said that he had nothing to do with the freight, and would not receive a part of the cargo unless he could have the whole. Written communications then passed to a somewhat similar effect, the captain offering to deliver the cargo on an undertaking from Mr. Philpotts to pay the freight when the cargo should be delivered. The defendant then left the ship, and conceived himself entitled to abandon the contract, and wrote to that effect to Mr. Hellicar and to the plaintiffs. On the 19th a notice of tender was addressed to the defendants by Mr. Hellicar; and on the 20th the notice was renewed in a more formal manner, with the usual notice, that if the defendants refused to accept, the plaintiffs would hold them liable for all costs, &c. The defendants did refuse to accept, the wheat was sold by auction, and this action was brought, for the difference between the price that the defendants had agreed to pay, and the sum which the cargo had produced at the auction, being £1081. 5s. 1d. The defendant relied on his view of the law of the case, that he was justified —namely, in treating the contract as a nullity, on the refusal of the captain to deliver up the entire cargo.

From the evidence it appeared that the delivery of the wheat would have occupied six or seven days, before which time the freight would have been paid.

Lord Abinger decided that the defendant had no case. *Verdict for the plaintiff, for £950.*

NEW ORDERS OF THE COURT OF CHANCERY.

Issued under the Stat. 1 & 2 Victoria, c. 110.

(Continued from p. 140.)

No. IX.

Writ of Elegit, on a Decree or Order of the Court of Chancery, for Payment of Money, or Money and Interest.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of greeting.

Whereas, lately in our High Court of Chan-

cery, in a certain cause or certain causes (*as the case may be*) there depending, wherein A.B. and others are plaintiffs, and C. D. and others are defendants, or in a certain matter there depending, intituled, "In the matter of E. F." (*as the case may be*) by a decree or order (*as the case may be*) of our said Court, made in the said cause or matter (*as the case may be*) and bearing date the day of , it was ordered and decreed, or ordered (*as the case may be*) that the said C. D. should pay unto A. B. the sum of £ , together with interest thereon, after the rate of £4. per centum per annum, from the day of , together also with certain costs, as in the said decree or order (*as the case may be*) mentioned, and which costs have been taxed and allowed by G. H. esquire, one of the Masters of our said Court, at the sum of £ , as appears by the certificate of the said Master, dated the day of . And afterwards, the said A. B. came into our said Court of Chancery, and according to the statute in such case made and provided, chose to be delivered to him all goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any one in trust for him, was seized or possessed of on the day of , in the year of our Lord (a) or at any time afterwards, or over which the said C. D. on the said day of (a) or at any time afterwards had any disposing power, which he might, without the assent of any other person, exercise for his own benefit. To hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest, upon the said sum of £ , at the rate of £4. per centum per annum, from the said day of , (b) and on the said sum of £ , at the rate aforesaid from the day of (c) shall have been levied. Therefore, we command you, that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seized or possessed of on the said

day of (a), or at any time afterwards, or over which the said C. D. on the said day of

(a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Chancery aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness myself at Westminster, &c.

- (a) The day on which the decree or order was made.
- (b) The day mentioned in the decree or order.
- (c) The date of the Master's Certificate of taxation, or if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

(To be continued.)

COURT OF COMMON PLEAS, DURHAM.

2 Vict. cap. XVI.

An Act for improving the Practice and Proceedings of the Court of Pleas of the County Palatine of Durham and Sedgeberge. [June 14, 1839.]

(Continued from p. 142.)

IX. And be it enacted, That every such writ of summons issued against a corporation aggregate may be served on the Mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of the county of Durham, or the inhabitants of any franchise, liberty, town, or place, not being part of a hundred or other like district, on some peace officer thereof.

X. And be it enacted, That all such proceedings as are mentioned in any writ, notice, or warning to be issued as aforesaid under this act shall and may be had and taken in default of a defendant's appearance.

XI. Provided always, and be it enacted, That nothing in this act contained shall subject any person to outlawry or waiver who, by reason of any privilege, usage, or otherwise, may now by law be exempt therefrom, or shall extend, save and except as herein-after is provided for, to any

cause removed into the said Court by writ of *pone loquela*, *recordari facias loquela*, or otherwise.

XII. And be it enacted, That from the time when this Act shall commence and take effect the writs herein-before authorized shall be the only writs for the commencement of personal actions in the said Court by serviceable process against the person in the cases to which such writs are applicable.

XIII. And be it enacted, That it shall be lawful for the parties in any action depending or to be depending in the said Court of Pleas at Durham, after issue joined, by consent and by order of the said Court, to state the facts of the same in the form of a special case for the opinion of one of the superior Courts of common law at Westminster, and to agree that a judgment shall be entered for the plaintiff or defendant, by confession or *nolle prosequi*, immediately after the decision of the case, or otherwise, as the Court before whom such case shall be heard may think fit, and judgment shall be entered accordingly.

(To be continued.)

SUFFOLK ASSIZES.

An ORDER in COUNCIL directs that the Assizes in and for the County of Suffolk, shall be held in the Summer, in the town of IPSWICH; and in the Spring, in the town of BURY ST. EDMUND'S.

THE CANADIAN PRISONERS.

It having been found impracticable to put the Canadian prisoners upon their trial in England, in conformity with the suggestion in the judgment of the Court of Exchequer, the Government has notified to them, that upon entering into personal securities *not to return to Canada*, they will be released.—*Morn. Chron. July 3.*

REVIEW OF NEW BOOKS.

A LETTER to the Right Hon. Sir EDWARD KNATCHBULL, Bart. relating to the Bill before Parliament for the ENFRANCHISEMENT of LANDS of COPYHOLD TENURE and other LANDS subject to MANORIAL RIGHTS. London, Payne and Foss, 81, Pall Mall, 1839.

This Letter places before the public the writer's views on the policy and injustice of passing a Bill now before the House of Commons, for "the enfranchisement of copyhold and customary tenure, and other lands subject to manorial rights." Which (he says) is now for the first time to be enforced by an universal and compulsory clause, which takes away from every lord of a manor, and every

copyholder and customary tenant, the power of exercising his own judgment and control in the management of his own vested rights.

The writer enters upon the question that he considers should be fairly discussed, and which he thus divides into two branches :—

The *first* relates to the reality of those grievances ascribed to the feudal tenures, not as they were aggravated through the abuses introduced by the Monarchs and superior Lords of past times, but as they now exist in their present more modified state, either through the aid of legislative interference, or the more liberal indulgence of modern feeling.

The *second* regards the grievances arising to the Copyhold tenant or actual occupier, from the *uncertainty of his tenures*, and the *liability to sudden expences*, and the *imperfect manner* in which he is *enabled to cultivate the soil*.

The *first* is a question of a personal nature, and pointing to the interests of the individual tenant; the *second*, one of public concern, and affecting the improvement of agriculture, generally, throughout the kingdom.

The writer enters upon these questions with some very fair reasoning, but it is all *on one side*. We would suppose that he was the lord of a manor, because the entire spirit of the Letter is in favour of such lords, and for leaving every thing to “*voluntary action*;” and he brings his “*finality*” to the following conclusions :—

That the objections to the present system have been strangely magnified and disfigured; and that ideal grievances have been fancied and talked over, until people have been convinced of their truth. In the mean time the practical difficulties attending the measure have been altogether overlooked. The *only sound conclusions*, that *no real*

grievance, save in the case of heriots (already alluded to), and the extension of building Leases, remains to be redressed; that Copyhold tenure is not detrimental to the improvement of agriculture; that the alteration would not in the main be advantageous even to the Copyholders themselves; that it will lead to the discomfiture and ruin of many of the smaller tenants, and be productive of other bad consequences, as affecting the general interests of the nation.

In our next we will look at *the other side* of the question.

GENTLEMEN CALLED TO THE BAR, Trinity Term, 1839.

LINCOLN'S INN.

Bennet, William Heath
Boughey, William Fenton Fletcher
Collins, George William
Harper, John Alexander William.
Hoare, Charles Richard
Hulton, Edward Horne
Livesey, Joseph, Jun.
Maude, Henry Hallett
Robertson, John
Severn, John Percy
Winstanley, James Winckworth.

INNER TEMPLE.

Anstruther, Robert
Bourke, Richard
Bright, John Edward
Bourke, Peter Joseph
Byrne, William Pitt
Dickenson, Sebastian Stewart
Foljambe, Thomas
Hoffman, Lewis
Holland, John
Hughes, Thomas Bird
Wyatt, Osmond Arthur.

GRAY'S INN.

Else, Richard
Saunders, Samuel.

ARTICLED CLERKS WHO PASSED THEIR EXAMINATION, Trinity Term, 1839.

Name.
Ansdell, Josias Thomas
Ash, William
Ball, Charles Sutton
Barlow, John
Birch, John
Bird, Henry
Blake, Charles
Bond, Edgar
Bradburne, Edmund

Name & Residence of Attorney to whom articled or assigned.
John Ansdell, St. Helen's, Lancaster; assigned to Marmaduke Forster, Manchester; and Joseph Lacon, Liverpool.
George Cooke, Bristol.
Charles Harrison, 14, Southampton Buildings.
James Winder, Bolton-le-Moors.
Thomas Briggs, Lincoln's Inn Fields.
John Cole, Odham and Basingstoke.
Charles Bridger, Winchester.
James Winter, Norwich.
Baker Gabb and William Woodhouse Secretan, both of Abergavenny, Monmouth.

Articled Clerks.

- Brooks, James Willis
 Bryant, Isaac
 Busfield, Johnson Atkinson
 Busfield, Currer
 Carter, William
 Champney, Henry Nelson
 Clegg, John
 Coles, Henry Thomas
 Coppin, John Frederick Augustus
 Crabb, Frederick
 Davis, Michael
 Downing, Francis
- Dukes, Henry Clifton
 Dunsford, Walter Comyns
 Edgell, Alexander
 Edmunds, John
 Engleheart, William Hayley
 Eyre, George Lewis Phipps
 Fellowes, Thomas Abdy
 Few, Charles, the younger
 Filliter, Henry
 Gibson, George
 Glynn, Edward
 Goulden, William Whitelegg
 Graham, Thomas Hedges
 Halton, Henry James
 Hamlin, Thomas
 Hillier, Henry Jenner
 Harris, Thomas
 Hills, Thomas
 Humphry, William James
 Hutson, John
- Hurley, William Frederick
 Irwin, Anthony Wellington
 Jervis, George Matthewman
 Kirsopp, William
 Langhorne, John Bailey
 Layard, Austen Henry
 Levy, Lewis
 Lewellen, Daniel
 Lightfoot, Rook Tiffen
 Lightfoot, Henry Wellesley
 Lowe, Richard
- Lowry, Joseph Stamper
 Lyne, William John
 Marshall, John Edwin
 Marshall, William
 Mecey, John William
- Thomas Cooper, 24, Lincoln's Inn Fields; assigned to James Sheffield Brooks, 29, John Street.
 Henry Rowden, Wimborne Minster.
 William Wells, Bradford.
 John Hampson, Manchester.
 John Richard Carter, Spalding; assigned to Richard Willis, 6, Tokenhouse Yard, Lothbury.
 Jonathan Geary, York; assigned to William Geary, the younger, York.
 Joseph Morris, Bradford.
 William Lewis, 4, Woburn Place, Russell Square.
 Broome Piniger, Newbury, Berks.
 John Bayly, Devizes.
 Henry Mostyn, Usk.
 Thomas Hardwick Merriman, 16, Southampton Street, Bloomsbury Square; assigned to William Wyke Smith, 16, Southampton Street, Bloomsbury Square.
 Thomas Dukes, Shrewsbury.
 Nicholas Broadmead, Langport, Somerset; assigned to Richard Reeder Crosse, Puriton, Somerset.
 James Heywood Markland, Inner Temple.
 Richard Edmunds, Worthing.
 Charles Jenings, 4, Elm Court, Temple.
 William Gunner, Bishop's Walsham.
 William Clark Merriman, Marlborough; assigned to Edward Hillier, 38, Cumming Street, Pentonyville.
 Robert Few, 2, Henrietta Street, Covent Garden.
 George Filliter, Wareham.
 Joseph Willis, Gateshead, Durham.
 Matthew Clayton, Newcastle-upon-Tyne.
 Charles Poole, Altringham, Chester; assigned to Thomas Peter, Manchester.
 William Graham, Abingdon.
 William Dobinson, Carlisle.
 John Baker, Aldwick, in the parish of Blagdon, Somerset.
 Thomas Harris, the elder, Kingsbridge.
 John Halcomb, Marlborough.
 Walter Hills, Chatham.
 Price and Co., Chichester.
 Mark Jameson, Berwick-upon-Tweed; assigned to John Kirk, 10, Symond's Inn.
 John Rodd Griffiths, Chipping Campden; assigned to John Bridges, 23, Red Lion Square.
 Charles Stewart Clarke, Bristol.
 Henry Vickers, Sheffield.
 Nicholas Ruddock, Hexham.
 George Waugh Stable, Newcastle-upon-Tyne.
 Benjamin Austen, Gray's Inn.
 George Drew, 185, Bermondsey Street.
 John Brownrigg Gore, Rolls Chambers, 89, Chancery Lane.
 John Lightfoot, Wigton, Cumberland.
 John Robeson, 26, Castle Street, Leicester Square
 Abraham Flint, Uttoxeter; assigned to Francis Blagg, Uttoxeter.
 Henry Jackson, Kirkby Stephen, Westmoreland; assigned to William Carrick, Brampton, Cumberland.
 Wilson Perry, Whitehaven.
 Henry Marshall, Durham.
 Henry Marshall, Durham; assigned to John Edwin Marshall, Durham.
 Jeré Bunny, Newbury, Berks.

- Mends, Herbert Archibald Gibson
Milne, Charles
Mortimer, William, the younger
- Mules, Henry Charles
Nicholson, John
Norman, John
Norman, James Ormond
Northwood, George
- Oliver, Daniel James
Pain, Thomas
Palmer, William Henry
Pickering, Joseph Henry
Pinckney, George Henry
Raw, Joseph
Richard, Thomas
Richardson, Joshua Thomas
Rigge, Thomas
Robinson, Henry
- St. Aubyn, William St. John
- Scott, Edward Wilson
Sealy, Henry
Shum, Robert
Smith, Richard Curgenven
Smithson, Oswald
Starling, Thomas
Staunton, Edward
- Stevens, Frederic
Stowers, Thomas
Taunton, William Doidge, the younger
Teulon, Peter Ross
Thornber, Paul Harrison
Trevor, James
- Tripp, John Rolley
Turner, John Hawkes Valentine
Upton, Henry
Underhay, John
Vymer, Charles James
Walcot, Thomas
- Warrant, Alexander
Washbourne, William
Watson, William the younger
Wellbourne, Charles
Wells, William
- Whidborne, John
- Robert Edward Moore, Plymouth.
Nathaniel Charles Milne, Inner Temple.
Thomas Bartley (deceased) and Charles Oldfield Bartlett, Wareham : assigned to Oxley Tilson, 29, Coleman Street.
Philip Mules, Honiton, Devon.
John Slater, Hawkshead.
William Nanson, Carlisle.
Thomas Swain, Frederick Place, Old Jewry.
John Huish Webber, Caroline Street, Bedford Square ; assigned to Charles Bedford, Worcester ; assigned to Walter Branscomb, of 1, Wine Office Court ; Tring ; and Richard Benson, of Tring and Aylesbury.
Daniel James Lee, Field Court, Gray's Inn.
George Lamb, Basingstoke and Odiham.
William Palmer, Doncaster.
John Flewker, Derby.
Edward Hillier, 6, Raymond Buildings.
Francis Pearson, Kirkby Lonsdale.
James Thomas, Llandilo Fawr.
Michael Milton, Pontefract.
Robert Moser, Kendal, Westmoreland.
Wootton Byrchinshaw Thomas, Chesterfield ; assigned to John Brown, Sheffield.
Fleming St. John, Lancaster Place, Strand ; assigned to William Henderson, Lancaster Place ; and Edward Erskine Tustin, 4, New Bridge Street, Blackfriars.
Richard Wilson, Kendal.
John Teesdale, 31, Fenchurch Street.
Henry Manisty, King's Road, Bedford Row.
Jonathan Luxmore, Plymouth.
Robert Smithson, York.
Edward Starling, 40, Leicester Square.
Thomas Staunton, Bath ; assigned to Thomas Rainford Ensor, 14, South Square, Gray's Inn.
William Stevens, 10, Little St. Thomas Apostle.
James Puttock, Epsom.
William Doidge Taunton, the elder, Totnes.
- Joseph Pope Hammet, 12, Southampton Buildings.
Alexander Liddle and William Whiteside, Poulton.
John William Trevor, Bridgewater ; assigned to Thomas Loftus, New Inn.
Leyson Orton Lewis, Llandilo, Carmarthen.
Henry Miller, Frome Selwood, Somerset.
John Luttmann Ellis, and William Hale, Petworth.
James Pitts, the younger, Exeter.
Simon Adams Beck, Ironmonger's Hall, Fenchurch Street.
Henry Enfield, 19, Southampton Buildings ; assigned to Thomas Cuvelje, 19, Southampton Buildings ; and William Skilbeck, 19, Southampton Buildings.
Thomas Parker, 10, St. Paul's Church Yard ; assigned to Charles Stuart Voules, 16, Bloomsbury Square.
Clement William Unthank, Norwich.
William Watson, the elder, Barnard Castle, Durham.
William Morris Elkins, 4, Cook's Court, Lincoln's Inn.
William Bury Wells, Dursley ; assigned to Henry Bishop, Dursley.
Charles Small and Harry Arthur Harvie, Bidesford, Devon ; assigned to Henry Wickens, 1, Christopher Street, Hatton Garden.

Williams, William

Wroe, John Blomely, the younger

Yockney, John

Yonge, John

William Murray, 5, London Street, City.

John Walker, Manchester; assigned to Joseph Ablett Jesse, Manchester.

Thomas Moseley, 13, Bedford Street, Covent Garden.

Robert Shank Atcheson, Duke Street, Westminster; assigned to William Ridge, Duke Street, Westminster; and Henry Rice, 39, Jermyn Street.

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In re Parlett, lunatic petition—Angell v. Davies, appeal for judgment—Kemp v. London and Brighton Railway, appeal motion, part heard—Hughes v. Wynne, to be spoke to.

Appeals.

Pickering v. Pickering, part heard—Wordsworth v. Wood, ditto—Knatchbull v. Fernhead, further directions and costs—Aldridge v. Forbes—Nash v. Cockrane—Burn v. Carvalho.

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Lindo v. Lindo, part heard—Corporation of Maldon v. Blackbourn—Hill v. Gomme—Mehrtens v. Andrews—Alder v. Foster—Prince v. Howard—Bennett v. Hayter—Harries v. Higgon—Robinson v. Robinson—the Attorney-General v. Matthews—the Attorney-General v. Lipscombe—Nias v. the Northern and Eastern Railway.

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Gordon v. Proctor—Solomons v. Jeffrey—Stapleton v. Harper—Poole v. Siddon—The Queen v. Barrack—Holden v. Griffiths—Bebb v. Taylor—Edwards v. Tear—The Queen v. Fitzgerald—Gibson and others v. Carroll and another—Halfhide and others v. Burnett—Whitbread v. Cannan.

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London Common Juries.

Cazaley v. King—Doe v. Smith.

EQUITY EXCHEQUER.

Petitions and Motions.

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The Legal Guide.

VOL. II.]

SATURDAY, JULY 13, 1839.

[No. 11.

LEX LOCI DOMICILII.

PART I.

IN CASES OF LEGITIMACY.

By what law shall the personal property, situate in England, of a British born subject domiciled in Scotland, or any of the British Colonies, and intestate, be governed?

(Continued from p. 147.)

IN juridically treating upon this Law, we must place out of sight entirely the ROMAN LAW, which is not applicable to modern days; nor must any great attention be paid to Foreign Jurists, for they have entertained different opinions upon the question of *domicile*, as to how it should govern the distribution of personal property. By the Roman Law it was considered only with reference to the burthens to be imposed upon a man, and not as to the succession to his moveable property. In the Digest (a) this is stated “*Viris prudentibus placuit duobus locis posse aliquem habere domicilium;*” and the case is put of a *divided residence*, perfectly in *equilibrio*, and they differed upon the effect of it. LUBRE decided that the party had no *domicile* at all: others held that he had several *domiciles* (b). HUBER quotes a decision of the Supreme Court of Friesland, by which the *domicile* was held to be at the *country house*; upon this he says, that where the

principal concerns are in town, *that* is the *domicile*; where, in the country, the *country residence*.

In DENISART (c) it is said, that the original *domicile* is constituted the first *domicile*, and *that* is preserved till another is chosen; and as to the distribution of *personal estate*, it is said, that the *domicile* continues until changed; and the reason is, the presumption of attachment to the place of birth and connections: a case is there (d) related of the Count de Choiseul, who was held to be *domiciled* in Burgundy, though he only went there in the shooting season; and several other cases will be found there, from which we collect that a *minor* could not do any act to change his *domicile*; that a *military man* should be presumed to have his *domicilium originis*, unless it was quite clear he meant to establish another. Denisart's definition of this Law is very much like that given by Vattel, (e) and consists in the fact and the intention; actual residence, and the intention of a man to establish himself in the place where he resides; when once it is established, that the *domicile* depends upon the fact and intention of residence, then recourse must frequently be had to the *domicilium originis*: as in the case of an infant, which is the reason given for the position,

(a) Lib. 50. tit. I. 1. 6. s. 2.

(b) Dig. lib. 50. tit. I. 1. 5.

(c) Dictionnaire, 2. letter D. p. 165.

(d) Article *Domicile*.

(e) Ante, p. 148.

that the domicile may be in a country in which the party never was. The domicile of *origin* is never to be resorted to when any other can be found (a). *Bynkerstock* (b) relates the case of a brewer at the *Hague*, who, having one son, hired a house near *Leyden*, for the purpose of acquiring the inheritance of the son by the law of that place. He took the house for three years, and carried to it part of his furniture; but at the *Hague* he had the whole of his establishment. The distribution was determined according to the law of the *Hague*. The reason given was, that at *Leyden* he was residing at a *country-house*. But *Bynkerstock* did not hazard a definition of the domicile.

Hence we must abandon, not only the Roman law, but also the laws of foreign European nations who have mostly taken that law for their guide. The *domicile of habitation* is the only one recognized in England. Nevertheless, all the writers on this subject shew that civil relations between parties in their own country are recognized in foreign states. Upon which principle a probate will be granted here upon the foot of a foreign probate, in the case of a foreigner dying and leaving property in this country.

The HOUSE OF LORDS has laid down these rules:—1st. That the succession to the *personal* estate of an intestate is to be regulated by the law of the country, in which he was a domiciled inhabitant, at the time of his death; without any regard whatsoever to the place, either of the birth or the death, or the situation of the property at that time. (c)

Secondly—That though a man may have two domiciles for some purposes, he can

only have one for the purpose of succession. This may be taken as a maxim, and the rule is laid down in *Denisart*.

Thirdly—The original domicile, or as it is called, the *forum originis*, or the domicile of origin, is to prevail, until the party has not only acquired another, but has manifested, and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile. This is speaking of the domicile of origin, rather than that of birth; for the mere accident of birth at any particular place, cannot in any degree affect the domicile.

There is no authority, or *dictum*, that gives for the purpose of succession any effect to the place of birth. If the son of an Englishman is born *on a journey*, in a foreign country, his domicile will follow that of his father. Lord ALVANLEY made this following distinction upon *contemporary domiciles*. That a person not under an obligation of *duty* to live in the capital in a permanent manner, as a nobleman, or gentleman, having a mansion house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country. On the other hand, a merchant, whose business lies in the metropolis, shall be considered as having his domicile *there*, and not at his country residence. These distinctions were founded upon the general principle, of all the European laws, that a *permanent public duty* changes the domicile—that a *temporary public duty* does not. The word “*legatus*” as used by the foreign jurists, was applied chiefly to the deputies of the towns and provinces of the empire coming to present petitions. *Huber* applies this doctrine of the *Roman Law*, to the deputies of the Dutch provinces, attending their duties at the *Hague*; concluding, that residence for that purpose does not take away the original domicile. The *Rota* of

(a) Howard's Dic. *Norman Law*, art. *Domicil*.

(b) *Quest. Jur. priv.* b. 1. c. 16. 185.

(c) See *Bruce v. Bruce Dom.* Proc. 15th April, 1790. *Ammancy v. Bingham, Dom.* Proc. 18th March, 1796, (*Sir Charles Douglas's case*). See also *Faubert v. Turst*, Prec. Chanc. 207. 1 Bro. P. C. 38.—The Courts of *Scotland* formerly held a different doctrine.

Rome (*a*) held the same doctrine, and the same is adopted by *Denisart*.

The case of *Anstruther v. Chalmers* (*b*) which was decided by Sir JOHN LEACH, V.C. was determined according to the rules we have shewn as governing the law of domicile in England. There Miss Anstruther who was born in *Scotland*, came to reside in England, and was domiciled in *London* to the time of her death. She was, however, in the habit of going occasionally to visit *Scotland*, and during her stay in *Edinburgh*, at one of those visits, she employed a writer to the signet to make her will, who made it in the *Scotch form*, so as to give an absolute interest in all her real and personal estate to Sir Alexander Anstruther, who afterwards died in her life time. This will, after the death of Miss Anstruther, was proved in England. At the time of her death she had no real estate, and it being admitted, that by the law of *Scotland* the gift to Sir Alexander Anstruther was not lapsed by his death, in the life-time of Miss Anstruther, the question was, whether her *personal property* would under the will belong to the representative of Sir Alexander Anstruther, or to the next of kin of Miss Anstruther, as in the case of a failure by lapse; and the Vice-Chancellor held that by the law of *England*, where an absolute interest in *personal property* is given by a testamentary instrument, then the gift fails if the donee die in the life-time of the testator. And Miss Anstruther being *domiciled in England*, the law of *England* must prevail, and her next of kin were declared to be entitled.

Sir HERBERT JENNER giving judgment in a recent case (*c*) (1838) upon the subject, fully explained the existing law. He said, it is now settled that the law of the domicile, and not

the *lex loci rei sitae* is to govern the distribution of, and succession to personal property.

It being *prima facie* evidence only, that where one person resides, there he is domiciled, it is necessary to see what was the domicile of origin of the party. Having ascertained that, the principle of the law is, that *that* domicile prevails, until the party has acquired another. Another principle is, that the acquisition of a domicile does not simply depend upon the residence of the party; that fact must be accompanied by a manifest intention of permanently residing in the new domicile, and of abandoning the former, or the change of domicile must be manifested *animo et facto*. A third principle is, that the domicile of origin having been abandoned, and a new one acquired; the new domicile may be abandoned, and a third domicile acquired. Further, the presumption of law being that the domicile of origin subsists until a change of domicile is proved, the *onus* of proof is on the party alleging the change, and this *onus* is not discharged by proving residence in another place, which is not inconsistent with an intention to return to the original domicile. See also *Price v. Dewhurst*, 1 Legal Guide, 54 *Chameau v. Riley*, id. 88.

PROBLEM XI.

VOL. 2.

HEIRS SPECIAL OR GENERAL.

What is the present state of the Law with regard to limitations to Heirs Special or General?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 13. VOL. 1.

(Continued from p. 150.)

Problem 13, vol. I, p. 197.—Actions at Law.

“What is the mode of commencing an Action?—shewing what the Writs are to

(a) *Farnese Decis. Rom.*

(b) S. C. 1 Sim. 1.

(c) *De Bonneval v. De Bonneval*, MSS. See also *Stanley v. Barnes*, 3. Hagg, 373.

contain, and manner and time of service.

—The decisions that have been made upon defective Writs, or irregular service."

AS TO THE PROCEEDINGS NECESSARY TO BE ADOPTED IN CASES WHERE THE DEFENDANT CANNOT BE PERSONALLY SERVED WITH THE WRIT OF SUMMONS.

By the enacting part of the 2 W. 4. c. 39. the writ of distringas is to be directed to the sheriff, or other proper officer for executing such process, and since the abolition of the Welsh Court, the writ may be directed immediately to the sheriff or other proper returning officer of any county in Wales, (11 G. 4. & 1 W. 4. c. 70. s. 13); and it may issue into either of the counties palatine, (*Chapman v. Maddison*, 2 Stra. 1089; *Jackson v. Hunter*, 6 T. R. 73.) But they are then to be directed to the chancellor of the county palatine of Lancaster, or his deputy there, or to the bishop of Durham or his chancellor there, in the form prescribed by G. R. M. T. 3 W. 4. reg. 11, and each is to make his mandate thereon to the sheriff of the county.

Several forms for directions of writs to sheriffs and other officers are given in the 2 W. 4. c. 39, Sch. No. 4., and the G. R. M. T. 3 W. 4. to which the reader's attention is directed; and should any omission or mistake be made in such direction, the writ would be void, (see *Bowring v. Pritchard*, 14 East. 289; *Grant v. Bagge*, 3 East. 128; *Bradshaw v. Davis*, 1 Chit. R. 374;) or should the direction be to the sheriffs in the plural number instead of the singular, as "To the Sheriffs of Middlesex," when it ought to be "To the Sheriff of Middlesex," it would be irregular, (*Baker v. Weedon*, 1 C. M. & R. 396; *Jackson v. Jackson*, id. 438; 3 Dowl. 182, S. C.); or should the writ be directed to the sheriffs in the singular number when it ought to be in the plural, it would be a fatal misdirection, (*Barker v. Weedon*, *supra*).

If there should be any material omission or variance in the writ or copy served, the same would constitute an irregularity, to be objected to in due time, namely, within eight days after the same has been served or executed. The writ is to be *signed* and *sealed* by the same officers, and at the same offices, and in like manner as the writ of summons and other writs, and the rule or order for the writ is to be left with the signer of the writ.

The 3rd sec. of the 2 W. 4. c. 39. enacts, that "writs of distringas and notice, or a copy thereof, shall be *served* on such defendant, if he can be met with, or if not, shall be left at the place where such distringas shall be executed," [i. e. where the goods of the defendant are distrained,] "and a true copy of every such writ and notice shall be delivered together therewith to the sheriff or other officer to whom such writ shall be directed."

The service of, or leaving the writ, and the distress may be made on any day, not being a *dies non*, on or before the return day, and at any hour of the day or night, but within the boundaries of the county, with the exception of a county within another county, (2 W. 4. c. 39. s. 20.) If all the goods of the defendant to be found be not equal to the value of forty shillings, then the taking of them is a sufficient distress according to the Act, (*Jones v. Dyer*, 2 Dowl. 445).

It will be observed that the 2 W. 4. c. 39. s. 3. is silent as to the proceedings to be taken in case the defendant has been actually served in person with a copy of the writ of distringas, and his goods shall have been actually seized, or in case either of those proceedings have taken place, and only provides how the court or a judge may interfere when the sheriff has returned in the conjunctive, "*non est inventus* and *nulla bona*." But although the Statute is thus silent, it has been decided that if the sheriff has actually distrained on the defendant's goods, and left on the same premises a copy

of the writ of *distringas* with the note at the foot for the defendant, and he do not appear, then the plaintiff, upon the sheriff's return of the fact, and upon filing an affidavit by the sheriff with the proper officer of the court of the fact of such service and execution of the writ of *distringas*, or of service or execution, and an affidavit by some person who has searched for the defendant's appearance, that the defendant himself has not caused an appearance to be entered, (as he ought to have done), may, as of course, enter an appearance for the defendant according to the 2 W. 4. c. 39. s. 3. *without any application for or leave of the court or a judge*, (*Johnson v. Smealey*, 1 Dowl. 526—555). It would seem, also, that if the defendant were personally served with a copy of the writ, although no distress had been made, an appearance might be entered for him by the plaintiff, (see *Atherton* on Personal Actions, 58). But if there has been neither a distress nor personal service, then the plaintiff cannot either enter an appearance or proceed to outlawry, *without the express leave of the court or a judge*, as presently stated.

If the writ of *distringas* can neither be served on the defendant, nor his goods taken as a distress, then the Sheriff must return in the conjunctive "*non est inventus* and *nulla bona*," upon which return the Court, in term, must be moved, or a judge, in vacation, applied to on motion, and affidavit, stating that all due means (it is presumed at least three ineffectual attempts) to serve the *distringas* have been taken, shewing the particulars of such attempt, and that the defendant has no goods at his residence, nor, as it is believed, after diligent inquiries elsewhere, (*Cornish v. King*, 2 Dowl. 18; *Scarborough v. Evans*, 2 Dowl. 9); for leave to enter an appearance for the defendant, (*Tring v. Gooding*, 2 Dowl. 162); and thereupon the Court, or a judge, will in general make a rule, (see 2 W. 4. c. 39. s. 3; *Scarborough v. Evans*; *Cornish v. King*;

supra Bulgay v. Gardner, 2 Dowl. 52); or order allowing the plaintiff "to enter an appearance for the defendant, and proceed to judgment and execution," (see *Johnson v. Smealey*, *supra*): and upon taking such rule or order to the proper officer, the plaintiff may enter an appearance for the defendant, and proceed to judgment and execution in the same manner as if the defendant had been served with the writ of summons in the first instance.

Should any goods of the defendants have been taken under the *distringas*, they must not be sold, but returned to the defendant after such appearance on reasonable request, (*Smith v. Macdonald*, 1 Dowl. 688; *sed quære*, see 1 Chit. Arch. 535.)

Should the plaintiff, on making a rule or order for a writ of *distringas*, have elected to proceed to outlawry against the defendant, and the Sheriff has returned "*non est inventus* and *nulla bona*," the enactment could, in the fifth sec. of the 2 W. 4. c. 39. which is as follows, will now apply, "And be it further enacted, that upon the return of *non est inventus* and *nulla bona* as to any defendant against whom such writ of *distringas* as hereinbefore mentioned, shall have been issued, whether such writ of *distringas* shall have issued against such defendant only, or against such defendant and any person or persons, it shall be lawful, until otherwise provided for, to proceed to *outlaw* or *waive* such defendant by writ of *exigi facias* and *proclamation*, and otherwise, in such and the same manner as may be now lawfully done upon the return of *non est inventus* to a *pluris* writ of *ca. ad respondendum* issued after an original writ."

The writ of *distringas* in order to outlaw the defendant is obtained in the same manner as the writ of *distringas* to enable the plaintiff to enter an appearance for the defendant, but the affidavit on which the same is obtained varies in some particulars, which, on considering the requisites of the former

affidavit will probably suggest themselves to the reader, and it must be sworn that the defendant has no known residence or place of abode, or of business, nor goods to be distrained upon, or it must be that he is abroad with intent to delay his creditors (see *Fraser v. Case*, 9 Bing. 464; 2 M. & S. 720; *Simpson v. Lord Greaves*, 2 Dowl. 10; see also *Morgan v. Williams*, Price's G. P. 53, note, where Bayley B. is made to say, "If when the writ of summons was left, the defendant was out of the kingdom, it is then a case for outlawry.")

After the Sheriff's return of *nulla bona* and *non est inventus* to the writ of *distringas*, the writ of *exigifacias* and other proceedings take place in the usual way, and are in the same form as those used on other occasions, with the exception of the *teste*, which is altered by the fifth sec. of the 2 W. 4 c. 39. providing, "that every such writ of *exigent proclamation* and other writs, subsequent to the writ of *distringas*, shall be made returnable on a day certain in term; and every such first writ of *exigent and proclamation* shall bear *teste* on the day of the return of the writ of *distringas*." And every subsequent writ of *exigent and proclamation* shall bear *teste* on the day of the return of the preceding writ, and no writ of *distringas* is to be sufficient for the purpose of outlawry or waive, if the same be returned within less than fifteen days after the delivery thereof to the Sheriff, or other officer, to whom the same is directed.

2nd July, 1839.

C. B.

Law Reports.

QUEEN'S BENCH.—May 31.

Sittings in Banco.

STOCKDALE v. HANSARD.

JUDGMENT.

(Continued from p. 152)

We were, however, pressed with numerous authorities which were supposed to establish that

questions of Privileges are in no case examinable at law. Thorpe's case was, as usual, first cited. The facts were, that the Lords in Edward the Fourth's time consulted the Judges respecting the Privilege then claimed by a Member of the Commons' House; and the Judges at first declined to answer facts totally inconsistent with an anterior settlement of Parliamentary Privilege, especially on the footing of the jealousy felt by the Commons towards the Lords and the judicial authorities. The Judges did ultimately waive their objection to declaring an opinion on a question of Privilege; they declared it in Parliament, and by Parliament it was adopted. Yet their reluctance to assume, in the first instance, the delicate office of interfering with the Privilege of Parliament, even at the request of the House of Lords, and the respectful and submissive language in which they, the interpreters of the law, avowed their deference to those who make it, has been construed into a judicial decision that in their own courts they would decline to enforce that very law when made, if either House of Parliament should obstruct and overbear it by setting up the most preposterous claim under the name of Privilege. Often, undoubtedly, similar expressions have fallen from the Judges, but they must be modified by the cases in which they occurred. A sentence from Chief Justice North's judgment, in *Barnardisten v. Soame* (6 St. Tr. 1109), was read at the bar. The question being, whether an action on the case lay against the Sheriff at common law for a double return of Members of Parliament, which he strongly denied. He said, in the course of his elaborate argument, "if we shall allow general remedies (as an action upon the case is) to be applied to cases relating to the Parliament, we shall at last include Privilege of Parliament, and that great privilege of judging of their own Privileges." These words appear, at first sight, of extensive import indeed; but when we refer them to the subject then in hand, which was an action against a Sheriff for his conduct in a Parliamentary election, we shall perceive that they are far from making the large concession supposed.

The right of determining the election of their own Members is one of the peculiar privileges of the assembled Commons, like all other proceedings for their own internal regulation. With respect to them, I freely admit that the Courts have no right to interfere, nor perhaps any regular means of obtaining information. How they must deal with such points, when actually brought before them, is another consideration. But the possible inconvenience that might arise from permitting the action against the Sheriff, if the Courts should come in conflict with Parliament in those points of unquestionable Privilege, in which Parliament must have the sole power of

declaring what its privilege is, furnishes no shadow of an argument for the proposition, that whatever subject either House declares matter of Privilege instantly becomes such, to the exclusion of all inquiry by the Courts.

We were also reminded of the disparaging terms applied by the Judges to their own authority, when Alexander Murray, in 1751, was brought before this Court by habeas corpus. I have obtained a copy of the return, setting out a commitment by the House of Commons for a contempt in general terms; but it is not unworthy of remark, that Foster, Justice, founds his judgment on what was said by Lord Holt, and treats it as a commitment for a contempt in the face of the House. The fact was so, but the return did not state it. And Lord Ellenborough observed, in *Burdett v. Abbot*, that Holt did not so limit the power of commitment for contempts.

Twenty years after, Brass Crosby, Lord Mayor of London, brought himself before the Court of Common Pleas by habeas corpus. The Lieutenant of the Tower returned, for the cause of his imprisonment, an adjudication by the House of Commons, "That the Lord Mayor being a Member of the House, having signed a warrant for the commitment of a messenger of the House for having executed a warrant of the Speaker issued by order of the House, was guilty of a breach of privilege of the House." The Lord Mayor had manifestly committed a breach of privilege: the grounds of it are fully set out in the Speaker's warrant. Nothing could therefore be less needful or less judicial than the wide assertion of Privilege that was volunteered by the Chief Justice. Yet after all that he said respecting the indefinite powers of Parliament, his decision rests on the simple ground, that all courts have power to commit for contempt.

Sir William Blackstone clearly showed, on the same occasion, that the return was good, on acknowledged principles of law, and declared the power then exercised to be one which "The House of Commons only possesses in common with the Courts of Westminster Hall." But it must be confessed, that his remarks on the state of public feeling rather evince the spirit of a political partisan, than the calmness and independence which become the judicial seat.

(To be continued.)

July 1.

WILLIAMS v. PANTON.

Malicious Prosecution.—The Measure of Damages.

This was an action for damages for an alleged malicious prosecution. The plaintiff was the

servant of Mr. Thomas Williams of Carnarvon, and was indicted with him at the Central Criminal Court for a conspiracy with relation to a will of a Mr. Jones Panton. The parties were all acquitted.

It appeared from the evidence that the defendant was the son of Mr. Jones Panton, and had lived with his father at the family residence of Plas Gwyn for many years. Mr. Jones Panton died in 1837, and the son then proved a will which had been made in 1834. While the matter was under the consideration of the Ecclesiastical Court, Mr. Thomas Williams produced certain testamentary papers, which were afterwards the subject of the indictments against him and his two servants. There had been three indictments against Mr. Williams, in one of which he was defendant alone, and in the other two he was defendant with his two servants, Anne Williams (the present plaintiff) and Ellen Evans. The prosecutor in all was Mr. Barton Panton, the present defendant. Mr. Williams was first tried and acquitted, and the two other parties were then acquitted without trial. It was alleged on the part of the present plaintiff that she had been indicted without reasonable and probable cause. To make out this case, witnesses were called, from whose statement it appeared that Mr. Thomas Williams had married the daughter of Mr. Jones Panton, and that on the 6th of November, 1834, Mr. Jones Panton was on a visit to Mr. Thomas Williams at Bryn Bras Castle, the residence of the latter gentleman, and then made his will, giving the greater portion of his property to his daughter, Mrs. Williams. The question was, whether this will was genuine or not. It was proved to have the signature of Mr. Jones Panton, but the body of it was in the writing of Mr. Thomas Williams. Mr. Williams was one of the witnesses on the present occasion, and he stated that he had made the will on the direction of Mr. Jones Panton, who first of all gave him directions for the will, and he copied the directions, and then made out the will according to the directions so given him; that he then called up three of the servants, J. Williams, Anne Williams, and Ellen Evans, who saw Mr. Jones Panton execute the will, and who attested his execution of it. The will was then sealed up, and put away, and in 1837, but a short time previous to the death of Mr. Jones Panton, Mr. Williams went to see him at Plas Gwyn, where he prepared a codicil, which was duly executed and attested, and was then given to Ellen Evans who made it and other papers up into a parcel, and this parcel was afterwards carried to Child's banking house, where it remained till it was taken out to be proved, when it was given to an attorney who gave it to Mr. Wadeson the proctor. The codicil only made some slight alterations in

the dispositions of the previous will. It bore date on the 7th May, 1837. The will was stated to have been written on pure white paper, without having marks of pencil, and without any signs of previous marks having been obliterated. The execution, the attestation, and the delivering into Child's banking house, together with all the circumstances which went to shew *bond fide* in the transaction, were distinctly sworn to by the witnesses on the part of the plaintiff.

For the defendant evidence was called to raise a case of suspicion as to the execution and attestation of the will and codicil, so as to shew that the defendant had reasonable and probable cause for what he had done. It was stated that in 1831 Mr. Jones Panton had made a will in favour of the defendant, who was his favourite son, who had lived with him for many years, and to whom he had frequently given hopes of the inheritance of the bulk of his property. But a very short time before his death the father had handed to his son a parcel, containing some papers and some valuables, making at the same time an observation to the effect that the defendant had been given nearly every thing. It was stated, too, that this was but in accordance with his often repeated intentions, and it was therefore concluded that it was impossible to conceive that a man feeling himself just on the brink of the grave should have deceived his favourite son; and at that last moment, and without any offence given, not only have disinherited that son, but have deceived him by a falsehood; and, above all, that it was impossible to conceive that he should have done this in order to favour a son-in-law, with whom he never had lived on such terms of intimacy and affection. Besides, it was stated that when the papers were produced they bore marks of a pencil, and the will seemed to have been written over something else, and therefore suspicion had become aroused, and legal measures directed under legal advice had been taken to put a stop to what was conceived to be fraudulent contrivance to deprive the son of Mr. Jones Panton of his just inheritance. Under these circumstances it was contended not only that malice in the prosecution was not made out, but that the defendant had reasonable and probable cause. In addition to all these matters, witnesses were called to show that John Williams, one of the servants of Mr. Thomas Williams, and one of the attesting witnesses to the will, could not write, in proof of which his marriage register was produced, with his mark only affixed to it. Witnesses were also called to show that on the day on which the last codicil bore date, Mr. Thomas Williams had not been in the house of Mr. Jones Panton.

Lord DENMAN summed up. After going through the evidence, he said that the questions

they had to consider were, whether the defendant had acted without reasonable and probable cause, and whether he had maliciously instituted this prosecution against the plaintiff. If they answered both these questions in the affirmative, the verdict must be for the plaintiff; if not, it must be for the defendant. Now, he must say that it seemed to him that the defence in this case did not exactly meet the complaint. The object of the evidence was to show that there were circumstances of suspicion attached to the making of the will, and that the defendant had reasonable and probable cause for instituting legal proceedings. Without expressing any opinion on the effect of that evidence, he was bound to tell the jury, that even if they thought that Mr. Thomas Williams was properly called on to explain the circumstances under which the will and codicil he set up were made, it did not follow that the servants, who merely attested those instruments, knew anything of the concoction of them. Even if those instruments could be supposed to be fraudulent, the jury must say whether there was anything which showed the servant, Anne Williams, the plaintiff on this record, to have been cognizant of the fraud. If they could not say that she was, if on the evidence they thought that there was nothing like a reasonable and probable cause for including her in the prosecution, then the verdict must be in her favour, with such damages as the jury thought the case fairly demanded.

Mr. Richards, on the part of the defendant, tendered a bill of exceptions to this direction.

Lord DENMAN, however, said that the whole was matter for the consideration of the jury.

The jury returned a verdict for the plaintiff, damages £30.

July 3.

EVANS v. PANTON.

This action arose out of the same cause of action as the last case; and was brought by Ellen Evans, the other servant of Mr. Thomas Williams, with whom she was also indicted.

The same facts were given in evidence, and

Lord DENMAN again summed up the case. His Lordship said, that the burden of proving that the proceedings instituted against the plaintiff had been so instituted without reasonable and probable cause, and with a malicious motive, lay upon the plaintiff. It was for the jury to say whether they were satisfied that that proof had been given. If it had, then the verdict must be for the plaintiff; and the question to be considered was, what was the amount of damages to which the plaintiff was entitled. In deciding on that question, the jury would forget that any other verdict had been given; they would not be

guided by the determination of any other jury, but by their own sense of what the circumstances of the case required. The charge made against the plaintiff was one of a most serious kind; so far as the evidence went there did not appear to be the slightest foundation for that imputation. The plaintiff and her fellow-servant had each been twice under examination, and in no one material point was the statement they had made, when first questioned upon this subject, contradicted or impugned. If the jury thought that the circumstances under which the will was made were suspicious, still there was nothing to show that the plaintiff knew anything of those circumstances. She appeared to have been called in to witness the execution of an instrument, but there was no evidence to show that the contents of that instrument, or the circumstances under which it was made, were communicated to her. The prosecution of her for fraud and forgery, therefore, did seem somewhat premature, but still it was for the jury to say whether the defendant had not acted on a real, though a mistaken suspicion. The jury must say, first, whether the prosecution was without reasonable and probable cause, and if so, the plaintiff would be entitled to a verdict; and, secondly, if so, they must consider whether there were any palliating circumstances, which might be urged on behalf of the defendant and they would note these in the amount of damages.

Verdict for the plaintiff, damages £20.

COURT OF COMMON PLEAS—July 6.

Sittings at Nisi Prius.

Special Jury.

BRADBEE v. THE GOVERNORS OF CHRIST'S HOSPITAL.

NUISANCE.—Special Damage.

This was an action brought by the plaintiff, to recover damages from the defendants for having seriously injured him in his business by erecting a hoard in front of his premises, and causing other special damage, in consequence of the opening which was made in Newgate-street in the year 1833, under the authority and by the direction of the defendants.

TINDAL, C. J. suggested that both parties should consent to a reference, in order to ascertain, first, if there were grounds for the action, and secondly, as to the amount of damages which the plaintiff had sustained.

Mr. Erle, for the defendants, agreed to the proposed arrangement.

The Jury found a verdict for the amount of damages laid in the declaration, subject to a reference.

COURT OF THE SHERIFF OF MIDDLESEX.

July 9.

THE TRUSTEES OF THE STRATHMORE ESTATE v. HART.

LESSOR AND LESSEE.—Breach of Covenant to Repair—Whether a Lessee under Covenant to repair, by his neglect, allows the house to fall down, is bound to build a new house of brick, the Building Act prohibiting the erection of wooden houses, of which description the house destroyed was, or as an alternative, pay the Lessor the value of the latter.

It appeared that the defendant held a lease of a house at Shadwell of the trustees of the Strathmore estate. The lease was granted in the year 1817, for the term of thirty years, and contained a covenant to "rebuild sufficiently the party walls," and the usual covenant to repair. The house, however, was an old wooden house, built in the Elizabethian style, and in the course of last year fell down. The plaintiffs now insisted that the defendant was bound to build a new house, and as by the New Building Act it was prohibited to build wooden houses, it must necessarily be built of brick, and the cost of which was estimated at £450.

Mr. James, for the defendant, contended that the tenant was only obliged to build it in the same manner, and in as good condition, being allowed the natural decay, as when he had it, and as the building could not be so built, the plaintiffs must bear the difference in the loss. An adjoining house, of a similar description as the one in question, was valued at £250.

The UNDER-SHERIFF said the defendant was bound to keep the premises in repair. If by his negligence in that respect, the plaintiff had been put to additional expense, he was justly chargeable; but the Building Act did not permit the erection of a similar structure. Whether, therefore, the defendant was to be put to the expense of building an entire new house was another question, and that which the jury were then called upon to decide.

The jury found for the plaintiff—Damages £200.

In actions of this nature, the jury may take into consideration the state of repairs, the subject of the demise was in at its commencement, in order to assess the damages, for which the defendant shall be liable. See Burlett *v.* Withers, 2 Nev. and Per. 122.— So also it was held in Soward *v.* Leggatt, 7 Can. and P. 613, by Lord Abinger, that

such a trust is liable for repairs only, and was not liable for the extra expense of laying a new floor upon an improved plan, or the like.

NEW ORDERS OF THE COURT OF CHANCERY.

*Issued under the Stat. 1 & 2 Victoria, c. 110.
(Concluded from p. 158.)*

No. X.

Writ of Venditioni Exponas.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of [redacted] greeting.

Whereas by our writ we lately commanded you that of the goods and chattels of C. D. (*here recite the Fieri Facias to the end*), and on the day of [redacted], you returned to us in our Court of Chancery aforesaid that by virtue of the said writ to you directed, you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore we being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you, that you expose to sale and sell or cause to be sold the goods and chattels of the said C. D. by you in form aforesaid taken and every part thereof for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Chancery aforesaid, immediately after the execution hereof to be paid to the said A. B. And have there then this writ.

Witness ourself at Westminster, the day of [redacted], in the year of our reign.

COTTFENHAM, C.
LANGDALE, M. R.
LANCELOT SHADWELL, V. C.

COURT OF COMMON PLEAS, DURHAM.

2 Vict. cap. XVI.

An Act for improving the Practice and Proceedings of the Court of Pleas of the County Palatine of Durham and Sadberge. [June 14, 1839.]

(Continued from p. 158.)

XIV. And be it enacted, That it shall and may be lawful for the said Court of Pleas at Durham, if the said Court shall think fit, on any application being made to the said Court in any action depending in the said Court on any question involving a question of law or fact, to grant a rule to show cause before any one of the Judges

of any one of the superior Courts of common law at Westminster, which Judge is hereby authorized and empowered to proceed to hear and determine the merits of all such rules, and to make such orders thereupon, as the said Judge shall think proper.

XV. And be it enacted, That it shall and may be lawful for the Justices of the said Court of Pleas at Durham for the time being from time to time to make such orders, rules, and regulations for altering and regulating the mode and time of pleading in that Court, and for altering the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law therein, and touching the voluntary admission, upon any application for that purpose, at a reasonable time before the trial of any action, of one of the parties to the other, of all such written or printed documents or copies of documents as are intended to be offered in evidence on the said trial by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause, in case of the omitting to apply for such admission, or the not producing of such documents or copies for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, as to the Judge before whom the cause may be tried shall seem meet.

XVI. And be it enacted, That all writs hereafter to be issued by the Court of Pleas at Durham under and by virtue of the statute passed in the Session of Parliament held in the eighth and ninth years of the reign of King William the Third, intituled "An Act for the better preventing frivolous and vexatious Suits," shall, unless the said Court shall otherwise order, direct the Sheriff of the said county of Durham to summon a Jury to appear before him instead of the Justices or Justice of Assize of and for the said county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said Sheriff to make return thereof to the said Court on a day certain in such writ to be mentioned; and such proceedings shall be had after the return of such writ as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a Justice of Assize or *Nisi prius*.

XVII. And be it enacted, That every other writ of inquiry to be issued by the said Court of Pleas at Durham shall be made returnable on any day certain to be named in such writ.

XVIII. And be it enacted, That in any action depending in the said Court of Pleas at Durham for any debt or demand in which the sum sought to be recovered and indorsed on the writ

of summons shall not exceed twenty pounds, it shall be lawful for the said Court, or any Judge of any of her Majesty's superior Courts of common law at Westminster, if such Court or Judge shall be satisfied that the trial of the said action will not involve any difficult question either of law or fact, and such Court or Judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the Sheriff of the said County Palatine of Durham or any Judge of any Court of Record for the recovery of debt in such County, and for that purpose a writ shall issue, directed to the said Sheriff or Judge, commanding him to try such issue or issues by a Jury to be summoned by him, and to return such writ, with the finding of the Jury thereon indorsed, at a day certain to be named in such writ, and thereupon such Sheriff or Judge shall summon a Jury, and shall proceed to try such issue or issues.

XIX. And be it enacted, That at the return of every writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the Sheriff or his deputy before whom such writ of inquiry may be executed, or such Sheriff, deputy, or Judge before whom such trial shall be had, shall certify under his hand upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the said Court of Pleas at Durham for a new inquiry or trial, or the said Court shall think fit to order that judgment or execution shall be stayed till a day to be named in such order; and the verdict of such Jury on the trial of such issues or issue shall be as valid and of the like force as a verdict of a Jury at the Assizes, and the Sheriff or his deputy or Judge presiding at the trial of such issue or issues shall have the like powers with respect to the amendment on such trial as are given to Judges at *Nisi prius* by an act passed in the third and fourth years of the reign of King William the Fourth, intituled "An Act for the further Amendment of the Law and the better Advancement of Justice."

XX. Provided always, and be it enacted, That, notwithstanding any judgment signed or execution issued as aforesaid by virtue of this Act, it shall be lawful for the said Court of Pleas at *Durham*, or any judge of any of her Majesty's superior Courts of Common Law at *Westminster*, to order such judgment to be vacated and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial or new writ of inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error or otherwise, as the Court may think fit to direct.

(To be continued.)

MANSION HOUSE—July 6.

(Before the Lord Mayor and Mr. Alderman Pirie.)

SIR ROBERT PEEL'S ACT FOR THE PREVENTION OF SMUGGLING, 3 and 4 W. 4. c. 53.

Construction of Sec. 34 by the Magistrates as to the Right of Searching the Person by the Custom House Officer.

Sec 34 enacts, "That it shall be lawful for any officer or officers of the Army, Navy, or Marines, duly employed for the prevention of smuggling and on full pay, or for any officer or officers of Customs, producing his or their warrant or deputation (if required) to go on board any vessel which shall be within the limits of any of the ports of this kingdom, and to rummage and to search the cabin and all other parts of such vessels for prohibited and uncustomed goods, and to remain on board such vessel during the whole time that the same shall continue within the limits of such port, and also to search any person or persons either on board or who shall have landed from any vessel. PROVIDED such officer or officers shall have good reason to suppose that such person or persons hath or have any uncustomed or prohibited goods secreted about his, her or their person or persons."

Sec. 35 enacts, "That before any person shall be searched by any such officer or officers as aforesaid, it shall be lawful for such person to require such officer or officers to take him or her before any justice of the peace, or before the collector, comptroller, or other superior officer of the customs, who shall determine whether there is reasonable ground to suppose that such person has any uncustomed or prohibited goods about his or her person; and if it shall appear to such justice, collector, comptroller, or other superior officer of customs, that there is reasonable ground to suppose that such person has any uncustomed or prohibited goods about his or her person, that then such justice, collector, comptroller, or other superior officer of customs shall direct such person to be searched in such manner as he shall think fit: BUT if it shall appear to such justice, collector, comptroller, or other superior officer of customs, that there is not reasonable ground to

suppose that such person has any uncustomed or prohibited goods about his or her person, that then such justice, collector, comptroller, or other superior officer of customs shall forthwith discharge such person, who shall not in such case be liable to be searched; and every such officer or officers, as aforesaid, is and are authorized and required to take such person, upon demand, before any such justice, collector, comptroller, or other superior officer of customs, detaining him or her in the mean time. PROVIDED ALWAYS, that no person, being a female, shall be searched by any other person than a female duly authorized for that purpose by the Commissioners of His Majesty's Customs."

Sec. 36 enacts, "That if any such officer or officers shall not take such person, with reasonable despatch, before such justice, collector, comptroller, or other superior officer of customs, when so required, or shall require any person to be searched by him, not having reasonable ground to suppose that such person has any uncustomed or prohibited goods about his or her person, that such officer shall forfeit and pay the sum of £10."

Messrs. Bush and Masters, Solicitors, brought up Elizabeth Gaston, a female searcher, for conviction in the full penalty under the above sections of the Statute for the prevention of Smuggling; she having searched, on board the CITY OF BOULOGNE STEAM VESSEL, two ladies, without having reasonable ground to suppose that they had uncustomed or prohibited goods about their persons.

Mr. Bush stated that the case was brought forward upon public grounds alone. The information was laid upon Sir Robert Peel's Act, which specified the mode to be adopted as to personal search by the officers, and which was evidently framed for the protection of people who could not be supposed to know the exact state of the law.

The Solicitor for the Customs stated that if the young ladies had represented to the Commissioners of the Customs that they had been subjected to any annoyance in the search of which they complained, immediate inquiry would have been made, and the present investigation would have been rendered unnecessary.

Mr. Bush said that he had been directed to bring the matter before the Lord Mayor, and not

before the Commissioners of the Customs, as a course most likely to give satisfaction to the public on a question which deeply interested the public. There was reasonable ground for believing that undue use of the power of searching was made by stewards and stewardesses on board foreign steamers, for the purposes of extortion, and it was but right to have the question settled before the magistrates of London. He then called—

Mrs. Jane R. Wingrove, who deposed that on the 12th of May, she went, accompanied by her sister, on board the CITY OF BOULOGNE steam-vessel, in order to visit a young lady at Boulogne. She had with her a letter of introduction from Sir William Curtis, Bart. to Captain Tune, who was the commander. The stewardess of the vessel, when they arrived at Boulogne, asked them for some pecuniary consideration, but as she had paid them no attention they did not think she was entitled to any, and they offered her sixpence. She said that she never took sixpences, and she detained half-a-crown which they put into her hand. When they complained of her keeping the half-crown, and mentioned that they were under the protection of the captain, she said they might go to the captain, and that he had nothing to do with it. They returned to London in the same vessel on the following Thursday, having with them the handbox and small bag in which they had carried a few articles of dress to Boulogne—The box and bag were searched on board by the searcher, and as they were leaving the vessel, the stewardess, who had on the former occasion kept the half-crown, observed to them that they had not given her anything. They replied "No." The stewardess then said "I dare say you will be coming over again," and witness said "Very likely." They then left the vessel, and were proceeding up the steps of the wharf, when witness heard her name called by some one on board—They immediately returned, and the searcher told them they must go below to be searched. They went down, and were told by the searcher that they must undress to be searched. They observed to her that they came under the captain's care. She asked them whether they were friends of the captain, to which they answered that they were not, but that they came under his protection. She then said to them that the stewardess of the vessel was the person who had them called back, and begged that they would not mention it, or she would lose her situation. She replied the request. They were very closely examined, even to their linen, and the searcher passed his hands under their stays. When they were examining themselves, the stewardess entered a berth. They were detained about half an hour by the search.

Mr. Bush.—Was the search offensive to you?

Mrs. Wingrove.—Not so much so as it was to my sister. I have been in very delicate health, and I was wrapped up closely during the voyage. The searcher told me it was her duty to search us, and I supposed that such was the case.

Miss Isabella Brown Reed (sister to Mrs. Wingrove) deposed, that she was searched after the last witness, by the same searcher, and more closely. They had no foreign goods about them. Her sister was ashore, and was proceeding up the steps, and witness was following her, when an officer touched her on the shoulder, and said they must go to be searched.

Mr. Bush.—Did the searcher, in your opinion, do more than there was occasion for her to do, to ascertain whether you had smuggled goods about you?

Witness.—I thought so.

The Lord Mayor.—Is it usual to act in this manner in steam-vessels?

The Solicitor for the Customs said that the subject was certainly an awkward one; but he assured the magistrates that the commissioners directed that, in searching, the utmost delicacy should be observed, and there never had been any complaint made except by these ladies.

Mr. Bush.—The public are not aware of the ground upon which search is justified, and therefore no complaints have been made. If the searcher had reasonable ground to suppose that search was necessary, let it be shown.

The Solicitor for the Customs.—I cannot call the defendant herself, and she was the only person present with the two ladies when they were searched; but it is impossible to conceive the stratagems used to conceal contraband goods.

Captain Tune stated that the young ladies were introduced to him by letter from Sir William Curtis, expressing the baronet's wish that he should take particular care of them; and he paid them particular attention.

Mr. Bush.—In your observation, was there anything in the conduct or appearance of the young ladies to justify the suspicion that they had contraband goods in their possession?

Captain Tune.—Not at all.

The Solicitor to the Customs.—I have no idea of charging them with anything of the kind.

The Lord Mayor.—Perhaps you would show why these two young ladies should have been selected from all the rest of the passengers to be searched?

The Solicitor to the Customs said, that he by no means meant to impute anything to the young ladies; but Mr. Bush seemed to wish to make an impression that there was a collusion between the stewardess and the searcher.

Alderman Pirie.—It has very much that appearance indeed.

The Lord Mayor.—Most certainly it has.—

What other inference can be drawn from what we have heard?

The Solicitor for the Customs.—The stewardess might have behaved ill, but our officer, if she received information, had no alternative. As for the argument that the Act was not complied with in reference to taking the ladies before a magistrate for inquiry into the reasonable ground, the ladies had not required it, and there existed of course no obligation upon her part to do so.

Mr. Bush said, that if the public were thus to be at the mercy of stewards and stewardesses, the 36th section must be put in force.

The Solicitor for the Customs.—This is a question of great nicety, and relates to the extent to which an officer may go in the execution of duty. It is quite clear that respectable young ladies have been detected with contraband goods concealed about their dress and persons. In the bustles, which are worn so unnaturally, quantities of valuable lace have been found. In the linings of their stays, and the various seams of their under-garments, and between their drawers and their persons, under their wigs (laughter), and, in fact, everywhere about their persons, smuggling has been carried on. Where, under such circumstances, in which the utmost ingenuity is exercised, is the point of delicacy to be decided upon? What can the searcher do but proceed in the performance of her duty with all the delicacy possible? It does not appear that anything was done in this case calculated to show that the duty was performed in an improper manner.

The Lord Mayor.—Are not the searchers able to judge pretty accurately what sort of persons deal in contraband goods in the way described?

The Solicitor for the Customs said, that many whom nobody would suppose capable of smuggling, were detected.

Alderman Pirie.—It is evident that they must have been satisfied on board the vessel that these young ladies had nothing about them of the kind, for after their box and bag were searched they were allowed to go ashore.

The Solicitor for the Customs.—I do not mean to say that they are capable of anything of the sort; but you will judge of the difficulties the searchers have to encounter, when I assure you that valuable articles have been found about females of most respectable appearance, everywhere from top to toe.

Alderman Pirie.—Why were not the ladies stopped and searched until they refused to give money to the stewardess?

The Solicitor for the Customs.—This searcher has been five years in the service, and has an excellent character; no person ever complained against her before.

The Lord Mayor.—It is not likely that ladies would willingly come forward to give evidence.

It must have cost these young ladies more pain to come forward and state these facts in public to-day, than they experienced even in undergoing the search for smuggled goods.

The Solicitor for the Customs submitted that the searcher had exercised the power of search with decency and propriety, and he assured the magistrates that if searchers were not allowed to pursue a strict examination, the contraband trade would be most frightfully increased.

Mr. Bush.—The defendant has not shown that she had reasonable ground for searching, and I must, under all the circumstances, press for the extreme penalty.

The Lord Mayor.—Alderman Pirie and I agree that the case is one which it is necessary should be visited with the extreme penalty. Here are two young ladies of most modest and retiring conduct and appearance. They properly refused to give a fee to the stewardess on account of her inattention. The stewardess then dishonestly kept possession of their money, and on their return, the same woman who had thus acted, held a conversation with them, which was quite intelligible, and which was followed up by the remarkable fact of obliging them to return, after they had quitted the vessel, to undergo a strict search, although there was nothing at all about them calculated to excite the shadow of suspicion that search was justifiable. We regret exceedingly, that they should have been subjected to so repugnant an examination, and we fine the searcher in the full penalty of £10.

REVIEW OF NEW BOOKS.

A LETTER TO THE RIGHT HON. SIR EDWARD KNATCHBULL, Bart., relating to the Bill before Parliament for the ENFRANCHISEMENT of LANDS of COPYHOLD TENURE, and other Lands subject to Manorial rights.

In closing our review of this *one-sided* Letter, (a) we promised to look at the *other side* of the question, which a correspondent has enabled us to perform.

PONTYPOOL.—COPYHOLD ENFRANCHISEMENT.
The case of the Copyholders and Inhabitants of the Manor of Wentsland and Bryngwyn and Town of Pontypool, in the County of Monmouth.

The copyholders and inhabitants of the manor have addressed a petition to the Legislature, hum-

bly praying "that an Act may be passed which, whilst it shall secure to the Lords of Manors an equivalent, in lieu of their fines and services, shall empower tenants holding by copy of Court Roll to obtain the enfranchisement of their estates."

In their solicitude to engage attention to the prayer of their petition, the petitioners have thought it expedient respectfully to present to the Members of both Houses of Parliament a statement of their case.

By the custom of this manor, a fine equal to *two years' improved value* of the property is payable to the Lords upon every alienation; to which are to be added *the cost of stamps*, for the surrender and admittance, and *the professional charges* of the steward or deputy steward of the manor.

In some manors a custom obtains of taking conditional surrenders, as upon the occasion of mortgage transactions; and, it not being then absolutely necessary that the surrenderee should, during the life of the surrenderor, be admitted, the payment of the fine may, in some cases, be avoided, by the inexpensive process of causing satisfaction to be entered on the Court Rolls, when the mortgage debt is satisfied. But here the Court Rolls do not afford evidence of such a custom; and it is considered that the custom of the manor requires the surrenderee *in the case of a mortgage*, as well as in the case of an absolute sale, to be admitted, and *pay the fine*. Upon payment of the mortgage debt, a surrender and admittance become necessary; and *the fine is again to be paid*, together with the *cost of stamps* and *steward's charges*. The descent of real property within this manor is governed by the perplexing custom of gavelkind. Upon the death of a copyholder, if he be resident within the manor, a *heriot of the best beast* is claimed by the lords. If the copyholder die, and his estate descend to his five or six sons, those sons become by the custom joint heirs. They must incur the expense of being separately admitted; and, upon the death of each, a *heriot is likewise claimed*. If the copyholder subdivide his estate, and make sale of the same to a hundred purchasers, upon the death of each, if resident within the manor, a *heriot is due to the lords*.

It must be obvious, from the foregoing statement, how oppressively such a custom must operate, and how impossible it is that property so clogged can, in a commercial country, be made to answer the general purposes of civil life. A person may have a building property worth—say £40. or £50. per annum; or, if it were freehold, perhaps £700. or £800. Having occasion for a sum of money in business, he borrows, by way of mortgage, say £500. The mortgage

(a) *Ante*, p. 157.

is admitted, and a fine of two years' value, beside the cost of stamps and law charges, attaches. The mortgagee by and bye dies. When the estate is sought to be redeemed from the mortgage, the real representatives of the mortgagee must be admitted, and a heriot of the best beast, and the cost of stamps and professional charges, must be paid. The property must then be again surrendered; and the mortgagor, if living, or his real representatives, if he be dead, must be admitted, and again pay the fine, the cost of stamps, and law charges. In such a case, a property worth £700. or £800. is rendered liable to fines of four years' improved value, besides a heriot, and the cost of stamps, and the professional charges incident to three surrenders and admittances, and also to the deeds of defeasance or mortgage deeds. In short, a property worth £700. or £800. may be nearly, or entirely, wasted by a transaction attending the borrowing of £400. or £500. If the property had been freehold, the transaction would only have rendered the party borrowing the money liable to those costs of stamps and professional charges, which are for the most part common alike to freehold and copyhold property; perhaps not more than five-and-twenty or thirty pounds!

The manor of Wentsland and Bryngwyn comprises the town of Pontypool, and a mineral district of country, extending four or five miles to the north and north-west of that town; and is itself comprised in the parishes of Llanithel and Trevethin, but chiefly in the latter. The country abounds with coal and iron ore; and owing to the abundance of those minerals, the district is becoming densely populous. The parish of Trevethin in 1801 contained 1400 inhabitants.

It is estimated that it now contains between fifteen and sixteen thousand; but that increase has taken place chiefly within the last ten or twelve years. Population is still upon the increase, owing to the erection of new, and the extension of existing works. A large proportion of the above-mentioned population is within this manor, or upon its very confines. It is not too much to say that, in this immediate neighbourhood, there are minerals sufficient to afford employment to a population of twenty or thirty thousand human beings, for more than a century to come.

The extension of the mines and manufactories of the district, and the consequent influx of workmen, and of persons who minister to their wants, create an incessant demand for dwelling-houses and premises for their accommodation. Tradesmen and the better sort of workmen seek to establish themselves in suitable premises and habitations; and the great importance of workmen acquiring those attachments and settled habits, which the possession of property so much

encourages, is universally admitted. This custom, however, operates as a great discouragement to their building, and the consequence is, that the rents of houses are immoderately high. But, as regards those persons who do embark money in building, cases such as the following frequently arise:—Tradesmen desirous not to expend the whole of their capital, procure probably a mortgage of some amount to enable them to complete their premises. A workman, perhaps, has occasion to resort to a similar expedient, to enable him to complete his dwelling.

Now, to effect those objects (as the custom does not admit of a demise for more than one-and-twenty years) those persons have to surrender to their mortgagees, upon whose admission the fines are to be paid, and the cost of stamps, and the steward's charges, and the professional charges attending the deed of defeasance, or mortgage deed. The fines in such cases may be but of small amount; but what follows? The tradesman upon a small plot of almost valueless ground completes the erection of premises worth forty or sixty pounds per annum. Those premises cannot be redeemed, in any event, without being liable to a fine equal to two years' improved value, besides the cost of stamps and law charges; and, if the death of the mortgagee ensue before redemption, another admittance becomes necessary, and a heriot must be paid, and the cost of stamps, and professional charges. And again: If the mortgagee call in his money, and the mortgagor is obliged to procure the mortgage security to be transferred, another fine is to be paid, besides the cost of stamps, and the steward's charges, incident to the admittance of the transferee of the mortgagee. An assignment of the mortgage debt also becomes necessary, and is attended with some expense. If the property had been freehold, that would have been the sole expense.

From what is here stated, it will be apparent that a property once mortgaged can seldom be redeemed, without being rendered liable to three or four fines, and the expenses of stamps, and professional charges incident to an equal number of surrenders and admittances, and also to several deeds of defeasance and assignment.

It is obvious that such a custom must sooner or later absorb all capital, however invested in the soil; and that it must hamper many of the transactions of life with a burden most grievous to be borne.

Persons whose misfortune it is to be thrown in the way of such oppressive customs, are sometimes told that they have no right to complain of imposts which affected their property, when they or their ancestors acquired it; the presumption being, that it was purchased for a less

consideration than it would have been, had the property been freehold.

That, however, as an argument which can only hold good, when applied to *cases simply of bargain and sale*, where the amount of the impost can be ascertained and taken into the calculation; but, as shewn above, it can have no application to those hundreds of cases wherein the owners of property desire to subject their estates to modifications and arrangements rendered necessary by the state of their families and affairs.

Under the foregoing circumstances, the authors of this statement have ventured to solicit the attention of members of the Legislature to the subject of *Copyhold Enfranchisement*, and to the expediency of establishing one uniform system of law applicable to the real property of the country, the subject being of infinitely greater importance to many large communities than is generally imagined. The principle which has been applied to the commutation of tithes might, they conceive, with perfect ease be applied to the extinction of copyhold tenures. Large portions of the property of the country would thereby be rendered infinitely more valuable to its owners, and more serviceable to the community at large; whilst, at the same time, that ample compensation, which justice demands, would be made to the lords of manors.

Business of the Courts.

COURT OF CHANCERY.

In re Swindell, lunatic petition — Kelsey v. Larkin, appeal motion.

Appeals.

Anderton v. Bradshaw — Burn v. Carvalho — Bacon v. Jones.

Causes.

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VICE-CHANCELLOR'S COURT.

Short Causes and unopposed Petitions.

After the Petitions.

Sturges v. Champneys, to be spoke to — Delcroix v. Lewis, petition by order — Houghton v. Gadschill, ditto — the Attorney-General v. Wynne, ditto — Lombe v. Stoughton — Askell v. Fletch, cause by order — Bennett v. Nesbitt, further directions by order — Pinkus v. Radcliffe Gas Company, motion by order — Humphries v. Crowther, ditto.

Causes by Order.

Simple v. Rice, demurrer — Phillips v. Lewis, ditto — Woodroffe v. Daniel, exceptions — Uttermore v. Wilham, further directions and costs — Reddell v. Dobree, two demurrers — Borrodale v. March, plea.

ROLLS' COURT.

Cashbourne v. Barsham, to be spoke to — Cor-

poration of Maldon v. Blackbourne, part heard — Hill v. Gomm — Mehrtens v. Andrews — Alder v. Foster — Prince v. Howard — Bennett v. Hayter, exceptions, further directions, and costs — Harries v. Higgon — Robinson v. Robinson — the Attorney-General v. Matthews — the Attorney-General v. Lipscomb — Nias v. Northern and Eastern Railway — Tench v. Cheese.

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The Legal Guide.

VOL. II.]

SATURDAY, JULY 20, 1839.

[No. 12.

LEX LOCI DOMICILII.

PART I.

IN CASES OF LEGITIMACY.

By what law shall the personal property, situate in England, of a British born subject domiciled in Scotland, or any of the British Colonies, and intestate, be governed?

(Continued from p. 163.)

FROM the authorities we have quoted, we are led to draw this conclusion, that *personal property* is governed by the *Lex loci domicilii* of the owner with respect to trade, disposition by deed, or will, donation, or succession *ab intestato*; in short, that *personal property* is wholly regulated by the *Lex loci domicilii* of the owner, in all the various modes, in which it can be transferred, dealt with, or pass.

This, we take to be the general principle; though there may be exceptions, arising in some cases, from the *lex loci contractus*, or from the laws of the country in which the personality is situate; in some instances, giving creditors or others a lien thereon, or preferable title thereto. We also think that the whole *lex loci domicilii* of the owner, and not a part only, is applicable to personal property. Thence it follows, that if a *Dutchman* die domiciled in *Spain*, the whole of his property ought to be disposed of according to the law of *Spain*, whether situate in *England*, *France*, or elsewhere. It is indeed obvious that this rule must be applied, or the *lex loci rei sitae*—a law now almost

universally repudiated, as regards personal property, but which exclusively governs the succession to real property—must prevail; and according to this rule it has been decided, (a) that if a Scotsman domiciled in *England* dies intestate, his personal estate, wherever its actual *situs* may be, shall be distributed according to the law of *England*.

Having shewn the rule and principles that govern the *Lex loci domicilii*, and supported our own views of this difficult subject, as it regards *personal property*, we think it right, and in fit season, to return to our very amusing learned contemporary—the *AMERICAN JURIST*; (b) who, in another work, (c) with all that “theoretical fulness and accuracy” with which *his works abound*, gives the European world *HIS RULES* (d) by which the *Lex loci domicilii* shall be governed. What sort of “a collection” they are may be readily seen in our little *Essay* upon the subject, which, if referred to, will shew that they are “a collection of principles” laid down by the ancient writers and the English Courts of Law; upon which one general rule has been founded, and nothing more. Not a single new light does the learned Jurist give us upon this subject—not a single reason—nay, not “any general

(a) *Balfour v. Scott*, 6 Bro. P. C. 550.

(b) See ante, p. 145.

(c) *Commentaries on the Conflict of Laws*, by Dr. Story, Dane Professor of Law in Harvard University.

(d) Rules of Law are *solely* created by and founded upon *Precedents*.

reasoning to illustrate them." These are **H
FOURTEEN RULES:**—

"Two things must concur to constitute domicile: first, residence; and, secondly, intention of making it the home of the party.(a) There must be the *fact and intent*; (a) for, as *Potheir* has truly observed, a person cannot establish a domicile in a place except it be *animo et facto*. And in many cases *actual* residence is not indispensable to retain a domicile, after it is once acquired; but it is retained, *animo solo*, by the mere intention not to change it, or adopt another. Sometimes it is a matter of great difficulty to decide in what place a person has his domicile. Without *speculating* upon all the various cases which may be started on this subject, the FOLLOWING RULES may be adopted! as guides, in cases of most familiar occurrence.

"1. The place of birth of a person is considered his domicile, if it is at the time of his birth the domicile of his parents.(b)

"2. The domicile of birth of minors continues until they have obtained a new domicile.(c)

"3. Minors are generally deemed incapable *proprio marte* of changing their domicile during minority, and therefore retain that of their parents; and if the parents change their domicile, that of the infant children follows it; if the father dies, his last domicile is that of the infant children.(d)

"4. A married woman follows the domicile of her husband.(e)

"5. A widow retains the domicile of her deceased husband until she obtains another.(f)

(a) Vattel; Denisart; and see ante, p. 161.—Ed.

(b) Denisart; and see ante, p. 161.—Ed.

(c) Id.—Ed.

(d) This we presume to be intended as one of the learned Doctor's *illustrations* of his Rule No. 2. We need not therefore repeat the source from whence he obtained it.—Ed.

(e) Law of England.

(f) This is ot intelligible: the word "another"

"6. *Prima facie* the place where a person lives, is taken to be his domicile until other facts establish the contrary. (g)

"7. Every person of full age, having a right to change his domicile, it follows, that, if he removes to another place, with an intention to make it his personal residence (*animo manendi*), it becomes instantaneously his domicile.(h)

"8. If a person has *actually* removed to another place, with an *intention* of remaining there for an indefinite time, and as a place of present domicile, it becomes his domicile, notwithstanding he may entertain a floating intention to return at some future period.(i)

"9. The place where a *married man's* family resides is generally to be deemed his domicile.(j)

"10. If a *married man* has two places of residence at different times of the year, that will be esteemed his domicile which he himself selects, or describes or deems to be his *home*, or which appears to be the centre of his affairs, or where he votes, or exercises the rights and duties of a citizen. (k)

"11. If a man is *unmarried*, that is generally deemed the place of his domicile, where he transacts his business, exercises his profession, or assumes municipal duties or privileges.(l)

may apply to another domicile or another husband. We must therefore leave this Rule without remark.—Ed.

(g) Ante, p. 163.—Ed.

(h) Anstruther v. Chalmers, ante, p. 163. See also Vattel, Denisart, and ante, p. 161, 162.—Ed.

(i) The "floating intention" is the only difference from No. 7, and it being a *new element*, quite foreign to the *animo et facto*, he may abandon that domicile and acquire another. Ante, p. 163.—Ed.

(j) This and No. 6 may go together.—Ed.

(k) Lord Alvanley's distinctions, ante, p. 162. The latter part of this rule is not *the fact*—a temporary public duty does not change the domicile.—Ed.

(l) This also may be tacked to No. 6, and the latter part is subject to the same observation as we made upon No. 10. Nos. 6, 9, and 11, may all be placed

" 12. Residence to produce a change of domicile must be voluntary.

" 13. A domicile, once acquired, remains until another is gained.(a)

" 14. If a man has acquired a new domicile different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is re-acquired *in itinere*, for it reverts from the moment that the other is given up."(b)

We have thus shewn the learned Professor's fourteen rules, among the whole of which we cannot find one new idea, but on the contrary, in two instances, we are compelled to reject them as untenable. We quite agree with him that there certainly is a very "remarkable difference in the manner of treating juridical subjects between the foreign and the English jurists;" but this we will affirm, that the whole UNITED STATES will be much puzzled to find such works as BLACKSTONE's, COKE's, or BACON's, although the learned Professor considers the names of these great men too insignificant for a place in his catalogue of celebrated authors, from whose works he has *made up his own*.

We have some recollection of being made acquainted within the classic walls of an English University with the fact of *Dithyrambic* poets of ancient times *claiming* the right of *making words* beyond all other writers, and that they did enjoy the liberty of forming double or compounded words by *joining together those already known and established*, which *Horace* calls *new words*:

Laurea donandus Apollinari,
Seu per audaces nova dithyrambos
Verba devolvit, numerisque fertur
Lege solutis.—*Lib. 4. Od. 2.*

Even so the learned Doctor wishes to mystify Europe with his superior knowledge, to

under one rule. The domicile of *habitation* is the only one recognized.—Ed.

(a) House of Lords, ante, p. 162.

(b) See No. 8.

convince the world that *he* discusses all his subjects with "an elaborate, theoretical fulness and accuracy, and that *he* ascends to the elementary principles of each particular branch of the science," while *he* proclaims that "the materials of the ENGLISH JURISTS are tied together by very slender threads of connexion."

It is with the view of preventing the Profession from being MISLED that we have shewn the *value* of this Professor's works, which being directed to STUDENTS might possibly be read by some, who, from the loftiness of the learned Doctor's address, may be led to imagine that *HE* is

" Free from all laws, but what HIMSELF ordains;" and may take for granted *all* that he has written, whereas the law of domicile is in a very small space, and governed, in truth (as we have shewn), by ONE RULE *only*, as regards Personal Property.(c) It is wholly regulated by the *lex loci domicilii* of the owner, in all the various modes in which it can be transferred, dealt with, or possessed.

(To be continued.)

PROBLEM XII.

VOL. 2.

GUARANTEES.

How are they affected by the STATUTE OF FRAUDS?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 5. VOL. II.

A REMAINDER.

What is it?—When is it vested?—When contingent?

Describe the rules to be observed in creating it.

AN estate in remainder may be defined to be, an estate limited to take effect, and be enjoyed after another estate is determined. As if a man seized in fee simple, granteth lands to A. for 20 years, and after the deter-

(c) Ante, p. 177.

mination of the said term, then to B. and his heirs for ever: here A. is tenant for life, remainder to B. in fee. In the first place, an estate for life is created or carried out of the fee, and given to A., and the residue or remainder of it is given to B. But both these interests are in fact only one estate, the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. (Co. Litt. 143.) At common law, no remainder can be limited after a grant of an estate in fee simple, (Plowd. 29. Vaugh. 269.) because he that is tenant in fee hath in him the whole estate; a remainder, therefore, which is only a portion or residuary part of the estate, cannot be reserved after the whole is disposed of. But under the statute of uses, (27 H. 8. c. 10.) a remainder may in effect be limited after the grant of a fee simple. Thus a limitation may be made to the use of B. and his heirs, but upon the happening of a particular event, then to the use of C. and his heirs; and on the happening of the event, the lands will go over to C. and his heirs. This limitation would have been void at common law, and can only take effect under the statute of uses. (Stewart's Rights of Things, 93.)

Remainders are either vested or contingent.

Vested remainders (or remainder executed whereby a present interest passes to the party, though to be enjoyed in future) are where the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if A. be tenant for life, remainder to B. in fee: here B.'s is a vested remainder, which nothing can defeat or set aside. (Stewart's Rights, &c. 93.)

Contingent or executory remainders (where no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious or uncertain person, or upon a dubious or uncertain event; and the true definition of a contingent remainder now seems to be established, that it is a remainder limited so as to depend upon an

event or condition, which may never happen to be performed till after the determination of the preceding estate; whereas a vested remainder is, where there is a present capacity of taking effect in possession, if the particular estate were to determine. (Stewart's Rights, &c. 98.)

The rules to be observed in creating a remainder, are—1st. There must necessarily be some particular estate precedent to the estate in remainder. (Co. Litt. 49.) As an estate for years to A., remainder to B. in fee. This precedent estate is called the particular estate, as being a small portion of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this particular estate, in order to make a good remainder, arises from this plain reason—that remainder, in strictness, is a relative expression, and implies that some part of the thing is previously disposed of; for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it will be, will be an estate in possession. (Stewart's Rights, &c. 94.)

An estate created to commence at a distant period, is therefore strictly no remainder, for it is an ancient rule of common law, that an estate of freehold cannot be created to commence *in futuro*, for it ought to take effect presently, either in possession or remainder, (5 Rep. 94) because at common law no freehold in lands could pass without livery of seisin: which must operate either immediately or not at all. It would, therefore, be contradictory, if an estate which is not to commence till hereafter, could be granted by a conveyance, which imports an immediate possession. So that when it is intended to grant a freehold, whereof the enjoyment shall be deferred to a future day; it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to

the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same at law.

But under the statute of uses, an estate may be limited to commence in futuro. Thus, if a man covenant to stand seized to the use of the heirs of his own body, or to the use of another after his own death, or if he bargain and sell lands after seven years in each of these cases, the grant is good, and until the event takes place, the use results to the grantor. But in conveyances operating by way of transmutation of possession, it is necessary that the present seisin should be transferred, in order to serve the resulting use. Thus, if a feoffment, or lease and release be made to J. S. and his heirs, to commence four years from thence, or after the death of the grantor, the limitation of the use of J. S. is good: for during the four years, or the life of the grantor, it will result and be executed.

2. A second rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate (Litt. s. 671). As where there is an estate to A. for life, remainder to B. in fee: here B.'s remainder in fee passes from the grantor at the same time that seisin is delivered to A. of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin, being made on the particular estate, whenever a freehold remainder is created. For if it be limited even, on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor; otherwise, the remainder is void (Co. Litt. 49), not that the livery is necessary to strengthen the estate for years; but as the livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder, without infringing the

possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law (Co. Litt. 49). But this rule, although undoubted at common law, it is to be observed, does not apply to limitations which take effect under the statute of uses. Thus, if A. covenant to stand seized to the use of B. after his own death, this will be in effect a valid remainder.

3. A third rule respecting remainder is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instante* that it determines (Rep. 66). As if A. be a tenant for life, remainder to B. instant; here B.'s remainder is vested in him, at the creation of the particular estate to A. for life; or if A. and B. be tenants for their joint lives, remainder to the survivor in fee; here, though during their lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these remainders are good.

W. T. K.

Imperial Parliament.

HOUSE OF LORDS, ENGLAND.

COURT OF CHANCERY.

Lord LYNDHURST, in moving for a return of papers relating to the Court of Chancery, said—“There are now upwards of 850 cases standing for hearing in the different branches of the Court of Chancery. There are 550 between the noble and learned Lord on the woolsack and the Vice-Chancellor; and there are 300 before the Master of the Rolls. I am informed by persons of eminence in that court, that many of these causes have been standing for a period of three years. I am told that in the court over which the noble and learned Lord on the woolsack so ably presides, and in the Vice-Chancellor's Court, the average period, after a cause is set down and is ready for hearing before it is heard for the first time, is two years and a half. I am further informed, that with reference to cases before the Master of the Rolls, a period of a year and a half elapses prior to the first hearing. Therefore,

taking these courts together, I may be considered as not making an outrageous statement when I say, that on an average, two years elapse before a case comes to be heard. Another evil which is felt by all the courts in equity, is the term fee. There are now 850 causes standing for hearing in the Court of Chancery. Suppose that each cause takes two years before it is heard, the mere term fees will amount to £7,000. This, however, is not the only evil; for not only is the term fee to be paid to the officers of the court, but also to the solicitors of the parties, so that in proportion to the prolongation of the period before the cause is heard, is the amount of term fees paid to the officers of the court and to the solicitors.—Then the situation of parties changes, and therefore it becomes necessary to file a supplemental bill, in order to shape the case to meet the new state of things previous to the hearing. That, however, which is the greatest grievance of all, not only upon the public, but also upon the Court of Chancery, is, that the lapse of time renders motions necessary. These are supported by affidavits on one side, and opposed by affidavits on the other, and in them are involved questions of the most entangled description. All these motions rise out of delay.

* * * * *

"The delay of justice, as my noble and learned friend opposite has on one occasion pointedly remarked, is equivalent to the denial of justice; and I believe that there are cases in which it would be much better for a party to have a decision at once against him, than to be hung up for years for a decision of his claims, even when the decision was favourable. I beg, my Lords, that in the observations I have made, and am about to make, that I may not be understood as casting any reflections on the noble and learned personages now presiding in the courts of equity. I am sure that the evil is not to be ascribed to them. My noble and learned friend on the wool-sack, and my noble and learned friend the Master of the Rolls, I know perform their duties meritoriously and successfully. I make the same observation with regard to their learned coadjutor, the Vice-Chancellor, who devotes all his time, all his learning, and all his energies to the business of the court. I do not ascribe the evils now prevailing in the different courts of equity to them. I believe that they work most successfully in the administration of justice. I believe that they exercise more time and more energy upon it than any country ought to require of its judges. I am one of those persons who think that a judge should not occupy his mind totally with the administration of justice. There is not any pursuit which does not tend, if a man devotes himself exclusively to it, to narrow the intellect and contract the understanding. A judge ought to look

broad, and to cultivate literature and science; for the lights he so acquires reflect back on the bench, and afford force and vigour to the judgment he pronounces.

* * * * *

"The Exchequer is a court of equity, as well as a court of law; they are separate and distinct from each other. The Court of Exchequer in equity has all the machinery of the Court of Chancery—it has every thing necessary for the purpose of constituting a proper court; but there is no judge. You have a court without a judge, as far as equity is concerned. Let me not be mistaken. My noble and learned friend, the Lord Chief Baron, Baron Alderson too, when he can be spared from the common law business, sit in equity, and administer justice on the equity side. But this is done to the great inconvenience of the common law business of the court; and in the next place, not one-third of the time which a permanent judge could give in equity, are they able to devote. Not only so, it is productive also of this great inconvenience;—there is as much common law business in the Court of Exchequer as in the Queen's Bench,—the same establishment of judges; how inconvenient then, the judges of the Queen's Bench not being too numerous, to draw away one of the judges from the Exchequer, for the purpose of administering justice in a court of equity? I have conversed with those learned persons, and they tell me, that the inconvenience to the court on the common law side is extremely great. What then is the remedy? To appoint a permanent judge on the equity side of the Exchequer. Leave the five common law judges to administer the common law of that court, and appoint an equity judge to preside over the equity side. Is not this an obvious remedy? Why not adopt it? What can be more plain, simple, and rational? What objection can possibly be urged against it? I say that such is the state of equity business, and such would be the increase of equity business if there was the power to carry it on, that there would not be too much force if there were both an equity judge in the Exchequer, and an additional judge in the Court of Chancery. This would be attended with the additional advantage that it would enable one of those judges to act as permanent president of the judicial committee of the privy council. That court will never be a completely effective court, palatable to the bar and to the suitors, until you have a permanent judge presiding in it. My noble and learned friend opposite (Lord Brougham), whenever his important avocations admit, presides there with great advantage to the suitors and the public; but that is merely temporary; we are to look forward to the future; and I think, therefore, one of the most important beneficial consequences of the

measure I propose is, that it would give a permanent president to the judicial committee of the privy council. This is necessary above all things, from a consideration to which I must for a moment allude. The consideration is this—the judicial committee of the privy council is conversant not in equity alone, not in common law alone, but it has to administer Spanish law, two different kinds of French law, and Dutch law; it has to direct its attention to all these various departments; how important, then, is it to have a permanent president, in order that he may feel it his duty to qualify himself to administer justice in such complicated matters with satisfaction to the suitors of the court. Another practical advantage, of no inconsiderable importance, which would result from this would be, that the bar of the learned judge would follow him from his equity court to the privy council. The bar would also become possessed of that information which was necessary to the administration of justice; there would thus be a permanent bar and a permanent judge to administer justice in one of the most important tribunals of the country. I have endeavoured, my Lords, to confine myself, according to what I stated at the outset, to one point. And now, having pointed out what I consider the proper remedy for the practical evil which I have exposed, I leave the case in the hands of her Majesty's Ministers."

Law Reports.

VICE-CHANCELLOR'S COURT.—July 12.

Ex parte THE EARL OF CRAVEN.—SIR EDWARD SUGDEN'S TRUSTEE ACT, 11 Geo. 4, and 1 Will. 4, c. 60.

Petition to appoint a person to convey a trust estate on behalf of a trustee, in whom it was legally vested, but who refused to execute a conveyance.

The Earl of CRAVEN presented a petition for an order to appoint a person to execute a conveyance in the stead of a trustee who refused to convey, under the following circumstances:—The late Earl of Berkeley was surviving trustee of an estate of the late Lord Craven. Upon Lord Berkeley's death the estates vested in his heir-at-law. The present Lord Segrave failed in the House of Lords in making out his title as heir-at-law, their Lordships, in the Berkeley peerage case, establishing that the Honourable Moreton Berkeley was the eldest legitimate son and heir of the late Earl. The Honourable Moreton Berkeley, however, has always repudiated the title, and refuses to execute the necessary conveyance of the Craven estates as such heir, as it would be an admission on his part that

the decision of the House of Lords against his brother Lord Segrave was right. Under these circumstances the petition was presented, as in the case of any other trustee, for any reason refusing to convey.

His HONOUR made the order.

The 8th section of the statute enacts, that where any trustee seized of land upon any trust, or the heir of any such trustee shall neglect or refuse to convey such lands for the space of 28 days next after a proper deed for making such conveyance shall have been tendered for his execution, by, or by an agent duly authorised by any person entitled to require the same, (that is by all the *cestui que trust*) it shall be lawful for the Court to appoint a person to convey, such conveyance to be as effectual as if executed by the trustee or his heir. See upon this subject—*In ex parte Merry*, 1 Mylne and K. 677, the *Master of the Rolls* considered that the statute could only be intended to apply to a *cestui que trust*, who is named in the instrument upon which his title depends, or to a person who claims directly under a *cestui que trust* so named, as real or personal representative, or as assignee, and the Lord Chancellor (*Brougham*) afterwards concurred in this opinion (15th August, 1833); but Lord LYNDHURST (Chancellor) afterwards, in the matter of the *De Clifford Estates*,* (25th March, 1835) said that the *Master of the Rolls* in his judgment in *ex parte Merry*, appeared to have confined his attention to the 8th section of the Act, and to have overlooked the 12th; the effect of which was plainly to shew that a discretionary power to make the order on petition was meant to be given to the Court.—ED.

July 15.

BROUGHTON versus LASHMAR.

Writ of Ne exeat regno.

An order for a Writ of *Ne exeat regno* had been obtained, *ex parte*, against the defendant, which he now moved to discharge.

* Mylne and Keen, 624; see also id. 820.

The bill was filed by the next of kin of Mary Elizabeth Vigurs Broughton, who died on the 18th of June last, in her 23d year, and sought an account against the defendant of funds to the amount of £700, which it was alleged had been placed in his hands as a trustee or agent of Miss Broughton. The facts alleged were, that in the year 1833, Miss Broughton went to reside with her sister, Mrs. Bowditch, who was a widow, at Croydon; Miss Broughton being then in her 18th year. Shortly after her residence with her sister, a strong intimacy grew up between both the young ladies and the defendant, who had practised for many years as a surgeon and apothecary in the town. The bill alleged, that at the period Miss Broughton first went to Croydon, she was a member of the Established Church, but that Mr. Lashmar, in his intercourse and intimacy with her, directed her attention to the differences subsisting between the doctrines of the Church of England and those of the Roman Catholics, and supplied her with religious books of a controversial character, applauding the doctrines and tenets of the Romish Church, and the consequence was that she ultimately became a convert to the Roman Catholic religion. This was alleged she was in a great measure induced to do from the influence and ascendancy Mr. Lashmar had acquired over her mind, though the allegation was most strongly denied by him. On attaining her 21st year, in December 1836, Miss Broughton became entitled to a sum of £5000. under the will of her father, and shortly after the stock was transferred to her by the executors: it was re-transferred on the 11th of April, 1837, into the name of Mr. Lashmar. Another sum of £2,100. stock was also alleged to have been purchased with the money of Miss Broughton, and transferred into Mr. Lashmar's name. The bill also alleged that the defendant executed a declaration of trust to Miss Broughton, the particulars of which the plaintiff was not able to ascertain. Miss Broughton died on the 18th of June last, and in her desk was found the following note or memorandum:—"June 4, 1839. It is my wish when I die, my sister Caroline should have all my dresses and jewels, and her children £1000. To my loved friend, Charles Lashmar, I give the remainder of my property, for his uniform kindness to me; and having been my trustee, I wish him to be my executor." This, which was the only testamentary instrument found after her death, Mr. Lashmar and Mrs. Bowditch, who was also a defendant, attempted to establish in the Prerogative Court, but a *caveat* was entered by the next of kin on the ground of want of attestation, and Mrs. Bowditch was at length compelled to join with them in obtaining administration. The bill charged that the defendant had been improperly dealing with the

funds of the deceased, of which he was a trustee for them, and that he had sold the principal portion of the stock, almost simultaneously with a declaration of his intention to go to France. On the allegation that his object in doing so was to avoid the claim of the plaintiffs, and escape out of the jurisdiction of the court, the writ of *se crexat* was granted *ex parte*. The defendant admitted, to a certain extent, he was a trustee of the fund for plaintiffs, but denied that he acted as the trustee or confidential agent of Miss Broughton. He also denied the allegations of improperly dealing with the funds of the deceased, and set forth the following letter from her as a justification of what he had done:—"Never again, dear Charles, ask my consent to what you wish to do with the money in the funds; it is all your own." With regard to the allegation that he was about to leave the country for the purpose of escaping from the jurisdiction of the court, he said that after the funeral of Miss Broughton, a conversation arose among her friends as to removing Mrs. Bowditch from the scene of her sister's death, and while various places were suggested for her to visit, he said he was shortly going for an excursion to France with his wife, but he could not be absent more than a fortnight, and it would be better for her to accompany them there. Nothing further occurred. He did not go to France, and the time when he meant to go, or could go, had passed away, and he denied that he ever had any intention of evading the jurisdiction of the court.

The VICE-CHANCELLOR said, it appeared to him that the declaration to leave the kingdom came to no more than this—that there was a sort of chaffering among the relations at the funeral as to where the sister had better be removed for change of scene—one suggesting one place, and one another, and then the defendant said she had better accompany him to the continent, but that it all ended in talk, and when the time came he did not go, though, if he had intended to avoid the plaintiff's claim, he might then have done so with security, as the bill was not filed.

A conference took place between the counsel, and it was arranged, on payment of £3000. into Court, the writ should be discharged.

QUEEN'S BENCH.—May 31.

Sittings in Banco.

STOCKDALE v. HANSARD.

JUDGMENT.

(Continued from p. 187.)

We know now as a matter of history, that the House of Commons was at that time engaged, in unison with the Crown, in *assailing the just*

rights of the people; yet that learned Judge proclaimed his unqualified resolution to uphold the House of Commons, even though it should have abused its power; rebuked the manner and complaint which its proceedings had justly excited; deprecated as the last of misfortunes, and in terms which might lead to a supposition that he was at liberty to withdraw from it, a contest between the Courts of Justice and either House of Parliament; and with reference to objections pressed against the mode of executing the warrant, worked himself up at length to the untenable position, "It is our duty to presume the orders of that House, and their execution, to be according to law."

The two cases last alluded to, were disposed of by the Courts without taking time to consider, and even without hearing counsel on one side. In the former, the Chief Justice Lee took no part, having been absent when Alexander Murray was brought here. I do not mean to insinuate that a longer consideration would have been likely to produce a different result, being satisfied that the decision itself was right. But I do believe that if the Court had deliberated and paused, they would have employed more cautious language, and abstained from laying down premises so much wider than their conclusion required. Lord Ellenborough, when pressed with their authority, distinctly refused to how to it, corrected some phrases ascribed to several Judges in the reports of both cases, and placed a limitation on the doctrine laid down by Chief Justice De Grey, without which it would have yielded to either House of Parliament the same arbitrary power over men's liberty, that the doctrine of ship-money would have lodged in the Crown over their property.

Lord Kenyon was cited as holding language of the same self-denying import, in the King v. Wright, 8 Term Reports, where Mr. Horne Tooke had applied for a criminal information against a bookseller, for publishing a copy of the report made by a Committee of the House of Commons, which was supposed to convey a charge of high treason against Mr. Tooke, after he had been tried for that crime and acquitted. This application for leave to set the extraordinary power of the Court in motion for the punishment of misdemeanors is at all times received with the utmost caution; the Court, in exercising its discretion, often refuses the indulgence prayed.

Lawrence, Justice, thought that the party was not libelled. "It is said, that this report charges him with being guilty of high treason, notwithstanding the verdict of a jury had ascertained his innocence; but that is not the fair import of the paragraph." This opinion, for which the learned Judge gives his reasons, was alone sufficient to discharge the rule. But he proceeded to make

other observations. He likened the publication of this report to that of a proceeding in a court of justice, and said, he was not aware of that having been deemed a libel.

To what degree such publications are justifiable, is still a question open to some doubt; there can be none, that without direct personal malice, it could not properly expose the publisher to a criminal information. Lawrence, Justice, remarked accordingly, "The proceedings of courts of justice are daily published, some of which highly reflect upon individuals, but I do not know that an information was ever granted against the publishers of them." He then remarks, with much good sense and liberality, that it is also greatly for the public benefit that the proceedings in Parliament should be generally circulated: and though he adds, "they would be deprived of that advantage, if no person could publish their proceedings without being punished as a libeller," still he speaks with reference to the case before him, giving his reasons for concurring in the discharge of the rule for criminal information, but not affecting to decide a legal question which did not arise.

Grose, Justice, laid down no legal proposition in the judgment delivered by him. Lord Kenyon certainly did, as certainly it was extra-judicial, and is open to investigation. The proposition asserted by him was, that no proceeding of either House of Parliament could be libel. But with the highest reverence for that most learned Judge, I must be allowed to observe, that he here confounds the nature of the composition with the occasion of publishing it. Matter defamatory and calumnious, which would therefore found legal proceedings for a libel, may be innocently published by one who has legal authority to do so. His Lordship says, "This is a proceeding by one branch of the Legislature, and therefore we cannot inquire into it." If this be true, one branch of the Legislature has power to overrule the law. Lord Kenyon felt this, and denied the existence of such a power, adding, "I do not say that cases may not be put in which we would inquire whether the House of Commons were justified in any particular measure." We cannot fail to see that the one sentence is in direct contradiction to the other. The latter puts an end to the claim to authorize any act, without the agents being subjected to any inquiry. It equally overthrows that doctrine of the subordination of courts, which would condemn the first criminal tribunal of England to silence and submission, if either House should unhappily be induced to give their warrant to a crime.

Lord Kenyon supposes a case in which the Court "would undoubtedly pay no attention to an injunction from the House of Commons;" and he seems to think the case too enormous to

have been ever possible. "If, for instance, they were to send their serjeant-at-arms to arrest a counsel here who was arguing a case between two individuals, or to grant an injunction to stay proceedings here in a common action." Yet these enormities, too gross to be thought possible, were the daily proceedings of the House of Commons in former times; nay, they fall short of the truth; not only did that great Assembly, in Charles the Second's time, placard Westminster Hall with injunctions to barristers (some of Lord Kenyon's most illustrious predecessors) against daring to appear in the discharge of their duty to their clients, but they sent their serjeant-at-arms to arrest and imprison counsel, solicitors, and parties who had violated their Privileges, by presuming to appear at the bar of the highest court of appeal in the country. They may not have granted their formal injunction to stay proceedings in a common action, but they constantly decided the subjects of common actions as matters of privilege, solely because one of the parties interested happened to be one of their own body.

If Lord Kenyon had been Chief Justice in the days of Sir John Fagg and Dr. Shirley, and either of them had sued out his writ of habeas corpus before him, and had appeared to be in Newgate for the offence of submitting his case to be argued in the House of Lords, it is plain that he would have inquired whether the House was justified in that particular measure, and would have restored the prisoner to freedom. Yet their Resolution "was a proceeding of one branch of the Legislature—a proceeding of those who, by the constitution, were the guardians of the liberties of the subject."

This inconsistency in a person of Lord Kenyon's wonderful acuteness, as well as other inaccuracies hereafter to be noticed, make one regret that the judgment in this case, like those before whom Murray and Crosby had been brought, was not more deliberately prepared. It was given on the instant, not in a full court, not after hearing both sides. It bears marks of haste, and, we cannot deny, of the excitement and inflammation which belonged to the extraordinary times in which it occurred.

(To be continued.)

July 6.

Sittings at Nisi Prius.

GIBSON & ANOTHER, ASSIGNEES OF CLARKE, A BANKRUPT v. CARROL AND ANOTHER.

Bankruptcy.—Whether a Dentist is a Trader within the meaning of the Bankrupt Laws.

This was an action brought by the Assignees of James Clarke against the Sheriffs of Middle-

sex, to recover the sum of £168. 9s. 6d. The real defendant in the case, however, was Martin Van Bu'chell. It appeared that Clarke was a dentist, and had resided in Keppel-street, Russell-square, in October, 1837, his affairs being much embarrassed he gave a warrant of attorney to Mr. Van Butchell, under which the Sheriffs levied for the sum in question. The plaintiffs contended that, before the levy, Clarke had committed an act of Bankruptcy, and therefore this levy could not be held good. They proved the act of bankruptcy, the petitioning creditor's debt, and that they were assignees.

The defendants contended that a dentist was not a trader, although dealing in teeth, and purchasing upwards of £200.'s worth at one time.

Lord DENMAN held that Clarke was a trader.

The jury returned a verdict for the plaintiffs for the full amount.

July 12.

Sittings at Nisi Prius.

EAST AND ANOTHER v. MC GIE.

Custom of Clothiers or Woollen Merchants—Whether a Tailor retaining cloths left with him for inspection for a certain time, shall be considered as having accepted them according to the custom of the trade, and liable to pay for them.

This was an action to recover the value of certain pieces of kerseymere cloth sent by the plaintiffs, who were respectable woollen merchants, to the defendant, who was a tailor in Bond-street. The cloths, which were sent on inspection for approval, were kept about three months, and then returned, the defendant having selected some others which pleased him better. The question intended to be tried was whether the retaining of these cloths was not by the custom of the trade to be considered as an acceptance of them, so as to render the party retaining them liable to pay for their price. A great many witnesses were called for the plaintiffs, to show that the tailor was bound to say within three weeks or a month at the very farthest, whether he did not accept cloth sent to him for inspection, and if he gave no intimation on the subject, the woollen draper was entitled to consider the cloth as accepted, and to charge it in account. The plaintiff's witnesses were cross-examined, with a view to show that this was not a custom of the trade, but was merely the particular habit of each individual witness.

The jury thought the custom established, and found a verdict for the plaintiffs.

COURT OF EXCHEQUER, June 27.

Sittings in Equity.

Before Mr. Baron Alderson.

CROMEK v. LUMB.

Vested Interest in Legacies—When the intention of a Testator is apparent to constitute the time appointed for the payment to be the essence of the gift.

This case was heard upon further directions, and the question at issue arose upon the construction to be placed upon the will of Samuel Martley, of Wakefield, Yorkshire.

It appeared that the testator by his will, devised and bequeathed all his real and personal property to trustees upon trust, as to eleven shares in the Barnsley Canal, to stand possessed thereof upon trust, until his eleven children then living should, if sons, attain the age of 23, or if daughters should attain that age, or be married with consent, and upon those events happening, to transfer one share to each of such grandchildren, and in the mean time to apply the dividends to their maintenance respectively. The testator then directed his trustees to lay out a sum of money on real or Government securities sufficient to raise three several annuities of £100. each. And as to these annuities:—"First, he directed that the first should be applied to the support, maintenance, and education of his grandchildren, the children of his daughter, Martha Hill, deceased, until the youngest of such children should attain the age of 23; and immediately after the youngest child should have attained that age, in trust, that the principal sum or sums of money laid out in the purchase of such annuity "shall be paid and divided unto and equally among my last-mentioned grandchildren, share and share alike as tenants in common." And as to the other two annuities, he directed them to be paid to his daughters Elizabeth Cromek and Sarah Worthington respectively for life, and as to each of such principal sums of money laid out in the purchase of such annuity of £100.—he proceeded: "I direct that my trustees shall pay, apply, and devise each of the sums from and immediately after the respective deaths of Mrs. Cromek and Mrs. Worthington unto and equally amongst all and every my grandchildren now living (children of my late daughter Hill), and unto and amongst all the children of my said daughters Cromek and Worthington, as well those now living as those who may hereafter be born, share and share alike, as equal tenants in common." And as to the residue, amongst all his grandchildren then living (children of the deceased Mrs. Hill) and all his grandchildren then living or who should be born during his lifetime, children of

his other two daughters, Cromek and Worthington, share and share alike, as tenants in common; and then proceeded:—"And I will that the respective shares (subject and without prejudice to the life-interest of my daughters), of all my said grandchildren hereinbefore mentioned, shall be paid to each of such grandchildren, being a son, on his attaining the age of 23 years, and each of them being a daughter upon the attaining that age, or being married with such consent as aforesaid, whichever event shall first happen (except as to such shares as are hereinbefore otherwise directed to be paid); provided always, and I do hereby expressly will and direct, that the legacy, part, or share, legacies, parts, or shares, as well specific as otherwise hereinbefore given to or intended for each and every of my grandchildren, as well now living as those who may hereafter be born, shall become a vested and transferable interest in each of my said grandchildren, being a son, when, and immediately after his attaining the age of 23 years, or leaving lawful issue at his decease before that age; and on each of my grandchildren, being a daughter, on her attaining that age, or marrying with consent, whichever shall first happen; provided always, that if any of my said grandchildren shall die during my lifetime, or after my decease, being a son, under the age of 23 years, without having lawful issue, or being a daughter under that age, and unmarried, then I will and direct that the legacy, part, or share, legacies, parts, or shares, as well specific as otherwise of him, her, or them so dying, shall go and accrue to the survivors and survivor of all and every my grandchildren, and the lawful issue (if any) of such grandchildren as may be dead, to be share and share alike; and if but one, then to such one or only surviving grandchild or issue (such issue taking only by representation the share which the parents or parent would have taken if living), and to be vested and transferable interests in him, her, and them, at such ages and times respectively as the original share or shares is or are hereinbefore declared to be vested, which accruing legacy, part, or share, legacies, parts, or shares, shall from time to time, upon any such death as aforesaid, be subject to such new chance, contingencies, or condition of accrue as is hereinbefore declared in respect of the said original legacies, parts, or shares."

ALDERSON, B. in delivering judgment said,— He proposed to make certain declarations before the case was sent to the Master, as it must be, in order that in point of form he might now do that correctly which had, it seemed, been done irregularly before; and after recapitulating the facts, said, the first question was, what interest the Hills took in the principal sum producing the first annuity? It appeared that at the time of the will and at the testator's death there were five

children of this family. Of these, three only attained the age of 23 years, and one of these, J. T. Hill, died after attaining 23, but before the period when the principal became payable. It was contended on the part of the plaintiffs, that he took nothing under these bequests; and that this case fell within the principle of the case "Batsford v. Kebbell," 3 Ves. jun., 363; (*a*) but he did not agree with that argument: he thought the principle of the case was cited by Mr. Roper, in his 1st vol. p. 500; and it was this—that if the interest or dividends alone were the subject of the bequest until a particular time, and the principal was not sooner taken out of the residue, but was directed for the first time to be taken out of it, and paid or transferred to the legatee at the end of that period, the intermediate gift of the interest or dividends would not vest the capital, and this was on the ground of the apparent intention to constitute the time appointed for the payment to be of the essence of the gift. Now, if this were so, it seemed to him to make an end of the point. For here the testator took the principal money out of the residue by the direction to the trustees, therewith to purchase an annuity. He devoted the dividends to a specific object immediately, and appointed the time of division of the principal, postponing it on account of the peculiar circumstances of the family. If, therefore, this bequest stood alone, he should be of opinion that it vested immediately, and that the declaration of the respective interests must be on that footing. But he thought this construction was controlled by the subsequent part of the will, and this led him to consider the general scope and plan of the will. The testator seemed to him to have first distributed his property to certain classes of grandchildren: first, to the eleven who were alive when the will was made, to whom he gave the Barnsley shares. These they were to take as they attained the age of 23, or, if daughters, at the age of 23, or when married. The second class were the Hills, who were orphans. To their maintenance he devoted the annuity, which, if their mother had been alive, would have gone to her for life, for the same presumable purpose, and this fund for maintenance he naturally continued to them until the youngest was of age; then the principal was distributed. The next bequests were to his surviving daughter, and then he disposed of the principal amongst a third class, consisting of all his grandchildren, alive, or to be thereafter born; and then came the residuary clause by which he gave the residue to a fourth class—namely, grandchildren alive, or who shall be born in his lifetime. Having done this, the remainder of the will contained a variety of provisions, applicable, as it seemed to him, to all these four classes, and to be read as

if repeated *mutatis mutandis* at the conclusion of each bequest. The first of these directed, that within the special exception of the bequest of the principal money of the £100. legacy to the Hills, each of his grandchildren should take the share due to him or her at 23, if sons, or at 23, or marriage, if daughters. The second of these general provisions was that the share of each grandchild should become a vested or transferable interest if a son at 23 years, or if he died before, leaving lawful issue, or if a daughter at 23, or upon marriage with consent. The third provided for what was to be done in case any of the grandchildren should die before their interests were vested; and it provided in substance that in that event those who survived (by which he understood those of each class who survived) were to divide the share of the one who died equally, share and share alike. Now, in the events which had happened, applying the above reading of the will to the facts of the case, he had come to the conclusion, that the interests of the Hills became vested at 23, and that, therefore, John was entitled to a portion of the share of the one whom he survived, but not to any part of Daniel's original share. He thought, therefore, that he took one-fifth originally, and one-third of Martha's gift, and that the other two Hills took one-fifth and one-third of Martha's, and one half of Daniel's original share. Thus, these two would take each 43-120th parts, and J. T. Hill would take 34-120th parts of this principal sum. The next question was, as to the devise of the principal of the two other annuities. He thought it followed from the construction he put on the will, and the authorities cited in argument, that this was void as being a bequest to a class as to some of whom it was too remote. This must therefore fall into and be divided with the residue. Then as to the residue. It appeared, that at the death of the testator there were twelve entitled. These were reduced to eight, of whom six had attained to the proper age, and two had died subsequent to the death of one of the six. It resulted, therefore, that the representative of J. T. Hill, who had died, would be entitled to one-eighth of the residue, and the remaining grandchildren would have each one-fifth of the remaining seven-eighths.

(*a*) There a testatrix gave the dividends of a certain stock to a person until he should attain the age of 32, at which time she directed her executor to transfer the principal to him, and it was held that the legacy did not vest till he had attained the age of 32.—ED.

PREROGATIVE COURT—July 15.
IN THE GOODS OF SARAH PECELL,
WIDOW, DECEASED.

New Will Act.—Whether a Codicil in the hand-writing of the deceased, but unattested and without date, made before the New Will Act came into operation, is good.

The deceased made a codicil to her will in her hand-writing, but *unattested and without date*, by which she gave to her daughter, Francis Augusta Jenkinson, the wife of the Bishop of St. Davids, £3000. Her will was dated in 1830, and the executors contended against the validity of the paper.

Sir H. JENNER said, that the question was really as to the construction of the late act. By old law the codicil would be good, and the court had no doubt that it was the intention of the deceased that the paper should operate, did the late Act affect the codicil or not? Was the Court to presume, because a codicil was without date, it fell under the new will? Was it the Court rather to be astute in finding means to carry the intentions of the testatrix to effect? He was of opinion, that where a person was entirely bare of circumstances as this was, and the deceased was as likely to do what he had done before or after the 1st of January, 1838, the presumption should rather be that it is done before. Every person was presumed to know the law, and where a codicil was without date, and merely signed by the deceased, the court, in the absence of circumstances, would be bound to presume that it had been executed according to the law as it stood at the time. It had been admitted that the codicil had been copied from a draught sent by some professional person, which afforded another presumption that the law, as it existed, had been complied with. Under the circumstances, he was of opinion that a codicil was entitled to be pronounced for.

COURT OF EXCHEQUER.

GENERAL ORDERS IN EQUITY.

11th June, 1839.

The Court doth hereby order and direct in the manner following—that is to say,

1. That in all cases in which it shall be alleged at the plaintiff is prosecuting the defendant in his court and also in some other court for the same matter, the defendant in eight days after filing his answer, or further answer to the plaintiff's bill, shall be entitled, as of course, on motion, to the usual order for the plaintiff to make his election in which court he will proceed, with the

usual directions in that behalf, unless the plaintiff shall before the expiration of the same eight days, have filed exceptions to the defendant's answer, or taken to his further answer the former exceptions. And in case such exceptions shall be overruled on argument, or otherwise, the defendant shall then be entitled, as of course, on motion or petition, to the usual order for the plaintiff to elect in which court he will proceed, with the usual directions. But in either of such cases, the plaintiff shall be at liberty to move that such order may be discharged on the merits confessed in the answer.

2. That every order obtained as of course to amend a bill shall contain an undertaking by the plaintiff to amend the bill within three weeks from the time of the order being obtained, and in default of the plaintiff amending his bill within that period, the order shall stand discharged without further motion, unless the court shall in the mean time on special motion make order to the contrary.

3. That after a replication has been filed the plaintiff shall not be permitted to withdraw it and amend the bill without special motion, supported by affidavit, stating the substance of the proposed amendment and that the same is material, and accounting satisfactorily for such matter not having been introduced into the bill.

4. That writs of attachment against parties on the record for non-payment of costs or for non-payment of money, ordered or decreed to be paid into court, or to any party on the record, shall be issued by the clerk in court without order, upon affidavit being filed on the service of the subpoena for costs, decree, or order, and on the default being verified by affidavit, or in case of the money being ordered to be paid into court by the Accountant-General's certificate of the money not having been paid.

5. That in all cases in which it shall appear that certain preliminary accounts and inquiries must be taken and made before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff shall be at liberty, at any time after the defendants shall have appeared to the bill, to move the court on notice that such enquiries and accounts shall be made and taken, and that an order referring it to the master to make such enquiries, and to take such accounts, shall thereupon be made, without prejudice to any question in the cause, if it shall appear to the court that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto, and that the same is consented to by such (if any) of the defendants as being competent to consent, have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon, the state-

ments contained in the answers of, such (if any) of the defendants as have answered the bill.

6. That all writs may be attested on the day on which the same are issued, and may be made returnable immediately, as well out of term as in term, but no bill shall be taken pro confesso against a defendant unless there be ten days between the teste of each writ, if the defendant reside in town, or within twenty miles thereof, and fifteen days in all other cases.

7. That foreclosure causes, as well as other causes, when ready for hearing, may be advanced for hearing, and may be set down to be heard on days appointed for hearing short causes, on a certificate being produced, signed by the plaintiff's counsel, that the cause is a short cause.

8. That every subpoena shall contain three names, where necessary or required, and that a gross sum of 5s. 10d. shall be the amount allowed in costs for every subpoena as heretofore; in addition to which sum the solicitor suing out of the writ shall be allowed one fee of 6s. 8d. for the precipice and attendance on subpoenas as heretofore, where the number of names included therein shall not exceed nine; and, if they shall exceed nine in number, then an additional fee of 6s. 8d.; and, if they exceed eighteen, a further fee of 6s. 8d.; and so on in proportion for every additional number of nine names included in such subpoenas.

9. That all orders to refer an answer or other pleading, or matter depending before the court for scandal or impertinence, shall contain a direction for the master to expunge any such scandalous or impertinent matter as he shall find therein, and which shall have been the subject of the reference, and the master shall be at liberty, without further order, to tax the costs of such reference and consequent thereon, and the same shall be paid by the party against whom the said order of reference shall have been obtained, if the said answer or other pleading or matter shall be certified to be impertinent—or by the party obtaining the said order of reference, if the said answer or other pleading or matter shall be certified not to be impertinent; and the scandalous or impertinent matter shall not be expunged, nor costs taxed, until the expiration of four days from the filing of the master's certificate of such scandal or impertinence, in order that the adverse party may have an opportunity of filing exceptions to such certificate, which exceptions he shall be at liberty to file without obtaining an order for liberty to file the same.

(Signed)

ABINGER.

J. PARKE.

J. GURNEY.

W. H. MAULE.

(To be continued.)

COURT OF COMMON PLEAS, DURHAM.

2 Vict. cap. XVI.

An Act for improving the Practice and Proceedings of the Court of Pleas of the County Palatine of Durham and Sedgeberge. [June 14, 1839.]

(Continued from p. 171.)

XXI. And be it enacted, That it shall be lawful for the defendant in all personal actions, except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant, by leave of the said Court of Pleas at *Durham* or one of the judges of any of her Majesty's Superior Courts of Common Law at *Westminster*, to pay into Court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading as the said Court or judge shall, by any rules or orders to be from time to time made, order and direct.

XXII. And be it enacted, That the justices of the said Court of Pleas at *Durham* may, by any rule or order to be made from time to time after this Act shall take effect, make such regulations as to the fees to be charged by all and every or any of the officers of the said Court of Pleas at *Durham*, and the attorneys thereof, as to them may seem expedient, and alter the same when and as it may seem fit and proper, so as such fees shall not exceed the fees now received in the Superior Court of Queen's Bench at *Westminster*; and all such regulations, after being sanctioned and confirmed by the judges of the then last Assize for the said County of *Durham*, shall be binding and obligatory on the said Court of Pleas at *Durham*, and all the officers and attorneys of the said Court.

XXIII. And be it enacted, That it shall be lawful for any party in any action now depending or hereafter to be depending in the said Court of Pleas at *Durham* to apply, by motion to any one of the Superior Courts at *Westminster* sitting in banco, within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in the said Superior Court, for a rule to shew cause why a new trial should not be granted, or non-suit set aside and a new trial had, or a verdict entered for the plaintiff or defendant, or a nonsuit entered, as the case may be, in such action, which Court is hereby authorised and empowered to grant or refuse such rule, and afterwards to proceed to hear and determine the merits thereof, and to make such orders thereupon as the same Court shall think proper; and in case such Court shall order a new trial to be had in any such action

the party or parties obtaining such order shall deliver the same, or an office copy thereof, to the prothonotary of the said Court of Pleas at *Durham*, or his deputy, and thereupon all proceedings upon the former verdict or nonsuit shall cease, and the action shall proceed to trial at the next or some other subsequent Session of Assizes holden for the County of *Durham*, in like manner as if no trial had been had therein; or in case the Court before which any such rule shall be heard shall order the same to be discharged, the party or parties obtaining any such rule may, upon delivering the same, or an office copy thereof, to the said prothonotary or his deputy, be at liberty to proceed in any such action as if no such rule nisi had been obtained, or if a verdict be ordered to be entered for the plaintiff or defendant, or a nonsuit is ordered to be entered, as the case may be, judgment shall be entered accordingly.

XXIV. Provided always, and be it enacted, That the entering up of judgment in any action in the said Court of Pleas at *Durham*, and the issuing of execution upon such judgment, shall not be stayed, unless the party intending to apply for such rule as last aforesaid shall, with two sufficient sureties, such as the last-mentioned Court shall approve of, become bound unto the party for whom such verdict or nonsuit shall have been given or obtained, by recognizance to be acknowledged in the same Court, or before a justice thereof, in such reasonable sum as the said Court shall think fit, to make and prosecute such application as aforesaid, and also to satisfy and pay, if such application shall be refused, the debt or damages and costs adjudged, and to be adjudged in consequence of the said verdict or nonsuit, and all costs and damages to be awarded for the delaying of such execution thereon.

XXV. Provided also, and be it enacted, That nothing herein contained shall prevent the said Court of Pleas at *Durham* from making order for any new trial, or setting aside any nonsuit, or entering a nonsuit, or altering a verdict as heretofore; provided the judges of Assize in and for the said County of *Durham*, when sitting as judges in the said Court of Pleas, shall be present on the making of such order as justices of the said Court, and shall be consenting thereto.

XXVI. And be it enacted, That the service of every writ of subpoena hereafter to be issued out of the said Court and served upon any person residing out of the jurisdiction of the said Court shall be as valid and effectual in law, and shall entitle the party suing out the same to all and the like remedies, by action or otherwise howsoever, as if the same had been served within the jurisdiction; and in case such person so served shall not appear according to the exigency

of such writ, it shall be lawful for the said Court, upon oath or affirmation to be taken in open Court, or upon an affidavit, of the personal service of such writ, to transmit a certificate of such default, under the hands of two of the justices of the said Court, to the Court of Queen's Bench in England, to the Court of Justiciary in Scotland, or to the Court of Queen's Bench in Ireland, and the said last-mentioned Courts respectively shall and may thereupon proceed against and punish, by attachment or otherwise, according to the course and practice of the said respective Courts, the person so having made default, in such and the like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpoena or other process issued to compel the attendance of witnesses out of such last-mentioned Courts respectively.

(To be continued.)

REVIEW OF NEW BOOKS.

A NEW LAW DICTIONARY, containing explanations of such technical terms and phrases as occur in the works of the various law writers of Great Britain, to which is added an OUTLINE OF AN ACTION AT LAW, and of a SUIT IN EQUITY—designed expressly for the use of Students, by HENRY JAMES HOLTHOUSE, Esq. London: William Crofts, 19, Chancery-lane, 1839. Price 9s. boards.

Perhaps one of the most cheap and useful little volumes that has lately appeared, for the use not only of Students to whom the author addresses his preface, but to every person, is that now us before; the appendix is a novelty that merits the attention of the profession. We have folios of Law Dictionaries, useful it is true for want of something better, but which few persons read, or even refer to. We will give the author's account of them, and of his own book.

The dictionaries now in use, are those of Dr. Cowel, Mr. Blount, Mr. Whishaw, and a small work entitled *Les Termes de la Ley*. There are also other works of a more comprehensive nature, published under the denomination of Dictionaries, but as those partake more of the character of Cyclopædias than of Dictionaries, it will be unnecessary further to mention them. The works of Cowel and Blount, although of high authority, are of little use to the Student of the present day, owing to the quantity of obsolete matter with which they abound, and the entire absence of many of our modern law terms. The little work entitled *Les Termes de la Ley*, contains a very limited number of words, and is

not exclusively confined to definitions and explanations; in addition to which, a great portion of it has become obsolete. The work which bears the nearest resemblance to the present, is the Law Dictionary of *Mr. Whishaw*, which although a useful book, and compiled with much care, contains a large number of useless words, which in the present publication have been altogether omitted, and their places supplied by others of more obvious utility. By *useless* words is here meant such as are of no use to the student in reference to his legal studies, and which have no connexion whatever with the law. The words "harbour, hovel, harriers, and monk's clothes," may be instanced as examples. Dr. Cowel appears to have been the first among our Law Lexicographers who sanctioned the admission of such words into a Law Dictionary, and he seems to have been followed in this step by all his successors.

It will be seen that in many cases the author's definitions have almost assumed the shape of Essays; this it was difficult to avoid, owing to the necessity of introducing preparatory observations, in order to lead the mind progressively to the comprehension of the subject.

At the end of the Dictionary is an appendix, containing an outline of an action at law, and of a suit in equity. These were introduced for the purpose not only of explaining the words which occur in those proceedings, but also with the view of shewing the relationship which exists between them.

We do not hesitate at recommending this book to the notice of the profession. The Student will find it a desirable acquisition, and the Attorney will find the appendix even more than the preface prepares him to expect.—It is in fact the practice of the Courts of Common Law and Equity.

Business of the Courts.

COURT OF CHANCERY.

In re Rosoman, lunatic petition, by order—*Attwood v. Small*, two petitions, part heard—*Bacon v. Jones*, appeal, part heard—*Rishton v. Cobb*, appeal.

VICE-CHANCELLOR'S COURT.

Short causes and unopposed petitions.

After the petitions, *Lyons v. Mitchell*, two petitions—*Harding v. Harding*, two petitions, part heard—*Semple v. Price*, demurrer—*Woodroffe v. Daniel*, exceptions—*Munro v. Graham*,

do.—*Reddell v. Debree*—The Same v. *Vaughan*, two demurrers—*Borradaile v. March*, plea—*Getting v. Morgan*, plea.

ROLLS' COURT.

Pritchard v. Foulks, for judgment—*Wiggins v. Pepin*, ditto—*Tawney v. Ward*, ditto—*Hopkinson v. Powis*, exceptions—*Lee v. Fernie*, ditto—*Hicks v. Kent*, ditto—*Henning v. Penkerbon*, ditto—*Miller v. Little*, ditto—*Stephen v. Munch*, ditto—*Eaton v. Smith*, ditto—*Randall v. Stanley*, ditto—*Cursham v. Newland*, ditto—*Eyre v. Markland*, ditto—*Taylor v. Brown*—*Glenn v. Adlard*.

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The Legal Guide.

VOL. II.]

SATURDAY, JULY 27, 1839.

[No. 13.

LEX LOCI DOMICILII.

PART I.

IN CASES OF LEGITIMACY.

WHETHER THERE BE BY THE LAWS OF ENGLAND ANY RESTRAINT ON BRITISH-BORN SUBJECTS, ACQUIRING FOR SUCH PURPOSES A FOREIGN DOMICILE?

(Continued from p. 179.)

TAKING for granted that *the rule we have stated* to be the general law with respect to personal property,—this question seems to require our next consideration, and we think it can be clearly proved that by the law of England every British-born subject (save certain exceptions) is permitted to assume to himself a foreign domicile, and to constitute himself a subject of a foreign state, provided he does not violate his allegiance.

See Lord Coke's 3 Inst. cap. 84. In *Maryatt v. Wilson*, 8 Term Rep. it was determined that a British-born subject domiciled in the *United States of America*, might carry on trade with the *East Indies* as an *American* subject, though such trade was prohibited to all persons resident in the king's dominions; and by the established practice of our Courts of national law, a British-born subject domiciled in a neutral country might, during war, trade with the enemy of great Britain, precisely in the same manner as a native-born subject of the neutral state, with the exception of trading in articles of war, which is prohibited, as contrary to his

allegiance, for by the law of this country no subject can shake off his allegiance. (a)

These authorities prove the affirmative that a British-born subject *may* take up his domicile in a foreign state, and is considered and treated as a foreign subject, and under no restrictions, save the necessity of observing his allegiance. We are not aware that any of the authorities negative this position; and if we look to the *rule* established by our own law with respect to *aliens* becoming domiciled here, we shall find domicile distinguished from temporary allegiance arising out of mere temporary residence, and that domicile has the effect of imposing the obligations of allegiance on an alien-born, temporarily absent from the kingdom. This is a proof of the operation of the *Lex loci domicilii* on the person.

Mr. Justice Foster, in the introduction to his discourse on High Treason, p. 183, says, natural-born subjects owe allegiance to the Crown at all times, and in all places. This is what we call *natural allegiance*, in contradistinction to that which is *local*. The duty of *allegiance*, whether natural or local, is founded on the relation the person standeth in to the Crown, and in the privileges he deriveth from that relation.

Local allegiance is founded in the protection a foreigner enjoyeth for his person, his fa-

(a) Co. Litt. 129. a, *nemo patriam in qua natus est exire, nec lege tantæ debitum ejurare, possit.*

mily or effects, during his residence here; and it ceaseth whenever he withdraweth with his family and effects. *Natural allegiance* is founded in the relation every man standeth in to the Crown, considered as the head of that society whereof he is *born a member*; and on the peculiar privileges he deriveth from that relation, which are with great propriety called his *birthright*. This birth-right nothing but his own demerit can deprive him of; it is indefeasible and perpetual. And consequently the duty of allegiance, which ariseth out of it, and is inseparably connected with it, is in consideration of law likewise unalienable and perpetual.

An *alien*, whose sovereign is in *amity* with the Crown of this Kingdom, residing here, and receiving the protection of the law, oweth a *local allegiance* to the Crown during the time of his residence. And if, during that time, he committeth an offence, which in the case of a natural born subject, would amount to treason, he may be dealt with as a traitor, for his person and *personal estate* are as much under the protection of the law as the natural born subjects; and if he is injured in either, he hath the same remedy at law for such injury.

An *alien*, whose Sovereign is at *enmity* with the Crown of this Kingdom, living here under the King's protection, committing offences amounting to treason, may likewise be dealt with as a traitor, for he oweth a temporary *local allegiance*, founded on that share of protection he receiveth.

And it was held by all the judges (*a*) that if such an alien, seeking the protection of the Crown, *having a family and effects here*, should, during a war with his native country, go thither and there adhere to the King's enemies for *purposes of hostility*, he might be dealt with as a traitor: for he came and settled here under the protection of the Crown, and though his person was removed

for a time, his effects and family continued still under the same protection (*b*).

This opinion could only have been formed upon the principle that the *alien* had acquired the character of a British subject by *fixed domicile* (not temporary allegiance); and we think that where the Law of Domicile has been so fully admitted as to foreigners settling here, it is not to be presumed that a contrary opinion would be held as to British-born subjects settling abroad. In all these questions reciprocity must for the most part prevail.

In conformity with these principles, was the judgment of Lord Hardwicke in *Pipon v. Pipon* (*c*).

If more were wanting, the consequences of a contrary rule would strongly shew the necessity of adhering to the *Lex loci domicili*. SUPPOSE a British-born subject removed at an early age to a foreign country, and there settled; he and all his connections might even be ignorant of the place of his birth. The injustice of subjecting his personal property in England to the laws of England, and subverting the laws of his domicile is most obvious.

Pushed to the extremity, the son of foreign parents, casually in England, at the time of his birth, would be subjected to the same inconvenience. Take the other case of an *alien born* in any part of the world, and dying domiciled in England, after having passed his whole life here, how clearly inapplicable would be the law of the place of his nativity to his *personal property*; during his life time, beyond all doubt it could have no operation, nor is there any just ground, why it should on his death.

For all these reasons we hold that the *Lex loci domicili* of the owner, does apply to the personality in England of British-born subjects dying domiciled abroad.

(*To be continued.*)

(*b*) See *Wells v. Williams*. *Salk.* 46.; *Latw.* 34.; *Lord Raym.* 282.

(*c*) *Ante*, p. 148.

PROBLEM XIII.

VOL. 2.

BAILMENTS.

COMMON CARRIERS.

What is the Common Law responsibility of a Common Carrier, and who shall be considered as such?

Imperial Parliament.

HOUSE OF COMMONS—ENGLAND.

THE NEW POSTAGE BILL

NOW BEFORE THE HOUSE.

Whereas it is expedient that the present rate of postage on letters should be reduced to one uniform rate of a penny, charged on every letter of a given weight, to be hereafter fixed and determined, with a proportionate increase for greater weights; parliamentary privileges of franking being abolished, and official franking being strictly regulated, and Parliament pledging itself to make good any deficiency of revenue which may be occasioned by such alterations of the rates of existing duties.

And whereas it is expedient and necessary to give by law a temporary authority to the Lords of her Majesty's Treasury to take the necessary steps to give effect to such reduction, and to make orders and regulations for the same; which reductions, orders and regulations shall have force and effect to the *fifth day of October, one thousand eight hundred and forty*, and no longer;

Be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be lawful for the Lords of the Treasury from time to time, and at any time after the *passing of this act*, by warrant under their hands, to alter, fix, reduce, or remit all or any of the rates of British or Inland, or other postage payable by law on the transmission of post letters, and to subject such letters to rates of postage, according to the weight thereof, and a scale of weight to be contained in such warrant (without reference to the distance or number of miles the same shall be conveyed), and to fix and limit the weight of letters to be sent by the post, and from time to time to alter or repeal any such altered or reduced rates, and make and establish any new or other rates in lieu thereof; but so

that all such warrants shall be inserted in the *London Gazette* ten days at least before coming into operation, and shall within fourteen days after making the same be laid before both Houses of Parliament (if then sitting), or otherwise within fourteen days after Parliament shall meet.

And be it enacted, that the rates of postage from time to time to be altered or reduced and fixed by any such warrant, shall be charged by and be paid to her Majesty's Postmaster-General for the use of her Majesty on all post letters to which such warrant shall extend.

And be it enacted, that it shall be lawful for the Lords of the Treasury, by warrant under their hands, to suspend wholly or in part any Parliamentary or official privilege of sending and receiving letters by the post, free of postage, or any other franking privilege of any description whatsoever, as well under an act passed in the first year of the reign of her present Majesty, intituled "An Act for regulating the sending and receiving of Letters and Packets by the Post, free from the duty of Postage," as under any other act or acts of Parliament now in force, and to make such regulations for the future exercise of official franking as they shall think fit: Provided also, that every warrant to be issued by the Lords of the Treasury for the suspension of the parliamentary privilege of franking shall be inserted in the *London Gazette* ten days at least before coming into operation, and shall, within fourteen days after making the same, be laid before both Houses of Parliament (if then sitting), or otherwise within fourteen days after Parliament shall meet.

And be it enacted, that it shall be lawful for the Lords of the Treasury, by warrant under their hands, and inserted in the *London Gazette* ten days at least before coming into operation, to suspend wholly or in part the regulations and privileges established and given by law in respect of letters sent by the twopenny post in London and Dublin, and also by any penny post, and in respect of any other letters which may be now sent by the post at a low or reduced rate of postage or free of postage, and to declare and direct that all and every or any of such post letters shall be charged and chargeable with the like rates of postage as any other letters transmitted by the post, or to make such other regulations in respect thereof as in any such warrant shall from time to time be expressed.

Provided always, and be it enacted, that it shall be lawful for the Lords of the Treasury, by warrant under their hands to be inserted in the *London Gazette* (which warrant may be rescinded, varied or altered as they shall from time to time think fit), to direct that letters written on stamped paper, or inclosed in stamped covers, or

having a stamp affixed thereto (the stamp in every such case being of the value or amount in such last-mentioned warrant to be expressed and specially provided for the purpose, under the authority of the act), shall, if within the limitation of weight to be fixed under the provisions of this act, pass by the post free of postage; and also to require that every letter sent by the post shall, in the cases to be specified in any such last-mentioned warrant, be written on such stamped paper, or enclosed in such stamped cover, or have such stamp as aforesaid affixed, or that in default thereof, or in case the stamp on which any letter shall be written, or the stamp on the cover on which it shall be inclosed, or to which it shall be affixed, shall be of less value or amount than in such warrant shall be expressed, such letter shall be charged and chargeable with such rate of postage as such warrant shall direct. Provided always, that in all cases the stamp on or affixed to any letter, or cover of a letter, put into the post, shall, after such letter shall have been delivered by the post, be no longer available for the purpose of protecting the same or any other letter from the duty of postage.

And be it enacted, that it shall be lawful for the Lords of the Treasury to order and direct the commissioners of stamps and taxes from time to time to provide proper and sufficient dies or other implements for expressing and denoting the rates or duties which shall be directed by any such warrant, as aforesaid, and to give any other orders, and make any other regulations relative thereto they may consider expedient.

And be it enacted, that the commissioners of stamps and taxes shall cause a separate account to be kept of the stamp duties arising under this act, and it shall be lawful for the Lords of the Treasury, and they are hereby empowered, by warrant under their hands, from time to time to authorise and require the said commissioners of stamps and taxes to direct their Receiver-General to pay over such sums of money arising from the said stamp duties as the Lords of the Treasury shall think proper to the account of the Receiver-General of her Majesty's Post-office at the Bank of England; and all such sums of money which shall be so paid over shall be held by the said last-mentioned Receiver-General, subject to all annuities and yearly sums now charged by law on, or payable out of the Post-office revenue, and all other charges, outgoings, and disbursements to which the Post-office revenue is at present liable.

And be it enacted, that the rates or duties which shall be expressed or denoted by any such dies as aforesaid, shall be denominated and deemed to be stamp duties, and shall be under the care and management of the commissioners of stamps and taxes for the time being; and all

the powers, provisions, clauses, regulations, directions, fines, forfeitures, pains and penalties contained in or imposed by the several acts now in force relating to stamp duties (so far as the same may be applicable), shall be of full force and effect with respect to the stamps to be provided under or by virtue of this present act, and to the paper on which the same shall be impressed, or to which the same shall be affixed, and shall be observed, applied, enforced, and put in execution for the raising, levying, collecting and securing of the rates or duties denoted thereby, and for preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully and effectually to all intents and purposes as if such powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties had been herein repeated and specially enacted with reference to the said last-mentioned stamps and rates or duties respectively.

And be it enacted, that all post letters shall be posted, forwarded, conveyed, and delivered, under and subject to all such orders and directions, regulations, limitations, and restrictions as the Postmaster-General, with the consent of the Lords of the Treasury, shall from time to time direct.

And be it enacted, that the penalty which by an act passed in the first year of the reign of her present Majesty, intituled "An Act for consolidating the laws relative to offences against the Post-office of the United Kingdom, and for regulating the judicial administration of the Post-office laws, and for explaining certain terms and expressions employed in those laws," is imposed on every master of a vessel, outward-bound to Ceylon, the Mauritius, the East Indies, or the Cape of Good Hope, who shall refuse to take a post-letter bag delivered or tendered to him by an officer of the Post-office, shall henceforth extend and apply to the master of every vessel outward-bound who shall refuse to take a post-letter bag delivered or tendered to him by an officer of the Post-office for conveyance; but every such master shall be entitled to the same gratuities as the master of any other vessel, not being a Post-office packet, conveying letters for or on behalf of the Post-office.

And be it enacted, that it shall be lawful for the Lords of the Treasury to make any reduction or alteration they may consider expedient in the gratuities allowed by law to masters of vessels for letters conveyed by them, for or on behalf of the Post-office between places in the United Kingdom, and between the United Kingdom and the Islands of Man, Jersey, Guernsey, Sark, and Alderney, and to allow any gratuities for the conveyance of letters to masters of vessels, passing to or from, or between any of her Majesty's colonies or possessions beyond the seas, if they

shall think fit, not exceeding the gratuities payable to masters of vessels for the conveyance of ship-letters from the United Kingdom to places beyond the seas.

And be it enacted, that whenever the word "letter" or "letters" is used in this act, the same shall be held to include newspapers, and any other packet, paper, article, or thing transmitted by the post, but not so as to deprive newspapers of any privilege they now legally possess of passing free of postage; and that the provisions of this act shall be construed according to the respective interpretations of the terms and expressions contained in the secondly herein-before-mentioned act of the first year of the reign of her present Majesty, so far as those interpretations are not repugnant to the subject or inconsistent with the context of such provisions.

And be it enacted, that wherever the order, consent, or direction, or any other act of the Lords of the Treasury is prescribed or required by this act, such order, consent, direction, or other act, may be signified under the hands of the Lords of the Treasury, or any three of them.

And be it enacted, that this act shall absolutely cease and determine on the 5th day of October, one thousand eight hundred and forty; and all warrants issued under the authority of the same, unless Parliament shall declare to the contrary (except in respect of any postage duties which may then have become payable under or by virtue of this act); and any proceeding for recovery of such duties, and except also as to any offence committed against the provisions of this or any other act, and any fine or penalty incurred by reason of any such offence, and any proceeding for recovery of any such fine or penalty, or for the punishment of any offender.

And be it enacted, that this act may be amended or repealed by any act to be passed during the present session of Parliament. (a)

July 22.

This bill was read a second time.

On the question that the bill be committed,

Mr. HUME said, he did not believe that there would be so great a falling off as had been anticipated. He had no doubt there would be a reduction in the amount of postage for some time, but it would be so great a convenience to merchants and others, that the sacrifice ought to be made. Other countries might be induced to concur in the plan. France had shewn a disposition to do so, and he had no doubt America would be equally willing to adopt it. No measure would be more extensively beneficial.

(a) The words in *italics* are proposed to be inserted in the committee.

Literary and scientific men would benefit by it; persons living in Scotland and Ireland might edit a work in London. Above all, the working classes would derive great benefit from the alteration.

MR. RICE said he should fix the committee for Wednesday, and go on with the bill from day to day, in order to get it to the other House in time to pass this session. He congratulated his honourable friend (Mr. Elliot) that he had brought his official experience to show the probable success of the experiment in respect to soldiers' letters, which afforded a fair inference that the same motives would produce a similar result here. With respect to the suggestion of the honourable member for Kilkenny, as to correspondence with other countries, the attention of her Majesty's Government would be turned to that subject, and there being a post-office treaty with France and Belgium it would enable us to open a communication respecting it. If our experiment should succeed, therefore, it would be for the benefit of the whole world, and equally for the interest of all countries.

The bill was ordered to be committed on Wednesday.

July 24.

On the motion of Mr. RICE, the House went into Committee on this bill.

Clauses up to 4 were agreed to.

Clause 5 having been proposed,

Mr. RICE stated, that in order to prevent forgery of the stamp, it was his intention to offer every inducement to scientific men of this and other countries to propose such devices as might effectually secure that end.

The clause was agreed to, as were also the following up to the 9th.

The remaining clauses were then agreed to.

Law Reports.

COURT OF CHANCERY—July 10.

NASH v. COCHRANE.

APPEAL FROM THE VICE-CHANCELLOR.

LESSOR AND LESSEE—*Specific performance of an agreement to take a Lease, where the Lessee had taken possession, and the Lessor had since done repairs as he had previously agreed to do, and the draft of the proposed lease sent to the Lessee, but rejected.*

The plaintiff agreed to let, and the defendant, the Hon. Erskine Cochrane, agreed to take certain premises in King's Arms-yard, Golden-square, for a period of twenty-one years, at a

rent of £50. a-year, the plaintiff agreeing to put the premises into a proper state of repair. The defendant entered into possession in September, 1830, and in November, the repairs going on in the meanwhile, a draft of the intended lease was sent him for perusal. No notice was taken of this draft, and no lease executed, but the defendant sent repeatedly to have repairs done until 1833, when he expressed himself satisfied. The plaintiff then pressed for the execution of the lease, but the defendant refused to bind himself further than as a tenant from year to year, and alleged, as a reason, that the repairs had not been executed in time, and that the lease contained covenants to do things which the plaintiff had not made him acquainted with, those covenants being contained in the original lease, by which the plaintiff held under the Crown. The Vice-Chancellor decreed against the defendant for a specific performance of his conduct, from which order the present appeal was made.

Mr. Richards contended that the lease was to be a consequent of the repairs, and that, as the repairs had not been done in any reasonable time, the plaintiff could not now insist on the fulfilment of the contract, and the more so, as he had not made the defendant acquainted with those covenants in the original lease which might render the property to him utterly valueless.

The LORD CHANCELLOR said the contract must be fulfilled. The defendant at an early period was furnished with a draft of a lease under the contract. He took no notice of it, but went on calling on the plaintiff at different times for more than two years to execute repairs under the contract, and then when the repairs were finished he proposed to get rid of the contract, which formed the basis of the demand he had made, and which he admitted to have been complied with. If he did not know the covenants in the lease, that was his own fault; but there must be an end of all the equitable jurisdiction of the Court in such cases if such a contract was not enforced. There must be a decree for a specific performance according to the prayer of the bill.

QUEEN'S BENCH.—*May 31.*

Sittings in Banco.

STOCKDALE v. HANSARD.

JUDGMENT.

(Continued from p. 186.)

I do not pretend to discuss at length the particulars of every case in which the doctrine of privilege is asserted; but two of paramount magnitude and importance cannot be passed over. Sir W. Williams was prosecuted, by ex-officio information, for an order signed by him as

Speaker, authorising the publication and sale of Dangerfield's Narrative, being a slanderous libel on James Duke of York, four years after that order had been given. This trial did not come on till the Duke had ascended the throne; he pleaded to the jurisdiction of the Court, and that plea is admitted to have been properly overruled. He then pleaded as a justification the order of the House of Commons, and that plea was set aside without argument. He was fined £10,000, and afterwards the fine was reduced to £8,000. He never questioned this sentence, nor has it been reversed by any court, or by Act of Parliament; on the contrary, Lord Kenyon, in the case last under discussion, appears to me to have considered it as a good law; but at the moment his memory, in general so faithful, misled him as to the facts. He said, "The publication was the paper of a private individual, and under the pretence of the sanction of the House of Commons, an individual published." Now, though the Narrative was indeed the paper of a private individual, it was adopted by the House, who ordered its publication. The Speaker did not publish as an individual, nor under pretence of their sanction, but as Speaker, and by their direct command. It was therefore an Act done in Parliament. The proceeding was by consequence a breach of the fundamental privilege which exempts all that is there done from question. The affair was taken up by the Convention Parliament; the Bill of Rights refers to it; the judgment would probably have been reversed by Parliament, like the attainders of Russell and Sidney, if the Bill introduced for that purpose had not contained a most iniquitous provision for reimbursing the sufferer out of the estates of the Attorney-General, which caused its rejection by the Lords.

Even if this case were not bad law, it would be worthy of the severest censure. A prosecution by the Crown of a single Member of Parliament for the misdeed of all; commenced years after; the defence indecently scouted from the Court without a hearing, and the conviction followed by an excessive penalty. But in what respect can it be said to bear the least analogy to the present case? The Speaker is not here sued; the sale of the present libel is not by the Speaker, nor took place within the walls of Parliament. If any officer of the House had been held innocent in disseminating that mass of atrocious falsehood, if any bookseller had been held justified in selling it, because the Speaker ordered that it should be sold for the benefit of the libeller, that would have been indeed a case in point. But I find in 5th Modern, p. 68, that Dangerfield himself had been convicted and punished for the same publication, and of that sentence I do not find that the legality, any more than the justice,

has ever been challenged. Yet it is plain that the Speaker's order, under the authority of the House, would have been as good a justification to him for publishing, as the resolution of the House can now be to the present defendant. These two cases afford the true distinction. The King v. Williams was ill decided, because he was questioned for what he did by order of the House, within the walls of Parliament. The King v. Dangerfield is undoubted law, because he sold and published beyond the walls of Parliament, under an order to do what was unlawful.

Lord Shaftesbury, in the 29th of Charles the Second, sought his discharge from imprisonment in the Tower, on an order of the Lords Spiritual and Temporal to keep him and two other Lords in safe custody "during his Majesty's pleasure and the pleasure of this House, for their high contempt committed against this House." The return was open to serious objections, as may be seen in the long arguments reported at page 144 of 1st Modern. Of the three judges who remanded the earl, one said "that the return, made by an ordinary court of justice, would have been ill and uncertain, but would not say what would be the consequences as to that imprisonment if the Session were determined." The second said, "The return no doubt is illegal, but the question is on a point of jurisdiction, whether it may be examined here? This Court cannot intermeddle with the transactions of the High Court of Peers in Parliament during the Session; therefore the certainty or uncertainty of the return is not material, for it is not examinable here; but if the Session had been determined, I should be of opinion that he ought to be discharged." And the third, the Chief Justice, thought "the Court had no jurisdiction," for reasons unconnected with the continuance of the Session. It is strange that the duration of the Session, on which the judgments turn so much, is now held to be immaterial where the Lords commit.

This decision, which undeniably and *a fortiori* would give a sanction to many later ones, and many dicta touching Privilege, which arose on habeas corpus, is cited by Lord Ellenborough in Burdett v. Abbott without a comment; in the King v. Flower, 8th Term Reports, page 314, allusion is made to it by Lord Kenyon, without considering its authority in point of law. Mr. Justice Holroyd, when arguing Sir F. Burdett's case at the bar, distinguished between that action, in which the nature of the contempt appeared in the plea, and the return to the habeas corpus, stating the contempt in general terms; he distinguished also between an action and the proceeding by habeas corpus. One feature of Lord Shaftesbury's case is curious, though not perfectly singular. The very proceedings of the House of

Lords to which the Court of King's Bench yielded entire acquiescence, were condemned by the same House, 19 November, 1680, as "contrary to the freedom of Parliament, derogatory to the authority of Parliament, and of evil example to posterity." The order and proceedings were thereupon adjudged "unparliamentary from the beginning, and in the whole progress thereof, and therefore were all ordered to be vacated, that the same or any of them may never be drawn into precedent for the future."

In the same manner, after Lord Camden and the Court of Common Pleas, had held Mr. Wilkes entitled to his release from custody before his trial on an indictment for libel, by reason of his Privilege as Member of Parliament, the House of Commons came to a vote, that themselves possessed no such Privilege. By which authority in such cases should we be bound? By that of our own law books, our daily guides, which, however, would appear to refer us to the Journals, or by that of the Journals of the House, in which the *Lex et Consuetudo Parlamenti* are treasured, but which are supposed to be hidden from our view? I think the Attorney-General referred us to the latter, of which he had before assured us that we were ignorant. Yet in Lord Shaftesbury's case, these Journals would overturn the authority of the Court. So in the Middlesex election contests between Wilkes and Luttrell, it is notorious that the law of Parliament was laid down in the most opposite sense on different occasions by the House of Commons. But as to these proceedings by habeas corpus, it may be enough to say, that the present is not of that class, and that when any such may come before us, we will deal with it as in our judgment the law may appear to require.

(To be continued.)

Summer Assizes.

WESTERN CIRCUIT—July 13.

Winchester.—Crown Side.

Before ERSKINE, J.

REGINA v. ROBERT SPINER.

BILL OF EXCHANGE.—*Whether an Acceptance to a Bill of Exchange, written by a third person, by direction of the intended acceptor, is of the same effect as if he had written it so as to quash an Indictment for Forgery preferred by the holder.*

The prisoner was indicted for uttering a bill of exchange drawn by himself upon, and purporting to be accepted by, his brother, John Spiner, knowing such acceptance to have been forged.

Mr. Deacon, solicitor, of Southampton, deposed, that in March, 1838, he applied to the prisoner for payment of a bill of costs. Witness agreed to give the prisoner time for payment, provided he gave some security. Prisoner proposed to give his brother John's acceptance for £45., which witness consented to take. Prisoner gave witness the acceptance produced.

John Spencer, the prisoner's brother, deposed that the acceptance produced was not in his handwriting. It is in the handwriting of the prisoner's son. Remembers the son coming to him when he was ill in bed, for the purpose of getting witness's acceptance. Witness was at that time forbidden to transact business. Could not at that time write, but sanctioned the son's doing it. Has no doubt that the bill now produced is the same. Did not sanction more than that one.

Mr. Missing then addressed the Court, and said, that after the evidence just given, he could not carry the case further, and should not offer any more evidence. He begged to say, however, that John Spencer had been summoned to attend before the magistrates at Southampton, but had not attended, in consequence of which the prosecutor had had no opportunity of ascertaining the facts.

ERSKINE, J. observed, that the son having written the acceptance with the authority of John Spencer, it was the same as though he had written it himself, and therefore directed an acquittal.

Mr. Serjeant Bompas then applied for a copy of the record, so as to enable the prisoner to take proceedings against the prosecutor for a malicious prosecution.

The JUDGE said he thought it a proper case for the prisoner to have a copy of the indictment, inasmuch as it appeared on the depositions that Mr. Mott, the prosecutor, at the time he took the bill, was unacquainted with the handwriting both of John Spencer and of the prisoner's son; added to which, the prosecutor had kept the bill in his possession upwards of five months before he instituted the prosecution. His Lordship, therefore, granted the application.

July 16.

Sittings at Nisi Prius before COLERIDGE, J.

KNIGHT v. COUPLAND AND ANOTHER.

ALLEGED LIBEL in the *Hampshire Advertiser* upon MAGISTRATES.—*Course to be pursued by Editors of Newspapers as to PUBLIC MEN and PUBLIC MEASURES—FREEDOM of the PRESS.*

The defendants are the publishers and pro-

prietors of the *Hampshire Advertiser*, and the alleged libels complained of were, first, that the plaintiff, being a magistrate of Winchester under the Municipal Corporation Act, had been guilty of gross partiality in the removal of the town-clerk of that borough, and in the appointment of another party to that office. It was ascribed that this was done from political motives. In the second charge, one of the magistrates was mentioned by name, and the others were designated as his "tail." They were called ignorant upstarts; and to this was added, "We laid before the public, a few weeks since, some pretty good proof of the justice which may be expected at the hands of the contemptible ignoramus and his tail;" and a copy of a letter which had been written to Lord John Russell, by Mr. Selby, one of the editors of the paper, was published, in which he complained of the conduct of the magistrates, and among other things said, that "he presumed his Lordship would recommend the removal of these magistrates from the commission, whose actions had proved them totally unworthy of the trust which they had prostituted, and the station which they had disgraced." The third alleged libel was in an argumentative strain, to the effect that persons in office, who had so conducted themselves, ought to be shunned by society. The fourth libel charged was an attack upon the Government in appointing these magistrates; and it asked the question, whether, if any known Conservative was brought before them, he would feel sure of impartial justice?

COLERIDGE, J. observed to the jury, that they must deliver a distinct verdict on each of the four counts in the declaration. They would first consider whether the defendants had published the articles in question; secondly, whether they applied to the plaintiff; and, thirdly, the character of the publications, whether or not they were libellous. The question of libel was a mixed question of law and fact, and the jury were at liberty to find a general verdict; taking both points in consideration, and receiving from the judge for the time being his opinion with respect to the law of the case. It was enough to say, that with regard to public men's public conduct, there was a distinction from the case of private men's private conduct. There was no public interest concerned with regard to dragging into public notoriety the man who adopted a private and quiet course of life, who courted no notoriety, and if any one chose to drag him forth and wound him in private life, nothing would justify him but a direct proof of the truth of his assertion. But with regard to public men and public measures, the public interest required a different course to be pursued. It was necessary for the public interest that public measures, and

the public conduct of public men, should be examined with great freedom, and the mode of doing so was by the public press, and that press was a free press; not a free press from the restraint of the law, but still a free press, as much so as Englishmen were free. Both were free, but both were subject to the restraint of the law. Whoever made comments upon public men in a spirit of honesty was only doing that which was allowable. Could any man doubt, that with respect to men in Parliament, or even Parliament itself, persons might with the greatest freedom, even with coarseness of language, examine into the wisdom or folly, the justice or injustice, of their proceedings. If the publication went no further, it was an innocent publication; but then the public interest did not require, and therefore the law did not sanction, an imputation to be made on men's motives, or if that was done, the party must justify and prove the truth of the imputation. You might say that you could show such a decision to be perfectly illegal and unjust, and the man who made it must be grossly ignorant, that would be justifiable; but to say that the party pronouncing the judgment was guilty of corrupt motives, did not fall within the rule he had laid down. Remembering, then, that it was not merely coarseness of language, not freedom of comment on conduct, but imputations on men's motives, or general abuse that constituted a libel, let them look at the case in question. The learned judge having gone through the case with the greatest particularity, placed the libels in the hands of the jury, and desired them to recollect that their verdict would be much canvassed, and he would therefore advise them to deliver their verdict upon great deliberation, but at the same time with perfect freedom, because they would find a justification in their own consciences. It was the great boast and privilege of this country that questions of this sort came before twelve men chosen from among our peers; but if they admitted their own feelings to govern them in their decisions, or made themselves channels through which the tide of popular opinion might flow through the great stream of justice, trial by jury would become a curse and be no longer a blessing.

The jury returned a verdict for the plaintiff on the first count—damages, 1s.; and a verdict for the defendants on the other three counts, on the ground that they were not libels.

Devizes, July 18.

GRAND JURY.

CHARGE OF MR. JUSTICE COLERIDGE, OCCASIONED BY THE CHARTIST RIOTS, &c.

His Lordship said the calendar, with certain exceptions, might be considered light for so large

a county, not merely in the number, but in the nature of the offences, yet it did still contain certain charges against certain individuals, which had excited great interest in the public mind, and which it was important should receive at their hands the fullest consideration—to be discussed with great deliberation, and fully disposed of, whether for or against the prisoners, in such manner as might tend to prevent a recurrence of offences of a similar description in this county and elsewhere. Upon those cases he should have several observations to make, but before he came to them it would be convenient to make a few observations on one or two other cases in the calendar, so that, having disposed of them, they might direct their more undivided attention to that which would more anxiously engage their consideration. The *first case*—that of *James Shepherd*—he only alluded to it because it arose on a question which was a little puzzling even to lawyers, as to whether it amounted to larceny.—The party was charged with having taken part in stealing a mare. The offence was committed in 1837, and the mare had passed through several hands. It appeared, that at Marlborough fair a lad was sent with the horse, which was intended for sale, but he was not authorized to sell it, but was merely to lead it up and down the fair. Before the master arrived, the prisoner came to the lad, and asked the price of the horse, and desired him to move it about; he then left the boy, and went to two persons, with whom he had previously been talking, and then they all came up and had a conversation with the boy. They had a good deal of negotiation about making an exchange; they offered to give £24. and another horse; the boy said he had no right to sell, but afterwards recollecting that his master had said he would take £25. he thought it was a good offer, and that it was best to sell the horse. They all went a little way out of the town, where the money was to be paid; while they were changing the saddles, the man who had the money disappeared, and the other rode off with the mare.—The question then was, whether that amounted, in point of law, to the stealing the horse, because it was clear the lad meant to have parted with the possession and with the property in the horse—he meant to effect an absolute sale. If, on the other hand, the prisoner had at first intended to have honestly made a purchase, but afterwards he or his companions had changed their minds and taken away the horse, that would be nothing more than a bargain and sale; but the price was not paid, and then it would not amount to larceny: but if a party got possession of a horse, never intending to buy it, but under the pretence of buying it, that would amount to a larceny.—If they thought there was a preconceived design to cheat the boy, and all other circumstances

were satisfactory, he should advise them to find the bill. In the case of Lloyd, for setting fire to a barn, the only question would be as to whether there was sufficient evidence to bring it home to the prisoner.—It was entirely circumstantial evidence, and required great consideration. In another case, a man was committed on a charge of manslaughter. He mentioned this case publicly, because it recurred to him, from the experience he had had on this circuit, that a somewhat lax notion was getting into the minds of people, and that shortly there would be no such thing as a conviction for murder; that whenever there appeared any heat of blood, or any slight provocation, it would be considered only as a case of manslaughter, and he could not avoid thinking that the frequency of this offence arose in some measure from that lax notion. It was not in every case of provocation that made the charge that of manslaughter only. The law that took into consideration and made allowance for human infirmity, did not allow for the intemperate or improper indulgence of passion; it was not because the blood was warmed that the offence was to be excused; if so, there would be one law for the cool-blooded man, and another for the passionate person. This could not be. The nature of the implement used ought to be considered; because, if he took a weapon which must produce death, the law considered he intended what he knew must take place, and that he intended to destroy the life of the party. If a man took a loaded gun and levelled it at an individual, that was a different thing to a man taking a switch stick. If in the heat of blood he took a stick, and used it, he might do so without intending to produce serious injury; but if he took a drawn sword or a loaded gun, and ran one through the heart of a party, or fired the other at his head, it was idle to say that he had not an intention to hurt the person. He would now bring their attention to a number of cases—six in number, and including twelve prisoners against whom bills would be presented. He did not know in what shape, or how many charges would be made, but some were committed for taking part in an unlawful assembly, and others for using seditious words, and for conduct intending to excite people to a breach of the peace and violation of their duty. The charge against five or six was for firing a pistol at a person of the name of Bengough, one of the police engaged for the purpose of suppressing the practice of these persons waiting together. To speak generally, for he did not mean to go into particulars, it appeared from the depositions, that in the month of May, and at different times, some of the towns in this county were under a good deal of excitement, occasioned by persons assembling calling themselves Chartists. These persons assembled in

great numbers, and violent language was used, and considerable alarm was felt. The magistrates acted with great promptness, and with the assistance of special constables and a police force peace was preserved; and in the end probably they would find that nothing did, in fact, take place in this county that would go beyond the offence of an unlawful assembly. It did not appear that the parties were suffered to go to the extent of rioting, or that any damage to life or property had taken place; that nothing did, in fact, occur, with the single exception of the firing of the pistol; but this, when examined into, was of less importance than at first might be imagined. He must in the first place say, that the public was not the less indebted to those gentlemen, but the more indebted to the magistrates, who, by the promptness with which they acted, prevented these things from coming to a great head, and it was not to be said that too much had been made of it, because a great deal had been prevented. If these gentlemen had been remiss, and not acted in the way they had done, in all probability great mischief would have ensued, which had now been prevented. With regard to the law there was not much difficulty. Any assembly, where people met together in great numbers,—where they met together under such circumstances, and exhibiting such conduct, either by the use of arms, by the use of seditious or violent language; or threatening language, by the use even of strong gestures, as against those who were concerned in the preservation of the peace,—anything of that kind was by law considered an unlawful assembly. They might probably have some common design in meeting, that common design being an unlawful one, but they were resisted, and parted voluntarily or by compulsion, before the design was carried into effect, so that there was not a riot, or even a rout: there might be no force, but still the mere fact of assembling together under such circumstances constituted an unlawful assembly. The law deemed it necessary to prevent the first tendency to a breach of the peace. It was better to stop those things in the beginning than suffer them to gain a head. They would remember, however, that in addition to the number of persons, and the common and unlawful design they had in view, there must be such circumstances in their behaviour as were calculated to inspire terror and alarm. It was not enough if persons met and conducted themselves peaceably, although you might believe something would occur, but you must find such an indication on their part, either by language or by their being armed, or in some other way calculated to inspire among reasonable people terror and alarm. That was the only observation it was necessary to make on the point of law. They would be satisfied that there had

been a meeting of considerable numbers, with a common and unlawful design to excite terror and alarm. When they were satisfied there had been such a meeting, they would address their attention to see whether the evidence attached this to the particular person charged. The rule of law was clear. It was not necessary, in order to fix a person with belonging to *an unlawful assembly*, that he should be proved to have used violent language, or to have taken an active part. *It was enough to be one of those actually joining the meeting, adding his strength and presence to increase the numbers—being there and not taking part against their common purpose, swelling the number and increasing the danger;* and every one who considers, will see how right it is that the law should be so, because every person who joined an assembly increased the terror and danger, and the mischief of such an assembly. It was necessary therefore to establish, that the assembly was of the nature and description he had mentioned. Then, if every one of these prisoners were present not taking part to prevent it, he became a criminal participant; and, of course, if a conviction should take place, in apportioning the punishment, one should look carefully to see the particular evidence against each person; but for the constitution of the offence his presence is quite enough. So much, for the present, upon that part of the charge. There would also be presented to them the charge of using seditious language. The persons who use language of this sort, if the case was brought home, stood morally in a greater degree of responsibility than those who merely assembled together, for they were the cause of the whole. It was seditious language to treat the Queen, the constituted authorities, the great body of Parliament, the Ministers of the State, the landed proprietors, or any persons charged with the administration of the law—to treat these persons with disrespect and contumely, constituted the use of seditious language; and if they were satisfied that that was brought home to any of these persons—that at this meeting he had endeavoured to induce the crowd to acts of violence, to disaffect their minds from the constitution, he had stated, the offence was clearly made out, and they would find the bill. Having said thus much with regard to the particular offence, and stated what he thought to be the duty of the magistrates—because, so far as his opinion went, he had commended them—it was hardly necessary to say that it was the duty of the magistrates to exert themselves promptly to put anything of that kind down; he need not wait for reading the Riot Act—he might stop it in the first instance; and that which he might do of himself, gave him also, of course, in reason and law, the right to call for the assistance of all her Majesty's subjects; and if he had a right to

call upon them for assistance to suppress the unlawful assembly, it was the duty of those persons who were called upon, to come forward and render assistance, and if that peaceful assistance failed, then it was the duty of the magistrate to call for the aid of the military—a recourse never to be resorted to but from necessity, and then the larger the force the better, and the sooner it was put down, the more merciful was the proceeding.—Now these offences having taken place, and the parties being here to be charged, if the guilt was brought home to them, the law must take its course, whether it might be presumed they were deluded or not: if the law was broken, of course the law must be vindicated, and every judge would be reprehensible if he did not deal with them so as to prevent a recurrence of such scenes in this and other counties: but it was far more desirable to prevent a recurrence of these things—to prevent rather than to punish; and it was probable, that whoever heard what had taken place, would see it was great ignorance and great error on the part of those who acted under that extreme delusion, on subjects one had hoped at this time of day were better understood than they appeared to be. The notion of their having any right to a division of property—that all mankind should be equal in station and property—was a vision one would think impossible any one could now entertain. Let any person examine and use his own common sense—look among people in his own situation—that equality would be unconstitutional. Make people equal to day, the difference of bodily strength, of mental strength, and in habits of industry, would make them all unequal to-morrow. But when they said that, don't let them be reading lectures to others without endeavouring to assist them, and if any unfair grievance pressed upon them, let them all do what they could to render them their aid. He thought we were much disposed to boast of the exertions we made in the cause of charity, and with the view of educating and relieving the wants of the lower orders; and he hoped we had some right to say we did so, but we could not do too much in making ourselves acquainted with their state, and we should consider that we still had a great deal to do by way of education. It was the duty of us all to set our shoulders to the wheel, and do what we could for that purpose; and this circumstance was never to be lost sight of. We had been for some time doing what we could: the extent to which education had gone, and certainly so far as had been ascertained, education had not produced the satisfactory result that we were led to expect some 25 years ago. He did not believe, if they examined the reports of crime in different counties, and the statements they had from the different gaolers, where care was now taken to ascertain the degree of information per-

sons had obtained, it would not be found that the best educated were always the least guilty.—God forbid that he should say anything against education, for he believed, if one thing more than another produced happiness, it was the wide and deep diffusion of education through the breadth and depth of the land—if education was properly understood—but it must be education founded on sound principles of religion; but if you taught people science and mechanics, and neglected that which was more essential, then all was a radical and fundamental error. They must exert themselves in giving the means of religious instruction, if they meant to meet the injuries now pressing upon us. In this country there was great inequality in station—there were great riches drawn into close approximation with great power. Education had gone far enough for people to understand what the meaning was of physical power, and if it was meant to make that physical power turn to the right account, you must combine the education that you gave with the inculcation of religious principles. He had taken the liberty of making these observations, going perhaps beyond the duties of a Judge, but the occasion seemed to him to warrant them, and they were not so much addressed to the grand jury as to those around.

NORTHERN CIRCUIT.—July 16.

York.—Civil Side.

Before COLTMAN, J.

PEACE v. EASTWOOD.

Lessee of Game upon a Manor whether Lessee of the Land also, so as to maintain Trespass.

This was an action of trespass alleged to have been committed on the plaintiff's close, and for taking certain dead grouse from his gamekeeper at Melton, in the West Riding. The plaintiff was lessee, under the Lord of the Manor, of the game upon it. On the 12th of August, 1837, the plaintiff sent his gamekeeper on the field in question to shoot grouse. The defendant met him there, and asked if he had shot any; to which the gamekeeper answered in the affirmative. The defendant then demanded them of him. The demand was refused, and the defendant said he should be strong enough soon to take them. Some time after he returned, accompanied by some other persons, when the demand and refusal were repeated, upon which a scuffle ensued. The defendant succeeded in bearing off two grouse in triumph; the rest were torn to pieces in the struggle. It turned out

that the plaintiff was not lessee of the land, but only of the game. On this the learned judge ruled that he could not recover for the trespass, but only for the game.

Mr. Alexander thought the measure of damages would be small, as it was only to try the rights of the parties, and not for damages, that the action was tried.

The jury returned a verdict for the plaintiff as to the taking of the game—damages £s.

STORM v. MILLAR.

LANDLORD and TENANT.—CUSTOM to STUB where the land would be fit for cultivation—RIGHT of a TENANT after notice to quit to CUT WHINS and sell them for his own benefit.

The plaintiff was landlord of the defendant, and brought this action to recover damages for mismanaging the land, of which he was the tenant, and for cutting and selling whins.

It appeared that in the autumn of 1838 the plaintiff gave the defendant notice to quit, and in contemplation of that event he, about Christmas, began to cut, from a field of about twenty acres, the whins, which were described as being very fine, and sold them, to the amount of about 200 tons, to Mr. Campion, proprietor of the alum works in Filingdale, near Whitby, to be used in the manufacture of alum, for which purpose they are sought for the country round. The cutting was not denied, but was justified as a right. On the other hand, the plaintiff contended, that, by a custom of the country, the tenant had only a right to sell when he cleared the land, root and branch, for tillage.

Several of the witnesses of the plaintiff, on cross-examination, stated that they had cut and sold whins without stubbing; and others spoke of a custom which limited the stubbing to cases where the land was fit for cultivation when cleared. But all agreed that it would be much more expensive to clear the roots out after the top was cut away, than by taking the whole together. It was also alleged, that the defendant had taken the mud from a pond, and put on land of another person.

COLTMAN, J. said, that there was some evidence of a custom to stub where the land would be fit for cultivation, and it had been stated that half of this field was so, and the other half would be more profitable for pasture than to continue in whins. Verdict for the plaintiff, damages £1. 10s.

COURT OF EXCHEQUER.—June 12.

NEW GENERAL ORDERS.

The Court doth hereby order and direct in manner following:—that is to say,

1. That every person to whom, in any cause or matter pending in this court, any sum of money or any costs have been ordered to be paid, shall, after the lapse of one month from the time when such order for payment was duly passed and entered, be entitled by his clerk in court to sue out one or more writ or writs of fieri facias, or writ or writs of elegit, of the form hereinafter stated, or as near thereto as the circumstances of the case may require.

2. That upon every such order hereafter to be entered, the entering clerk shall, at the request of the party leaving the same, mark the day of the month and year on which the same shall be so left for entry; and no writ of fieri facias or elegit shall be sued out upon any such order, unless the date of such entry shall be so marked thereon as aforesaid.

3. That such writs, when sealed, shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior courts of common law belongs, and shall be executed by such sheriff or other officer as nearly as may be in the same manner in which he doth or ought to execute such like writs; and such writs, when returned by such sheriff or other officer, shall be delivered to the clerks in court by whom respectively they were sued out, or be left at their respective seats, and shall thereupon be filed as of record in this court. And that for the execution of such writs, such sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority, for the execution of the like writs issuing out of the superior courts of common law.

4. That if it shall appear upon the return of any such writ of fieri facias as aforesaid, that the sheriff or other officer hath by virtue of such writ seized, but not sold, any goods of the person ordered to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs is payable, shall immediately after such writ with such return shall be filed as of record, be at liberty by his clerk in court to sue out a writ of venditioni exponas in the form hereinafter stated, or as near thereto as the circumstances of the case may require.

5. That on every such writ of fieri facias and elegit so to be issued as aforesaid, there shall be endorsed the words, “By the Court,” and also thereunder the calling and place of residence of the party against whom such writ shall be issued, and also the name and residence, or place of busi-

ness, of the solicitor at whose instance the same shall be issued, and the name of the clerk in court issuing the same; and that every such writ be also endorsed for the sum to be levied, costs of writ, sheriff's poundage, &c. according to the forms used upon like writs issuing out of the superior courts of common law.

6. That for every such writ of fieri facias or venditioni exponas so to be issued as aforesaid, there shall be allowed to the clerk in court issuing the same, the sum of 18s. 7d., and for every such writ of elegit the sum of £1. 10s.; and that there be allowed to the solicitor, at whose instance any such writ of fieri facias, elegit, or venditioni exponas, shall be issued, the sum of 6s. 8d. for instructions for the said writ, and that there be also allowed to such solicitor the further sum of 6s. 8d. for attending to procure a warrant, and for attending to instruct the officer charged with the execution of such writ.

FORMS OF WRITS.

No. I.

Writ of Fieri Facias, on a Decree or Order of the Court of Exchequer for Payment of Money.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of , which lately before us in our Court of Exchequer at Westminster, in a certain cause, or certain causes (as the case may be) wherein A. B. is plaintiff, and C. D. is defendant, or, in a certain matter there depending, intituled, “In the matter of E. F.” (as the case may be), by a decree or order (as the case may be) of our said court, bearing date the day of was decreed or ordered (as the case may be) to be paid by the said C. D. to A. B. And that of the goods and chattels of the said C. D. in your bailiwick, you further cause to be made interest upon the said sum of , at the rate of £4. per centum per annum, from the day of *. And that you have that money and interest before us, in our said court, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree or order (as the case may be). And that you do all such things as by the statute passed in the second year of our reign, you are authorized and required to do in this behalf; and in what man-

* The day on which the decree or order was made, or, if that were prior to the 1st October, 1838, as: “from the 1st day of October, 1838.”

ner you shall have executed this our writ, make appear to us in our said court immediately after the execution thereof. And have there then this writ. Witnes James Lord Abinger, at Westminster, the day of *, in the year of our reign.

No. II.

Writ of Fieri Facias, on a Decree or Order of the Court of Exchequer for Payment of Money and Interest.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Sheriff of greeting.

We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made the sum of , and also interest thereon at the rate of £4. per centum per annum, from the day of , + which said sum of money and interest were lately before us, in our Court of Exchequer at Westminster, in a certain cause, or certain causes (as the case may be), wherein A. B. is plaintiff, and C. D. is defendant, or in a certain matter there depending, intituled, "In the matter of E. F." (as the case may be) by a decree or order (as the case may be) of our said court, bearing date the day of , decreed or ordered (as the case may be) to be paid by the said C. D. to A. B., and that you have that money and interest before us, in our said court, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree or order (as the case may be). And that you do all such things as by the statute passed in the second year of our reign, you are authorised and required to do in this behalf; and in what manner you shall have executed this our writ, make appear to us in our said court immediately after the execution thereof. And have there then this writ. Witness, &c.

COURT OF COMMON PLEAS, DURHAM.
2 Vict. cap. XVI.

An Act for improving the Practice and Proceedings of the Court of Pleas of the County Palatine of Durham and Sanderige. [June 14, 1839.]

(Continued from p. 191.)

XXVII. Provided always, and be it enacted, That neither of the said Courts of Queen's Bench or Court of Justiciary shall in any case proceed against or punish any person, nor shall any such person be liable to any action, for having made default by not appearing to give evidence in obe-

dience to any writ of subpoena or other process for that purpose issued under the authority of this Act, unless it shall be made appear to the Court that a reasonable and sufficient sum of money to defray the expences of coming to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpoena or other process was served upon such person.

XXVIII. And be it enacted, That in all cases where final judgment shall be obtained in any action or suit in the said Court of Pleas at Durham, and also in all cases where any rule or order shall be made by the said Court of Pleas at Durham, whereby any sum of money, or any costs, charges, or expences, shall be payable to any person, it shall be lawful for the judges of any of her Majesty's Superior Courts of Record at Westminster, upon the application of any person who at the time of the commencement of this Act shall have recovered, or who shall at any time thereafter recover, such judgment, or to whom any money or costs, charges, or expences shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or a transcript thereof, or upon the production of such rule or order, such record or transcript thereof, or rule or order, as the case may be, being respectively under the signature of the Prothonotary of the said Court of Pleas of Durham, or his deputy, to order and direct the judgment, or, as the case may be, the rule or order of the said Court of Pleas at Durham to be removed into the said Superior Court, and immediately thereon such judgment, rule, or order shall be of the same force, charge, and effect as a judgment recovered in, or a rule or order made by such Superior Court; and all proceedings shall and may be immediately had and taken thereupon, or by reason or in consequence thereof, as if such judgment so recovered, or rule or order so made, had been originally recovered in or made by the said Superior Court at Westminster; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment, rule, or order: Provided always, that no such judgment, rule, or order, when so removed as aforesaid, shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had remained a judgment, rule, or order of the said Court of Pleas at Durham, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same.

(To be continued.)

* The day on which the writ issues.

+ The day mentioned in the order.

2 & 3 Vict. cap. XXII.

An Act to enable Justices of Assize on their Circuits to take Inquisition of all Pleas in the Court of Exchequer of Pleas which shall be brought before them without a Special Commission for that purpose.—[July 4, 1839.]

Whereas by the statute, commonly called "The Statute of Westminster the Second," passed in the thirteenth year of the reign of King Edward the First, the justices of assize on their several circuits are empowered to take inquisitions of all pleas in the Courts of Queen's Bench and Common Pleas; and whereas it is expedient to extend the said power to pleas in the Court of Exchequer, in order to put an end to the practice which has hitherto obtained of issuing a separate commission from the said court upon each record brought therefrom before the judges of assize: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, it shall be lawful for all justices of assize, and they are hereby authorized and empowered, on their respective circuits, to try causes and take inquisitions of pleas pending in the Court of Exchequer of Pleas which shall be brought before them, and to proceed thereon in like manner as they can or may do in respect of causes and pleas pending in the Courts of Queen's Bench and Common Pleas under and by virtue of the said Act, or by any other law, statute, or usage whatsoever; and that it shall not be necessary hereafter to issue any commission from the said Court of Exchequer of Pleas for that purpose.

REVIEW OF NEW BOOKS.

The CABINET LIBRARY of scarce and celebrated Tracts, No. 9—LAW SERIES, Vol. 2, Part 1, price 1s. 6d.—WARNKÖNIG'S ANALYSIS of SAVIGNY'S TREATISE on the LAW of POSSESSION. Edinburgh: Thomas Clark. London: Simpkin and Marshall; Hamilton and Adams. 1839.

A Reviewer has a difficult task, when he attempts at reviewing the disjointed part of an Author's work, written upon a particular subject;—that subject may or may not be

well written; in either case, an honest judgment cannot be passed upon the entire work, indeed, it would be an insult to the public, to praise, or condemn, a whole work, merely, because one article happened to be well or ill written.

The number before us, professes to be an Analysis of *M. Von Savigny's Treatise on Possession, according to the Roman Law*, and explains the method pursued by that Author.

The first chapter, entitled, *NOTION, or IDEA of POSSESSION*, is intended, to give a precise idea, of the signification, presented by the words *possessio* and *possidere*, in the different texts of the Roman Law.

The second chapter treats of the MEANS OF ACQUIRING POSSESSION, or of the CONDITIONS NECESSARY TO SUCH ACQUISITION, namely, the real apprehension of the thing (*factum possessionis*), and the intention to possess or appropriate the thing (*animus possidendi*).

The third chapter is the Loss of POSSESSION, either by some act or the will.

The fourth chapter contains the theory of INTERDICTS, or of the *actions* introduced for the guaranty of possession. The origin—the true end—and the nature of these possessory actions, and the procedure in relation to them.

The fifth chapter is devoted to the *Quasi-possession*, of personal and real servitudes, and of other rights of the same nature. And the sixth chapter explains the different modifications which the Roman law has undergone by the general laws of Germany; and concludes with this observation—That the basis of the system of the Roman laws in the matter of possession, still subsists in the common law of Germany; and consequently, that the principles, contained in the titles and fragments of the *Corpus Juris Romani* are still applicable in practice.

The difficulties of the matter of possession is regarded by all the interpreters as one of the most obscure and intricate subjects of the

Roman Legislation, and the Treatise of M. de Savigny has enjoyed a high reputation among Foreign Jurisconsults—his exposition is luminous—his style concise—and, in a few words includes many ideas. For THE ANALYSIS we will give the words of the Professor. “ It will be very difficult within the limits prescribed by the nature of this collection, to give the reader a just idea of the system of *M. Von Savigny*, without causing his work to lose much in the process of analysis.” And we will add, that those who wish to make themselves acquainted with the OLD ROMAN LAW of Possession, cannot do better than read this number; and if the second part be written as faithful to the text of *M. Von Savigny* as the present, the whole will be a desirable acquisition to a library, though we can say nothing for its practical utility in England.

Business of the Courts.

COURT OF CHANCERY.

APPEALS.—Bacon v. Jones, appeal part heard—Rishton v. Cobb, appeal.

CAUSES.—Saward v. Macdonald, by order—Portman v. Mills, further directions, by order—Gompertz v. Ansdell, ditto—Heap v. Haworth.

VICE-CHANCELLOR'S COURT.

Short Causes; after the Short Causes, Unopposed Petitions; after the Petitions, Causes by order; after the Causes by order,

CAUSES.—Thompson v. Sears, part heard—Naylor v. Weatherall, cause and petition—Ryan v. Hill, two causes—Cloake v. Roalfe, ditto.

ROLLS' COURT.

Lee v. Fernie, part heard—Link v. Stullard—Ellis v. Walmsley, further direction and costs—Hicks v. Keat, exception—Hemmington v. Pinkerton—Miller v. Little—Hall v. Lewis—Jones v. Maurice—Stephen v. Wrench, exception—Cator v. Smith, further direction and costs—Cursham v. Newland, ditto.

NOTICE TO CORRESPONDENTS.

SCRUTATOR.—We have no leisure.—Nor do we see the necessity, for troubling us, to inform you, the probable result of an Action, which ap-

pears to have been abandoned.—You will not give your time away to your clients, and starve yourself; and yet you, with many others, expect us to do so. Indeed, some have endeavoured to make us the stalking horse to fill their own purses. We, however, notice your APOLOGY, and will for once step out of our way.—The Legal Estate will prevail. The want of registration will not avoid a Deed as between the parties themselves. Its priority is only postponed to subsequent incumbrancers who shall have registered their Deeds.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 27th July, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, AUGUST 3, 1839.

[No. 14.

LEX LOCI DOMICILII.

PART I.

IN CASES OF LEGITIMACY.

THE PRESUMPTION OF THE LEGITIMACY OF A CHILD BORN IN LAWFUL WEDLOCK.

(Continued from p. 194.)

WE will now enter upon the question of LEGITIMACY.

The old law of "*quatuor maria*" was exploded in the case of *Pendrell v. Pendrell*, when the Court determined that the doctrine of being *within the four seas* was not to take place, but that the jury were at liberty to consider of the point of access. The issue to be tried was, whether the plaintiff was heir-at-law of Thomas Pendrell. It was admitted, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in London, and he going into Staffordshire; that at the end of three years the plaintiff was born; and there being some doubt upon the evidence, whether the husband had not been in London within the last year, that fact was for trial. The plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of non-access; and the Court agreed (*RAYMOND, C. J.*) that the old doctrine of being within the four seas was not to take place, but that the jury were at liberty to consider of the point of access, and they found against the plaintiff. The

Chief Justice allowed the defendant to prove the mother to be a woman of ill fame (*a*), but he would not allow the mother's declarations to be given in evidence till she had been called, and denied them upon the cross-examination (*b*).

Lord MANSFIELD said, that it had been solemnly determined by the delegates, that where the child is born in wedlock, the evidence or declarations of the parents seem inadmissible to bastardize such issue (*c*).

We will turn attention to the law, as it now stands, and in doing so we think that the opinions of the judges, given in 1811, before the House of Lords, upon questions submitted to them in relation to the *Banbury Peerage* case, will best answer our purpose of explanation. These questions were as follow :—

1. Whether the presumption of legitimacy, arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption?

2. Whether the fact of the birth of a child from a woman united to a man by lawful

(*a*) See *Pride v. the Earls of Bath and Montagu*, *Salk.* 120.

(*b*) *2 Stran.* 925.

(*c*) *Coupl.* 594.

wedlock, be always or not always, by the law of England, *prima facie* evidence that such child is legitimate; and whether, in every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* be always, or be not always, upon the person or party calling such right in question; whether such *prima facie* evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence, that such access did not take place between the husband and wife, as by the laws of nature is necessary, in order for the man to be in fact the father of the child; whether the physical fact of impotency, or of non-access, or of non-generating access (as the case may be), may always be lawfully proved, and can only be lawfully proved, by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the laws of England, that a physical fact be proved?

3. Whether evidence may be received and acted upon, to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access. Whether such proof must not be regulated by the same principles, as are applicable to the legal establishment of any other fact?

4. Whether, in every case, where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place, after the marriage, between the husband and wife, (the husband not being proved to be separated from her by sentence of divorce), until the contrary is proved by evidence, sufficient to establish the fact of such non-access, as negatives such presumption of sexual intercourse within the period, when, according to the laws of nature, he might be the father of such child?

5. Whether the legitimacy of a child, born in lawful wedlock (the husband not being proved to be separated from his wife by sentence of divorce), can be legally resisted, by the proof of any other facts or circumstances, than such as are sufficient to establish the fact of non-access, during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question, but such non-access, can be legally left to a jury, upon any trial in the Courts of Law, to repel the presumption of the legitimacy of a child so circumstanced.

Sir JAMES MANSFIELD, C.J. delivered the following opinions of the Judges, who were unanimous:—

To Question 1.—That the presumption of legitimacy, arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born, in the course of nature, may be rebutted by circumstances, inducing a contrary presumption.

To Questions 2 and 3.—That the fact of the birth of a child, from a woman united to a man by lawful wedlock, is generally, by the law of England, *prima facie* evidence that such child is legitimate. That in every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question. That such *prima facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence, that such access did not take place between the husband and the wife, as by the law of nature, is necessary, in order for the man to be in fact the father of the child. That the physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved, by means of such legal evidence, as is strictly admissible in every other case,

in which it is necessary, by the law of England, that a physical fact be proved.

That after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them), no evidence can be received, except it tends to falsify the proof that such intercourse had taken place. That such proof must be regulated by the same principles, as were applicable to the establishment of any other fact.

To Questions 4 and 5.—That in every case, where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such a child.

That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife, by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and the wife, at any time when, by such intercourse, the husband could by the laws of nature be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father to that child? and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient, to the satisfaction of a jury, that no sexual intercourse took place between the husband

and wife, when by such intercourse the husband could, by the laws of nature, be the father of such child.

The non-existence of sexual intercourse is generally expressed by the words "non-access of the husband to the wife;" and we understand those expressions, as applied to the present question, as meaning the same thing; because, in one sense of the word access, the husband may be said to have access to his wife, as being in the same place, or the same house; and yet, under such circumstances, as, instead of proving, tends to disprove that any sexual intercourse took place between them.

(*To be continued.*)

P ROBLEM XIV.

VOL. 2.

What is a FEOFFMENT?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 6. VOL. II.

What are the remedies for INJURIES to HOUSES?

Wherever a direct injury is committed to houses or lands, which are in the possession of the party complaining, the proper form of action is trespass, where, however, the injury is merely consequential upon some act of the defendant, which if abstractedly considered would not be illegal, the remedy is case. The latter action is also in some cases a concurrent remedy with trespass.

A possessory right is sufficient to maintain an action of trespass, therefore, whoever is in possession may maintain the action against a wrong doer to his possession, (*Harker v. Birkbeck, 3 Burr, 1563*) even though the tenant's possession be void; therefore, one in possession of glebe land under a lease,

void by stat. 13 Eliz. c. 20, by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrong doer, (*Taylor v. Eastwood*) East, 212.

It is not necessary to have an interest in the soil to maintain an action of trespass, for one who has an interest in the profits merely, though not in the soil itself, has a sufficiently exclusive possession to maintain the action.

An action of trespass may be maintained for any wrongful entry into the house, lands, or tenements of another, without his consent, or for treading down, spoiling, eating, &c. his hay or corn, or cutting down his trees, or hunting in his close, or breaking down his hedges or ditches, or throwing down or disturbing the setting of his fold, or breaking up his pond. It is also maintainable, if a man enters, and does damage to another, though he does not keep the possession, and it is no justification of a trespass on a close, that the defendant entered it to take goods of his that were there (*Anthony v. Honeyes, D. Bing.* 186).

The action does not lie for a mere trespass, as for pulling down a wall, and taking down the tiles from a house, unless it be alleged that the timber was thereby rotted, (Com. dig. tit. action on the Ca. B. 6.). The injury as before observed, must result from some act of the defendant, which considered of itself, might be perfectly objectionable, but which is followed by consequences injurious to the party complaining. This is, therefore, the proper remedy for nuisances to houses or lands, which are consequent upon an act of the defendant committed upon his own property.

Where an injury is committed to the house or land of a person, who not being in possession has merely a reversionary interest therein, the proper remedy is by an action on the case, and so he may have an action for continuing the nuisance, even after a former recovery for committing it (*Shadwell*

v. Hutchinson, Car. and Payne, 333). In this form of action the landlord may recover damages, commensurate with the injury which he has sustained by the deterioration of that property, of which the reversion is in him. The nature of the reversion to which the plaintiff is entitled, is only so far material as to regulate the amount of damages to be recovered by him. A reversioner for life can only recover such damages for an injury to the estate, during the term of a lease, as are equivalent to an injury done to the life estate, (*Evelyn v. Baddish, S. C. 7, Taunt. 411*).

If the plaintiff declare as a reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature, as to be necessarily injurious to his reversion, otherwise, the want of such allegation will be cause for arresting the judgment therefore, where a plaintiff declared as reversioner of a yard, and part of a wall which W. T. occupied as tenant to him, and that the defendant wrongfully placed on the said part of the wall quantities of bricks and mortar, and thereby raised it to a greater height than before, and placed pieces of timber on the said wall, overhanging the yard, per quod the plaintiff lost the use of the said part of the wall, and also by means of the timber overhanging the wall, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and the said part of the wall were injured, without stating that his reversion was prejudiced, the Court arrested the judgment, (*Jackson v. Peskod, 1 Maule & Selw. 234*).

By the common law, all out-houses, as barns and stables, though not contiguous to the dwelling-house, might be the subject of arson; and the common law also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house. But by the

stat. 1 Vic. c. 89. s. 3. it is enacted, that whosoever shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united Church of England and Ireland, or shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same, or any of them respectively, shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony ; and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas, for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years. And by s. 12, it is enacted, that where any person shall be convicted of any offence punishable under that act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction ; and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment, with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet.

By statute 1 Vic. c. 86. s. 3. it is enacted, that every person convicted of burglary, shall be liable, at the discretion of the Court, to transportation for life, or for any term not less than ten years, or to be imprisoned for three years, with or without hard labour, in the common gaol or house of correction, and also to solitary confinement during such imprisonment, but not for more than one

month at any one time, or for more than three months in any one year. And it is declared, that if any person shall enter the dwelling-house of another, with intent to commit felony, or being in such dwelling-house, shall commit felony, and shall, in either case, break out of the said dwelling-house in the night time, such person shall be deemed guilty of burglary. And by 1 Vic. c. 86. s. 4. the night time is declared to commence at nine in the evening, and to conclude at six in the morning.

W. T. K.

Imperial Parliament.

HOUSE OF LORDS—ENGLAND.

COPYHOLDS ENFRANCHISEMENT BILL.

Lord BROUGHAM rose to call their lordships' attention to a bill, framed with the greatest care, and founded upon the soundest principles. This bill proceeded from the Real Property Commissioners, who, after much inquiry, had produced a report on the subject of tenures. On some of the recommendations of that commission the present bill was framed, and the measure had received the greatest consideration in the other House of Parliament. He should state shortly to their lordships what the objects of the bill were. A great part of the landed property of the country was built over by towns, or it was situate in the neighbourhood of towns, and was therefore likely to be built over, and this property was held by the tenure called copyhold. Lord Coke, and after him Mr. Justice Blackstone, said that this tenure, though not of a high family, was of a very ancient house, coming as it did from the ancient villeins. By degrees those villeins obtained possession of their lands, and there grew up a firmer title, but still in the eye of the law the possessors of those lands were merely tenants-at-will, although under very peculiar circumstances; the will of the lord being determined by the customs of the manor. Now, the manner in which the customs arose in each particular manor, formed the groundwork of the bill which he had the honour to propose to their lordships. In each manor the customs varied, and constituted a code of law which, however different from that which obtained in other parts of the kingdom, was the law of that manor. Now, let them only look at the consequences of this. The position of the ground, and its quality, whether wood, river, or mine, the state of the inhabitants, the degree of

their civilization, the amount of property held by the lord, the amount of property held by the tenant—nay more, the mere caprice of the lord, became severally the origin of all the diversities in the customs of manors which had since sprung up. There was not a greater diversity in the laws which affected the customs of France, before the Code Napoleon amalgamated and melted them all into one, than at this moment was to be found in England. The first diversity respected the enjoyment of land, particularly the leasing power. Generally speaking, the tenant could not lease for more than a year, but with the consent of the lord he might grant a lease for a longer term. In many manors, however, the copyholder might lease for seven years, in others for nine, in others again for life, and in one manor the custom was for the copyholder to lease for life and 40 years afterwards. In like manner the custom varied in different manors as to the amount to be paid to the lord for his license to lease. The amount was sometimes perfectly indefinite, and the lord of the manor might demand whatever sum he pleased for his consent, and consequently the copyholder in many instances could not lease at all. In other manors the tenant might lease on payment of a fine certain, and the amount of that varied in different manors. So much as to the mode of enjoyment as far as tenure was concerned. But there was another diversity. The timber which grew on copyhold land could not be cut down by the copyholder without the consent of the lord in many manors, and indeed it was a common proverb all over England, "the oak will not grow except on free land." So with respect to the enjoyment of underground property; mines and minerals generally belonged to the lord, but by special custom to the tenant, and sometimes the property was to a certain extent in the lord, and to a certain extent in the tenant. The consequence was, that in these cases the mines could not be worked without the joint consent of the lord and the tenant. So again, as many diversities prevailed in the customs affecting free bench or dower, and the transmission of the copyhold property by descent. The widow of the copyholder was sometimes entitled to a third of the property for her dower, sometimes to a moiety, and sometimes to the whole. Then, again, when the property passed by descent, it came sometimes to the eldest and sometimes to the youngest son; in some manors all the brothers took together, and no son at all; sometimes it passed to the youngest daughter, sometimes to all the daughters in coparcenary, and sometimes the eldest daughter took all. There was equal variety in respect to the conveyance of the property, whether by transfer *inter vivos*, or by will, and also in respect of

the amount of the fine payable on the transfer. Then, again, the customs differed with respect to heriots. Their lordships knew that a heriot was the best chattel which the tenant had, and he believed that Smolensko was once claimed as a heriot. (A noble lord mentioned that Waxy was also taken as a heriot.) But the evil did not stop here. If a piece of copyhold land descended according to the custom of gavelkind, all the sons had to pay a heriot, and if the land were divided for building purposes, it might so happen that 90 or 100 heriots would be payable. He had said enough to show their lordships that we ought to get rid of these diversities in the law, which, without doing much good to the landlord, were exceedingly injurious to the tenant. It was proposed, therefore, to give facilities for voluntary enfranchisement, and failing that, to have recourse to compulsory powers. The tithe commissioners, who had judiciously and successfully carried the Tithe Commutation Act into effect, had consented to take the superintendence of this measure. There was no compulsory power under the bill, with the exception that a binding power was given to the majority of copyholders over the minority; and whenever the lord of the manor, together with more than one-half of the copyholders in number, and more than three-fourths in value, assents to enfranchise all the copyholds, the provision was made to enable them to avail themselves of the power of the commissioners by appointing valuers, obtaining reports, settling disputes, and fixing the amount of compensation to the lord. The noble and learned lord, after observing that he had explained the general provisions of the measure as clearly as he could, concluded by moving that the bill be read a second time.

The motion was put and carried.

Lord LYNDHURST trusted the noble and learned lord did not intend to press the measure forward this session, because many noble lords interested in the matter had left town with the impression that it would not be brought on.

The LORD CHANCELLOR expressed a hope that the progress of the bill would not be delayed.

Lord LYNDHURST observed, that he had said "not content" to the motion for the second reading, and he was not aware that the bill had yet passed that stage.

The LORD CHANCELLOR said, that when he put the question he did not hear any noble lord object to it.

After some conversation on this point,

The Duke of WELLINGTON said he should have objected to the second reading if he had not believed it to be the understanding that the bill would not be proceeded with this session.

LORD BROUHAM was not aware of any understanding of the sort.

LORD LYNDHURST said, that the noble and learned lord might set the matter right again by moving that the bill be committed, to which motion he (Lord Lyndhurst) would take the opportunity of objecting.

LORD BROUHAM accordingly moved that the bill be committed.

LORD LYNDHURST opposed the motion.

The House then divided—

Content	28
Not Content	39

Majority against it 11

After the division,

LORD LYNDHURST informed the House, that he did not object to the principle of the bill, but to its details; and that he should be happy to assist his noble and learned friend (Lord Brougham) in framing and passing a similar measure in principle next session.

July 22.

APPEALS.

(Before the **LORD CHANCELLOR & other Peers.**)

WILSON v. TAIT.

This case was heard out, and judgment deferred.

STEWART v. GLOAG AND OTHERS.

This was an appeal from an interlocutor of the Court of Session.

The Lord Advocate and Mr. Anderson appeared for the appellant, Mr. Pemberton and Mr. M'Neill for the respondent.

The principal question involved in this case is, whether the appellant is bound to sign a certain deed of discharge, in the character of director of the County and City of Perth Fire Insurance Company, though he had made a voluntary assignment of his shares prior to the demand for his signature being made on him.

The Lord Advocate and Mr. Anderson having been heard for the appellant, and Mr. Pemberton for the respondent, the further hearing was, at a quarter past four o'clock, adjourned.

Law Reports.

VICE-CHANCELLOR'S COURT.—*July 22.*

REDDEL v. DOBREE.

Mr. Jacob and Mr. Swinburne appeared in support of a demurrer in this case. The bill disclosed the following singular facts:—Mr. John Dobree, who was a retired silversmith, and a widower, living alone at Brixton, formed a strong attachment for the plaintiffs, Charlotte

Reddel and Allison Kyle Reddel. In the autumn of 1837 he had a cash-box made with a Bramah lock, and to the key attached a bone label, on which Miss Reddel's name was inscribed. On the 10th of September he gave her the box, and, as the bill alleged, accompanied the gift with these words:—"At my death go to my son and ask him for the key, which will be found in the iron chest. If he will not give it up, take the box to Vaughan. It contains money, take care of it. It will make hundreds difference to you. It is for yourself and your sister, and entirely at your own disposal after I am gone; but I shall want it from you every three months while I live." It appeared from the bill that Vaughan, who was one of the defendants, and had formerly been Mr. Dobree's partner, and was also considerably indebted to him, was the person employed by Mr. Dobree to obtain the cash-box. When the box was delivered to the plaintiff she was ignorant of its contents, and upon Vaughan shortly after asking her "whether she did not wish to know what the old gentleman had left her," she objected to receive any information about the matter. In the month of December following, Mr. Dobree called upon Miss Reddel on his road to town, and took away the box, which, however, he re-delivered to her on the same day as he returned. In March, 1838, he paid the plaintiff another visit; she was absent from home, and left word that she should bring the box to his house. In compliance with this message, she took the box to his house, and received it again in a few days. Mr. Dobree died on the 1st of June, 1838, leaving a son and daughter, and by his will left the iron chest to his son, whom he also appointed his residuary legatee. After Mr. Dobree's death the plaintiff made an application to the defendant, his son, for the key, but on his refusal to give it up she had the box broken open, and found therein two envelopes, one of which was directed to herself, and contained a draught on Ransom, and dated April 2, drawn by Vaughan for £500. payable to John Dobree or bearer, and another draught of the same date for £200. for her sister. When the draughts were presented to Messrs. Ransom and Co. the payment was refused, and then Miss Reddel filed the present bill against Vaughan, the drawer of the checks, and also against Dobree as the residuary legatee of the testator. Among the allegations in the bill it was stated that several small boxes of the same kind as that given to the plaintiff were made at different times by the direction of Mr. Dobree, and presented to various persons. The bill also alleged, that the two draughts found in the envelopes after the testator's death, were placed there in the room of two similar draughts which the box contained when it was

first delivered to Miss Reddell. It was further alleged, that the defendants set up a pretence that the draughts were made on the 1st of April, which being a Sunday, the instruments were illegal, and could not be sued upon. In answer to this the plaintiff alleged that the defendant had been informed by Mr. Dobree, during his lifetime, of his intention to make a provision for herself and sister, and that even if the case were as they pretended, the whole was a fraudulent scheme to defeat his intention and deprive them of the enjoyment of his bounty. The learned counsel contended, in support of the demurrer, that a case of *donatio mortis causā* could not be supported by the bill.

Mr. K. Bruce and Mr. Anderdon appeared in support of the bill.

The VICE-CHANCELLOR said, the case appeared to him to be quite a mistake. There certainly was not in his opinion a *donatio mortis causā*, or anything like it, but merely a gift of what might happen to be in the box at the time of the testator's death, and which of course was always liable to be recalled. His Honour could not but think the testator meant all along to retain complete dominion over the box, and that it was only an accident that he died so shortly after the last delivery of it to the plaintiff. That, however, could not vary the nature and constitution of the case. His Honour was of opinion that at the utmost the plaintiff held the box upon trust for the testator himself, and if not in favour of himself, then for the holder. Such a trust, however, the Court could not entertain a jurisdiction over, and therefore the demurrer must be allowed.

ROLLS COURT.—July 24.

WARD v. PAINTER.

INSOLVENT DEBTORS.—Whether the subsequently acquired effects of an Insolvent Debtor are liable to the debts contained in his Schedule.—Jurisdiction of the Court of Chancery as to the application of the assets of an Insolvent after his decease.

This was a demurrer to the bill of the plaintiff, Mr. James Ward, filed for himself and all the unsatisfied creditors of William Painter, deceased, against Mary Anne Painter, his widow and administratrix.

Mr. Tinney appeared for the defendant, the widow and administratrix. It appeared that the plaintiff was a creditor of Painter for £25. In 1819 Painter took the benefit of the Insolvent Debtor's Act, and was discharged from prison, having first executed an assignment of his estate and effects, but as he had then no effects no

assignees were appointed. After his discharge Painter continued his business of a carpenter and builder, and acquired by his exertions about £3,000. He died in 1838, having bequeathed all his property to his wife, the defendant, who took out administration to his estate and effects. The plaintiff's bill prayed that the property of Painter acquired after his discharge should be made liable to his debts contracted before his discharge. He (Mr. Tinney) would admit that in the case of "Barton v. Tattershall," Russell and Milne, p. 237, (a) it was held that the subsequently acquired effects of an insolvent were liable to his former debts, but that was only a single decision, and the Court could not consider it of sufficient authority to close all further discussion of the question.

Lord LANGDALE.—The practice since then had been uniform.

Mr. Tinney.—Your Lordship then argued on the same side for which I am now to contend. By the Insolvent Debtor's Act, certain remedies were given against the future estates of insolvents; but those acts did not say that debts due from the insolvents should be recoverable at all events, but left to the consideration of the particular circumstances of each case how far they were to be recovered, and the Legislature provided a particular mode for the application of the future estates. The acts provided for the case of an insolvent afterwards acquiring property, and his creditors calling on him for payment in his lifetime, and also for their calling for payment after his death. During the life of the debtor nothing could be done excepting under the direction of the Insolvent Debtor's Act. The Court had to consider the reasonable allowance to be given to the insolvent, and various other circumstances. By the acts the Court was to have a regard to the maintenance of the debtor, and to have the full control how the future effects were to be applied. It was not proper in this case to transfer that jurisdiction to a court which could not enter into the circumstances of the case. Painter had acquired nothing but the exercise of his own diligence in his trade of carpenter and builder. Before his death it was clear that the creditor could have applied only to the Insolvent Debtor's Court; and if the application had been then made, and that court had refused his application, he would ask if the creditor could now have filed his bill?

Mr. Pemberton, for the plaintiff, relied on the case of "Barton v. Tattershall." The latter acts of the 1st and 7th of Geo. IV. were passed to remedy the difficulties occasioned by the 53rd and 54th of Geo. III., the recognizances which were by those acts directed to be given, having turned out to be nugatory, as all the applications under them by creditors had failed. In "Barton

v. Tattershall," the only application that had been made to the Insolvent Court, was to appoint an assignee, and the assignee, when appointed, filed the bill. The report of that case was not very clear; but it was argued that the creditors' rights against the future property of the insolvent were not absolute, but were subject to the jurisdiction, and the jurisdiction only, of the Insolvent Debtor's Court. Sir John Leach, however, determined that a court of equity had a right to administer the future effects of an insolvent. That case had been cited and approved of in various other cases, and had continued from 1830 down to the present time, and he apprehended that the present demurrer was founded upon a mistake of the grounds on which that decision was made.

Lord LANGDALE said the bill was filed by a creditor of the insolvent, who, by meritorious industry, acquired property after his discharge to the amount of £3,000. It was his duty to pay his debts, but he did not, and died in 1838, leaving a will in favour of the defendant, his wife and administratrix. The plaintiff, a creditor for £25., filed the bill, praying that his debt, and the debts of the other creditors, might be discharged. It was admitted that he (Lord Langdale) could not overrule the demurser without overruling the case solemnly decided by Sir John Leach. He certainly was not bound by the single decision of a co-ordinate judge, and all decisions were open to the most free discussion; but the solemn decision of a competent judge was not to be disregarded, and ought not to be overruled without a conviction that it was erroneous, and as he was not so convinced he would not allow the demurser. The acts for relief of insolvent debtors were to relieve them from personal imprisonment, and not to discharge their future estates; they were allowed to acquire future property, but subject to their former debts. The legal and moral obligation were the same. The intention of the Legislature was to make the judgment or recognizance available against the insolvent in the Insolvent Debtor's Court; but upon his death the application of assets being part of the general law of the land, the jurisdiction of Chancery could not be ousted, and the present remedy was properly in this court. The demurser must be overruled.

(a) In that case one Philip Jacobs was discharged under the Insolvent Act, on the 14th of September, 1814. On the 22nd of February, 1820, he was again discharged. He subsequently acquired considerable property but paid none of his debts, and died on the 4th of December, 1826, leaving property

more than sufficient to pay all his debts incurred since the 22nd of February, 1820. A creditor under each insolvency, and the assignee in both, filed a Bill against the executor of the Insolvent, in order to have the surplus of the assets, after payment of the debts contracted since his last discharge, applied in satisfaction of the debts specified in the schedules. Sir JOHN LEACH, M.R., in deciding upon this case, said,—by the several acts for the relief of Insolvent Debtors, if the assets of the insolvent are, at the time of his death, more than sufficient to pay his subsequently contracted debts, from which he was relieved by the insolvent acts; and a particular mode is prescribed, in which the benefit of that provision is to be obtained. That mode has not been followed in the present case, and the question is, Whether a Court of Equity has authority to administer the assets in discharge of those debts. I am of opinion that it has such authority. The insolvent here had twice taken the benefit of the acts; and it appears to me that the order of payment, must be, to pay last, the creditors who claim under the first insolvency. I do not consider the lapse of time as of the least importance; for here the liability arises in respect, not of a promise, but of a lien created by the statute.

The order made was, that the surplus assets after payment of the funeral and testamentary expenses, and debts since his last insolvency, were applicable, first, to the payment of the debts under the second insolvency; and then in the payment of debts under the first insolvency. S.C. 1 Russ. & My. 243; Reg. Lib. 1829. A. 1111.

In the case here cited, it was contended, (by the present Master of the Rolls, who was Counsel against the Bill,) against the claim of the creditors for whose benefit the suit was instituted, that they would have been bound by the Statute of Limitations, if the debtor had not taken the benefit of the Insolvent Acts. And that the question was—What is

there in the provisions of the Insolvent Acts to put the Creditor in a better situation than if insolvency had not occurred?—ED.

Summer Assizes.

MIDLAND CIRCUIT.—July 29.

Warwick.

GRAND JURY.

CHARGE OF MR. JUSTICE LITTLEDALE OCCASIONED BY THE CHARTIST RIOTS.

His LORDSHIP said, he deeply regretted that they would on the present occasion have to investigate several cases of serious interest, and of a nature and character which, if imitated and carried out to any great extent, would occasion great alarm for the safety of the Government and constitution, the institutions and property of the country. It was well known to them that, for a considerable time past, opinions had prevailed which were of an alarming nature; statements had been made by many persons and circulated in various parts of this kingdom, that a large portion of our population, more particularly those of the operative classes of society, were entitled to certain rights which they ought to possess, and which were unjustly withheld from them. More especially they had been told that they ought to have a greater share than they had in the conduct and administration of the government of public affairs in this country; that property was most unequally distributed, and that those who had little or none ought to have a share in the possession of their richer neighbour, and that property should be more equally divided, so as to bring the different classes of society to a nearer approach to the same level. As far as the expression of these or similar opinions was confined to private conversations and discussions the law took no notice of them, for every person in this country was entitled to entertain and express what opinions he pleased, provided the expression of them had produced no evil consequences to others, endangered neither their lives nor property, nor tended to a breach of the public peace. No doubt these opinions would have remained dormant and quiet in the minds of the greater part of those who understand them had they been left to themselves, but, unfortunately, too many persons were found who would not suffer the masses of the people to be quiet, but inflamed their minds by violent and inflammatory speeches and harangues, at meetings convened for the purpose, as well as by seditious placards, pamphlets, newspapers, and other publications, for the avowed object of persuading them to co-operate together, in order

to obtain their fancied rights. Amongst other modes which had been adopted, in order to obtain their fancied rights, was the setting up of what was called the National Convention, which professed to be an assembly of delegates sent from meetings which had been held in different parts of the country, by which these persons sought to give an apparent sanction to the various measures which they proposed to adopt, in order to gain these fancied rights. It did not appear what the precise object of the National Convention was; whether it was confined to the institution and direction of the various measures to be adopted in order to achieve those alleged rights, or whether it had not ulterior objects and aimed at ulterior measures. But though this did not clearly appear, he could not but remark that the name of "National Convention" was an ominous one. Since and during the period that its meetings had been held, large numbers of persons had notoriously assembled in different parts of the country; they had been exhorted to arm; they had been drilled and trained in the practice of arms and military evolutions and exercises; riots had taken place, and property had been burnt and destroyed. With respect to the folly of endeavouring to give effect in this manner to the views entertained by them he would say nothing. The people themselves would soon discover it. The situation of the misguided men who, under an impression that they would obtain their fancied rights in no other manner, had been induced to act thus, was truly to be pitied; for there could be no doubt that they would not have engaged in such enterprises had they not been instigated and solicited by others. It was a matter of great regret that such riots had taken place; much mischief had ensued, much evil inflicted, by these misguided people. Whatever their opinions or whatever their views, it was their duty to submit to the law, and not attempt to carry their wishes into effect by violence. That such proceedings were against law there could be no doubt, and it was the clear duty of the authorities to suppress such proceedings, and to bring those who offended the laws before the ordinary tribunals of justice in this country. The cases of this nature which would come under their consideration were of three kinds: the first related to the demolition of houses and property, the second to riot, and the third to seditious publications and speeches. With reference to the first description of cases, many acts of Parliament had been passed which bore on the subject. Amongst others, the 7th and 8th of George IV. c. 30. sec. 8. by which all persons riotously and tumultuously assembled together, destroying houses or property, or aiding and abetting in such destruction, were guilty of felony; and the act stated that such persons, if convicted,

should suffer death as felons; so that this crime still remained by law a capital offence. With regard to the second class of cases, the meaning of a riot was perfectly well understood. It was a tumultuous disturbance of the peace by three or more persons assembled together with the intention of assisting each other for the execution of any enterprise of a private nature, and afterwards executing the same in a riotous and tumultuous manner, to the terror and alarm, or in a manner calculated to excite the terror and alarm, of the peaceable and well-disposed. He said, of a private nature, for in some cases such riotous proceedings might amount to high treason, as where, for instance, the parties were assembled to levy war against the sovereign. But it was the universal practice, that where the object of the parties assembled related to public matters, and, in point of fact and common sense, their proceedings amounted to riot, only to indict them for that riot and not for the greater crime. But no meeting of a public nature, called for public purposes, could be considered a riot, unless attended by circumstances of actual force and violence, or such an apparent tendency to force and violence as should be calculated to excite terror and alarm, such as the show of arms, threatening speeches, and turbulent gestures, and then the law held that under such circumstances it was not necessary that disturbances should actually take place, in order to constitute a riot. He did not know whether any cases connected with unlawful assemblages would be brought before them. Such meetings as were calculated to excite great fears in the public mind were clearly unlawful assemblages. As where, for instance, a great number of persons complaining of a common grievance met together, armed in a warlike manner, was to create terror and alarm in the minds of the people. It had been held that such assemblies were unlawful, and that all persons countenancing and upholding them were criminal parties. The third class of cases was that of seditious speeches of persons going about to public meetings and addressing those persons in language calculated to excite them against the Government, constitution, and institutions of the country, to bring them into contempt, and to instigate the people to violence in order to carry out their objects. Such proceedings as those constitute an offence at common law, and the persons committing it were liable to be punished accordingly. It was not, however, every argument or statement even of a violent character which could be considered seditious; great allowance was made for public opinion, but such speeches and publications as he had described were clearly seditious.

NORFOLK CIRCUIT.

Cambridge—July 26.

Before Mr. Justice VAUGHAN.

REGINA v. THE ARCHDEACON OF ELY.

Mandamus—To compel the defendant to admit FRANCIS EADEN, Churchwarden of the parish of St. Clement, in Cambridge—Illegal election.

The writ stated that the prosecutor had been “nominated and chosen” into that office on the 1st of April last, and the defendant’s return, upon which the issue was joined, alleged that the prosecutor was not so nominated and chosen.

The facts of the case appeared to be that the proper mode of electing churchwardens in that parish was according to the canon law, by which the vicar has the appointment of one, and the parishioners the other, of those officers. The defendant, on the other hand, contended that the election ought to be according to a certain ancient custom there existing, by which the power of appointment of both churchwardens is confined to six individuals, to the exclusion of the rest of the parish. This latter system has been for a long time the cause of great offence, and has produced much irritation in the parish, and which was increased by the late churchwardens having made a church-rate towards the end of their year of office. A few days, therefore, before last Easter, the prosecutor and some 40 or 50 other rated parishioners of St. Clement’s, held meetings upon the subject, and resolved to oppose the “close” system at the then next election; and in pursuance of such resolution they assembled in the vestry on Easter Monday last, being the day of election, in considerable numbers. The vicar of the parish, the Rev. Mr. Spence, who was the chairman of the meeting, was about to take the election in pursuance of the custom, when the prosecutor and some others protested against that mode, and insisted that the choice should be according to the 89th canon, by which the vicar is to appoint one churchwarden, the parishioners the other. The chairman, finding upon inquiry that the customary mode had existed from a remote period of antiquity, felt himself bound by it, and proceeded to the election in conformity with it. The custom was as follows:—The inhabitants, being assembled in the vestry on the day appointed for the election, quit that room upon the vicar taking the chair, and retire into the body of the church, leaving the churchwardens, whose term of office is about to expire, with the chairman in the vestry. The churchwardens then proceed to the body of inhabitants and select two of their number, whom they send into their vestry in their stead: having done so, they them-

selves "mingle with the rest of the parishioners." The main body still remaining in the church then send into the vestry two more persons as their representatives, and the four who have thus joined the vicar call in two more, thus making six. These six then "deliberate amongst themselves," and appoint the two churchwardens for the ensuing year. It will be seen that this is a most exclusive system of election; and the rate-payers feel that it is a great hardship upon them, inasmuch as the churchwardens have very extensive powers of taxing their fellow-parishioners vested in them. Upon the present occasion it was difficult for the friends of that system to find a sufficient number of supporters to enable them to give effect to it. The late churchwardens called into the vestry Messrs. Bond and Coulton; Shallow and M'Farlane sent in Messrs Phillips and Spink; the four so chosen returned the latter compliment by selecting the same Shallow and M'Farlane; and these six re-elected the old churchwardens, thus confining the election to six persons, whilst eight or ten times that number were excluded from any share, and reduced to the "poor revenge of protesting." The vicar, who behaved throughout with the greatest urbanity and impartiality, then proceeded to take the election according to the canon law, in order to put the matter into a train for legal decision. He nominated one of the old churchwardens on his part, and two gentlemen nominated and seconded Mr. Eaden, the prosecutor, on the part of the parish. Mr. Eaden's name was proposed to the meeting by the chairman, and his election was carried by an overwhelming majority. The meeting then passed a vote of thanks to the vicar, and the vestry broke up. In due time Mr. Eaden presented himself to the defendant, in order to his being sworn into the office; but a *caveat* having been entered by the other party, and the archdeacon finding that he had been elected in opposition to the ancient usages and customs of the parish, declined to admit him. Mr. Eaden obtained a writ of *mandamus* from the Court of Queen's Bench, to compel the defendant to admit him into the office, with all its burdens and its honours, alleging, as already mentioned, that he was "nominated and chosen into the office." This allegation, it has been seen, the defendant denied in his return; and whether he was nominated and chosen, or not, was the question the jury were to-day assembled for the purpose of trying. The above facts, relative to the re-election of the old churchwardens under the ancient system, and the prosecutor under the canon law, were proved, and a vast body of evidence, written and oral, was called, which proved the custom, which was relied upon by the defendant to have existed far

beyond the time to which living witnesses could speak.

Mr. Andrews, for the prosecutor, contended that it was sufficient for him to show that his client was in fact elected churchwarden, and that the validity of that election was not a matter of any consequence and could not be tried upon the present issue. The archdeacon is a merely ministerial officer, and is bound to admit any party who is in fact elected, and cannot judge of the legality of that election. The present writ of *mandamus* alleges only that Mr. Eaden was "nominated and chosen," not "duly" chosen, and he had proved that he was in fact chosen.

Mr. Kelly, for the defendant, insisted that this issue put in question the validity of the election of Mr. Eaden; and as the office was full by an election according to the accustomed and legal mode at the time when he was chosen, the choice was utterly unavailing and void. The allegation in the writ was therefore disproved.

Mr. Justice VAUGHAN was clearly of opinion that the validity in point of law of Mr. Eaden's election was in issue, as well as his election in point of fact. If the jury should be of opinion that the defendant had proved the custom he had alleged to have existed in this parish, then the prosecutor, not having been elected in conformity with it, was not entitled to be admitted to the office, and he should direct a verdict for the defendant. An objection having been made, that the custom, supposing it to exist in fact, was bad in law, his Lordship also expressed himself of opinion that it was valid, and free from objection; but he would reserve the points. The learned Judge summed up the evidence with the utmost exactness and perspicuity, and left it to the jury to say, whether it satisfied them that the custom set up by the archdeacon had existed from time immemorial, which they would be well justified in inferring it had, from the uncontradicted proof of usage in modern times, and the ancient documentary evidence given by the defendant.

The jury delivered their verdict, and found the custom set up by the defendant had existed from time immemorial.

Mr. Justice VAUGHAN then told them, that in his view of the law, they must find a verdict for the defendant, as the prosecutor was not legally elected, which (as he interpreted the allegation in the writ and return) he must be in order to entitle him to succeed upon the issue raised.

Verdict for the defendant accordingly.

July 27.

SPECIAL JURY.

PETERS v. FLEMING.

INFANCY—Whether certain articles of jellies shall be considered as "NECESSARIES"

for an under graduate, the son of a gentleman of fortune.

The plaintiff is a jeweller in Cambridge, and the defendant was an under graduate of one of the universities. The action was brought to recover the sum of £8. 0s. 6d. for the under-mentioned items :-

" A fine gold ring . . .	1	8	0
" A ring, engraved crest, &c. . .	0	18	0
" A short gold watch-chain . . .	2	2	0
" A pair of pins . . .	0	18	0
" A ring . . .	1	6	0
" A ring . . .	1	5	0
" Repairing a ring . . .	0	3	6
<hr/>			
	£8	0	6"

These articles were supplied between the months of November, 1834, and March, 1835. The defendant is the son of a gentleman of very large fortune residing in London, and during his sojourn at college he had a livery-servant, and his companions, as one of the witnesses said, were "among the first and best in the university." He also kept a horse during a part of the time he was at college, and his habits and appearance were such as in all respects showed him to be a gentleman of fortune, or the son of one. The defendant pleaded the general issue and "infancy." To the latter plea the plaintiff replied that the goods were "necessaries," suitable to the condition in life of the defendant.

Mr. Andrews, for the defendant, applied to the learned Judge to nonsuit the plaintiff, upon the ground that the articles in question were not in their nature "necessaries" for an infant. They might be convenient or useful, and such as an infant might very properly furnish for himself with any means he happened to possess; but in point of law it was impossible to say that they were necessities. They were mere ornaments.

Mr. Justice VAUGHAN thought he ought not to withdraw the case from the consideration of the jury, as it was a mixed question of law and fact.

Mr. Andrews then addressed the jury for the defendant.

The learned JUDGE said. As a general rule, an infant could not bind himself by a contract; but there were certain exceptions to that, one of which was, that he might make a valid contract for necessities suitable to his condition and circumstances. The question, "what are necessities," always bears a reference to the condition of the parties—it is a relative term. It is not simply in any absolute thing, as clothes, food, lodging, or the like, but any article which may correspond with the condition and circumstances of the party. He was not aware of any instance in which an infant, who was not shown to have any property of his own at the time, but who

was the son of a man of fortune, had been held liable for articles of ornament like those in question; but still he thought, under all the circumstances, that it was a question for the jury. They would say, in the first place, whether these articles were "necessaries" at all; and if they were, then whether they were suitable in quality and quantity to the degree and condition of the defendant.

The jury found a verdict for the plaintiff for the amount claimed.

Mr. Andrews applied for leave to move to enter a non-suit if the Court should be of opinion that these articles of ornament did not properly fall under the description of necessities.

Mr. Justice VAUGHAN said he would certainly reserve leave. It was a question of the highest importance. He must add that the community were very much indebted to any gentleman who had the courage to endeavour to put a stop to the extravagancies of young men at the university. The present bill was not at all unfair in amount; but it was a matter which ought to be settled by the solemn decision of a court of law whether the price of articles of this kind could be recovered at all in a court of justice against an infant.

NORTHERN CIRCUIT.

Durham—July 25.

Before Mr. BARON MAULE.

MIDDLETON v. MIDDLETON.

Annuity void for want of enrolment of memorial—Action in assumpsit for the consideration money—STATUTE OF LIMITATIONS by reason of the original debt having accrued more than 6 years since—Whether payment of subsequent interest is a sufficient answer to it.

Mr. Bliss stated the case, and said that the action was brought in *assumpsit* for money paid by the plaintiff to the defendant, and on an account stated. The defendant had pleaded—first, the general issue to all except £86. 8s. 6d.; secondly, to the whole declaration, the statute of limitation; thirdly, as to the £86. 8s. 6d. a payment and the receipt from the plaintiff in discharge of the action so far; and fourthly, a set off for money paid to the plaintiff, and for board and lodging afforded by the defendant to the plaintiff. The defendant and plaintiff were it appeared brothers, and the latter was the administrator of their father, who died several years ago. The plaintiff was entitled to a share of the residue, calculated to amount to £100. and he agreed to accept in its stead from the defendant an annuity of £8. per annum for life, for

which the defendant executed to the plaintiff a bond, in the penalty of £200, but *no memorial was enrolled* until the 17th of June, 1838. In consequence of the annuity having been in arrears for the last seven or eight years, an action was brought for its recovery, to which the defendant, *inter alia*, pleaded that the memorial of the annuity was not enrolled in the Court of Chancery according to the terms of the Act of Parliament. On making inquiries into the case it was found that this plea would be fatal, as there certainly was an informality, though it had been the work of the defendant's brother-in-law, a solicitor, and in consequence, on the 9th of December, 1837, notice was given of the discontinuance of the action then pending, and the plaintiff was compelled to bring the action in its present form, in order to recover the consideration money instead of the arrears of the annuity, which turned out to be less than was anticipated by £16., leaving the balance £84. 8s. 6d. now claimed. The principal ground of defence was, that the original debt, which accrued more than six years ago, was barred by the Statute of Limitations, but a witness was called, who proved that he was present on one occasion within six years, when the plaintiff applied to the defendant for "his interest," and received £2. to buy him some clothes.

Mr. Cresswell addressed the jury for the defendant, and put it to them to infer from the circumstances that this was not a payment on account of the annuity, but a voluntary donation.

The learned Baron directed the jury to return a verdict for the plaintiff if they could place reliance on the evidence of the witness, observing that if he could not recover the balance of the annuity there was no reason why he should not recover the consideration money, seeing that the informality in the enrolment was the fault of the defendant himself.

Verdict for the plaintiff for £84. 8s. 6d.

COURT OF EXCHEQUER—June 12.

NEW GENERAL ORDERS.

FORMS OF WRITS.

(Continued from page 206.)

No. III.

Writ of Fieri Facias, on a Decree or Order of the Court of Exchequer for Payment of Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Sheriff of greeting.

We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be

made the sum of , which said sum of money was lately before us in our Court of Exchequer at Westminster, in a certain cause, or certain causes (as the case may be), wherein A. B. is plaintiff, and C. D. is defendant, or in a certain matter there depending, intituled, "In the matter of E. F." (as the case may be) by a decree or order (as the case may be) of our said court, bearing date the day of , decreed or ordered (as the case may be) to be paid by the said C. D. to A. B., together with certain costs in the said order mentioned, and which costs have been taxed and allowed by G. H. Esq., one of the masters of our said court, at the sum of as appears by the certificate of the said master, dated the day of , and that of the goods and chattels of the said C. D. in your bailiwick, you further cause to be made the sum of , * together with interest at the rate of £ per centum per annum on the said sum of , † from the day of , ‡ and on the said sum of , § from the day of , || and that you have that money and interest before us, in our said court, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree or order (as the case may be). And that you do all such things as by the statute passed in the second year of our reign, you are authorised and required to do in this behalf; and in what manner you shall have executed this our writ, make appear to us in our said court immediately after the execution thereof. And have there then this writ. Witness, &c.

* The costs.

† The money.

‡ The date of the order, or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

§ The date of the master's certificate, or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

No. IV.

Writ of Fieri Facias, on a Decree or Order of the Court of Exchequer for Payment of Money, Interest, and Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff greeting.

We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made the sum of , and also interest thereon at the rate of £ per centum per annum, from the day of , * which said sum of money and interest were lately before us in our Court of Exchequer at Westminster, in a certain cause or certain causes (as the case may be),

wherein A. B. is plaintiff, and C. D. is defendant, or in a certain matter there depending, intituled, "In the matter of E. F." (as the case may be) by a decree or order (as the case may be), of our said court, bearing the day of , decreed or ordered (as the case may be), to be paid by the said C. D. to A. B., together with certain costs in the said order mentioned, and which costs have been taxed and allowed by G. H. Esq., one of the masters of our said court, at the sum of , as appears by the certificate of the said master, dated the day of , and that of the goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of , together with interest thereon at the rate aforesaid, from the day of , and that you have that money and interest before us, in our said court immediately after the execution thereof, to be paid to the said A. B., in pursuance of the said decree or order (as the case may be). And that you do all such things as by the statute passed in the second year of our reign, you are authorised and required to do in this behalf; and in what manner you shall have executed this our writ, make appear to us, in our said court, immediately after the execution thereof. And have there then this writ. Witness, &c.

* The day mentioned in the order.

+ The date of the master's certificate of taxation, or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

(To be continued.)

COURT OF COMMON PLEAS, DURHAM.

2 Vict. cap. XVI.

An Act for improving the Practice and Proceedings of the Court of Pleas of the County Palatine of Durham and Sadsberg. [June 14, 1839.]

(Continued from p. 206.)

XXIX. And be it enacted, That in case any other rule of the said Court of Pleas at Durham cannot be enforced by reason of the non-residence of any party or parties within the jurisdiction thereof, it shall be lawful, upon a certificate of such rule by the Prothonotary of the said Court, or his deputy, and an affidavit that by reason of such non-residence such rule cannot be enforced as aforesaid, to make such a rule of any one of the said Superior Courts at Westminster, whereupon such rule shall be enforced as a rule of the Court last-mentioned.

XXX. And be it enacted, That every writ of *venire facias juratores* issued out of the said Court of Pleas at Durham shall bear date on the day next preceding the first commission day of

each assizes, unless such commission day shall be on a Monday, and then on the Saturday preceding, and that every writ of *habeas corpora juratorum* shall bear date on the day of the return of the *venire facias juratores*; and that all other writs issued out of the said Court of Pleas at Durham, except writs of *distringas* and *exigent* and *proclamation*, shall respectively bear date on the day on which the same shall be issued; and that all writs of execution may, if the party suing out the same shall think fit, be made returnable immediately after the execution thereof.

XXXI. And be it enacted, That whenever by any Act of Parliament, or by or under the authority of any Act of Parliament, or by any rule or order of any of her Majesty's Superior Courts at Westminster, or of any of the judges of the same, any rules, orders, or regulations already have been or hereafter shall be made for the purpose of framing, regulating, or amending the proceedings, practice, or pleadings of any of the said Superior Courts at Westminster, it shall be lawful for the justices of the said Court of Pleas at Durham, or any two of them, by rule or order to be made in that behalf, to adopt, *mutatis mutandis*, all or any of such rules, orders, or regulations, or any part or parts thereof, as to the said Court shall seem fit.

XXXII. And be it enacted, That the costs to be from time to time allowed for preparing pleadings in actions in the said Court of Pleas at Durham, shall be the same as shall be allowed for preparing pleadings of a like description in actions in the Superior Courts at Westminster.

XXXIII. And be it enacted, That the proceedings in all actions, except actions of *replevin*, which shall be removed from any inferior Court within the said County Palatine of Durham into the said Court of Pleas by writ of *pone loquela*, or any other writ, shall not be stayed or delayed in any such inferior Court by reason of any such writ of *pone loquela* or other writ, unless the person or persons removing such action from any such inferior Court, with two sufficient sureties, such as the sheriff or other officer of such inferior Court shall approve of, shall be bound unto the other party in the said action, by recognizance, to be acknowledged before such sheriff or other officer of such inferior Court, in double the amount of the debt or damages mentioned in the writ, issued in such inferior Court, or in such other sum as such sheriff or other officer of such inferior Court shall direct, to prosecute the said writ of *pone loquela* or such other writ with effect, and also to satisfy and pay (if judgment be given against the person or persons removing such cause, or the writ of *pone loquela* or other writ be not proceeded in) all

and singular the debt, damages, and costs adjudged.

XXXIV. And be it enacted, That in all cases the person or persons in whose name or names any writ of false judgment or supersedeas thereon shall be brought for the reversing of any judgment in any inferior Court within the said County Palatine of Durham shall, with two sufficient sureties such as the Court of Pleas shall approve of, within six days after the return of any such writ into the Court of Pleas at Durham, be bound unto the party for whom such judgment is given, by recognizance, to be acknowledged before a justice of the said Court of Pleas at Durham, in treble the sum adjudged to be recovered by the former judgment, to prosecute the said writ of false judgment or supersedeas with effect, and also to satisfy (if the said judgment shall be affirmed, or the writ of false judgment or supersedeas be not proceeded in,) all and singular the debt, damages, and costs adjudged, and all costs and damages to be awarded for the delaying execution; and in case such recognizance shall not be acknowledged and entered into, such writ of false judgment shall abate, and the party to whom such judgment is given, on delivering to the sheriff or other officer in such inferior Court a certificate by the Prothonotary of the said Court of Pleas, or his deputy, that such recognizance has not been acknowledged and entered into, shall be entitled to execution out of such inferior Court for the sum adjudged to be recovered by such judgment, and costs of action.

(To be continued.)

Business of the Courts.

COURT OF CHANCERY.

Saward v. M'Donald, to be spoke to—Sturges v. Champneys, appeal by order.

Appeal Motions:

Murray v. Walters—Bannatyne v. Leader—Vanderghucht v. Blaquier—Altree v. Horden—Pritchard v. Foulkes.

Cause Petitions.

Nye v. Maule—Swaby v. Dicken—Attorney-General v. Dupre—Vigors v. Lord Audley (2)—Hughes v. Wynne—Bezon v. Bolland—In re Stafford's Charities—Attorney-General v. Wilson.

VICE-CHANCELLOR'S COURT.

Short Causes, after which,

Cause Petitions.—About 200 are in the list, the unopposed only to be taken to-day.

Causes by order, after the Petitions,
Mitchell v. Mitchell—Mangham v. Vincent
—Forsyth v. Chard—Tripp v. Knowles—Pemberton v. Bell—Sheldon v. Sheldon, to be spoke to—Smith v. Elgie, motion, part heard.

ROLLS' COURT.

Petitions.—The unopposed to be taken first.

After the Petitions, Motions and Trezevant v. Fraser, cause, part heard.

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The Legal Guide.

VOL. II.]

SATURDAY, AUGUST 10, 1839.

[No. 15.

LEX LOCI DOMICILII.

PART I.

IN CASES OF LEGITIMACY.

THE PRESUMPTION OF THE LEGITIMACY OF A CHILD BORN IN LAWFUL WEDLOCK.

(Continued from p. 211.)

THE best illustration that can be given of the modern doctrine was shewn by Lord LYNDHURST in the recent case of *Morris v. Daries* (a). His Lordship said, "It appears that Mr. and Mrs. Morris were married in 1778. They resided at Shrewsbury, where he practised in the medical profession. About 1788 they separated; and articles of separation were drawn and executed, in which it was stated, in consequence of unhappy differences existing between them, they had agreed to live apart. A provision for Mrs. Morris for life having been made by those articles, she went to reside at Llanfair; and after some little time, Mr. Morris went to live at a place called Argoed, 14 or 15 miles distant from Llanfair. Although these parties separated, it does not appear that they were in a state of decided variance and hostility with each other. A young man, of the name of William Austin, who had been taken into the service of Mr. and

Mrs. Morris, as, Mr. Morris described it, "to clean his shoes," was suspected of some familiarity with Mrs. Morris. He accompanied her, together with other servants, to Llanfair; but, notwithstanding that circumstance, some intercourse still continued to be kept up between Mr. Morris and his wife. The impression upon my mind, from the evidence is, that the extent and the nature of that intercourse, have been much exaggerated by the witnesses on the part of the plaintiff." His Lordship, after commenting upon the evidence, and giving it as his opinion that there was sufficient evidence, that on more than one occasion Mr. Morris was in Mrs. Morris's house, and that he sometimes walked with her, continued, "Austin continued to reside for many years in Mrs. Morris's service, where he remained until he entered the army. In the spring of 1792, Mrs. Morris became pregnant. That pregnancy was not communicated to Mr. Morris; she endeavoured to conceal it as far as she was able. About the close of December, 1792, she was delivered at night of a male child; and there is sufficient evidence of identity to satisfy me that that male child is the present plaintiff. Immediately, after she was delivered, the man who had the care of the horses, was sent out of the way; the child was wrapped carefully in flannel; two horses were taken from the stable; a woman, of the name of Ann Evans,

(a) See *Nicholls on Adulterine Bastardy*, p. 230, where this case, in all its stages, and all the cases upon the subject, will be found.

who assisted at the delivery, and Austin, who was present about that time, and in the house, and who is described as being in a state of considerable agitation, mounted these horses, and set off with the child towards a place called Wem, about 30 miles from Llanfair. When they arrived within a short distance of Wem, Ann Evans was left upon the road with the child, while Austin rode on to his father's house, who was a weaver, carrying on business at Wem. Mrs. Austin, the mother of Austin, came and received the child; and Austin and Ann Evans returned to Llanfair with as much expedition as they could use. On their arrival there, it appears that Ann Evans was anxious to go about, and show herself as much as possible, that no suspicion might be entertained of her absence. Thus the greatest care appears to have been taken, at the risk even of exposing the life of the child, to conceal the circumstance of Mrs. Morris's delivery.

The child was shortly afterwards baptized at Wem, by the name of Evan Williams, and was described as "a base-born child." He continued for a considerable time in the house of Mr. and Mrs. Austin, the father and mother of Austin. When he had attained the age of five or six years, he was put to school, by the name of Evan Austin, with Mr. Walker, and he was maintained at the expense of Mrs. Morris. The boy was afterwards removed to a school at High Ercal, and there was called by the name of Evan Williams, but was described also as Evan Austin. Mrs. Morris, from time to time, saw the child, and treated him as her son; and during the whole of this period he was treated, and obviously considered by Austin as his son. * * * * Mr. Morris knew nothing of the birth of this infant; he lived for 17 years afterwards, considering his daughter Harriet as his only child. In the year 1799 Harriet married Mr. Davies, without her father's consent; he

was incensed against her, and made a will, by which he disposed of the whole of his property in favour of a nephew. In 1807, he was party to an instrument, in which he described Harriet Davies as "his only child, and heir at law." In 1808, having been reconciled to his daughter, he disposed of his property in favour of her and her children: and no notice whatever was taken by him of any other child. It appears, indeed, that, in a conversation he had with Mrs. Morris in 1799, he stated some reports, which had accidentally reached his ear, of her having had a child; but she replied, by a vehement and peremptory denial. The child, therefore, was recognized on the one side as the child of Austin; on the other, no knowledge whatever of such child having been born ever reached Mr. Morris. The existence of such child was never communicated to him; in no one instance did he act upon the supposition of there being such a child; there was nothing but a vague report, which was instantly contradicted by Mrs. Morris.

Upon these facts the question arose, whether the child was the *legitimate* son of Mr. Morris?

His Lordship continued, "There is no doubt or difficulty, as it appears to me, with respect to the law, applicable to this question. It was stated, clearly and distinctly, by the Judges in the case of the *Banbury Peerage* (*a*); and I consider the opinion expressed on that occasion, not as laying down any new doctrine, but as arising out of, and founded upon, the previous decisions. On that occasion, the Lord Chief Justice of the Common Pleas stated the unanimous opinion of the Judges (*b*). The question therefore, is a question of fact, whether sexual intercourse took place in the spring of 1792, (for that is the period to which reference must be

(*a*) See ante p. 210.—1 Sim. & Str. 158. S.C.

(*b*) Answer to Questions 4 & 5, ante p. 211.

had) between Mr. and Mrs. Morris. In the absence of all evidence, either on the one side or on the other, the law would presume that such sexual intercourse *did* take place.

It was argued, at the bar, that the doctrine contained in the opinion which I have stated has been affected by a case decided in this Court, (*Head v. Head*) (a). In truth, however, *Head v. Head* does not, in the slightest degree, affect the opinion delivered by the Judges in the case of the *Banbury Peerage*. It recognizes and adopts that opinion: and all that is said by the present Master of the Rolls is, that the Court, which is to be satisfied that sexual intercourse did *not* take place, must be so satisfied, not upon a mere balance of probabilities, but upon evidence, which must be such as to exclude all doubt, that is, of course, all reasonable doubt, in the minds of the Court or Jury to whom the question is submitted."

(*To be continued.*)

PROBLEM XV.—VOL. 2.

STOPPAGE IN TRANSITU.

What is meant by Stoppage in Transitu?— Show the State of the Law relating to it, and when the right determines.

(a) 1 Sim. & Stu. 150, S. C. Turn. & Russ. 138, where it was held to be a presumption of law, that a child born of a married woman is *legitimate*, the husband being within the four seas, unless there is irresistible evidence against possibility of sexual intercourse having taken place.

The VICE-CHANCELLOR (Sir JOHN LEACH) said, that it was to be deduced, as a corollary from the opinion of the Judges in the *Banbury Case*, that whenever a husband and wife are proved to have been together, at a time, when, in the order of nature, the husband might have been the father of an after born child, if sexual intercourse did then take place between them, such sexual intercourse was *prima facie* to be presumed; and that it was incumbent upon those who disputed the legitimacy of the after born child, to disprove the fact of sexual intercourse having taken place; and not by mere evidence of circumstances, which might afford a balance of probabilities against the fact that sexual intercourse did take place.

The decision in this case was afterward confirmed upon appeal by the LORD CHANCELLOR (LORD ELDON.)

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 9. VOL. II.

COVENANTS.

WHAT COVENANTS RUN WITH THE LAND?

In treating of this subject, it will be necessary to consider shortly the nature of covenants, and their different kinds; which inquiry we shall find will lead us ultimately into the question more immediately before our notice.

Covenants are defined to be agreements made by deed in writing, (or generally clauses of agreements contained in a deed) between two or more persons, whereby either party stipulates for the truth of certain facts, or bind themselves to the performance of certain promises. He that makes the covenant, is called the covenantor, and he to whom it is made, the covenantee. No particular words are requisite to the validity of the covenant, (see 6 Ann, c. 35) for any words which shew the party's concurrence in the performance of certain acts, will be sufficient, Bacon Abr.; Covenant B. Wood's Inst. 228; Lant *v.* Norris, 1 Burr. 287; Hollis *v.* Carr, 2 Mod. 87, 92. As if lessee for years covenants to repair, &c. "Provided always, and it is hereby agreed that the lessor shall find timber," &c.; this makes a covenant on the part of the lessor to find timber, by the word "agreed," and it shall not be a qualification of the covenant of the lessee, 1 New Abr. 527.

Covenants are either implied or expressed.

Implied covenants (otherwise called covenants at law) are such as are not expressed in the deed, but arise from the relation of landlord and tenant, or from certain technical words in such deed; thus by the words "Demise and Grant" the law doth imply and intend, on the lessor's part, that the lessee shall quietly enjoy against all

incumbrances during the term, Co. Litt. 384. And this covenant in law, created by such words, shall go to the assignees of the term.

An action may be brought on such implied covenant against him in the reversion, as where the heir that is in by descent, puts out the termor of his father; the termor may have an action against him, and under the word "demise," the lessee may maintain an action of covenant against the lessor, for not having sufficient power to demise for the whole term; whereby the lessee was put to expence, in procuring a better title for the whole term, *Fraser v. Skey*, 2 Chit. Rep. 646.

Although a covenant in law, is generally against all persons that have title during the term, and extends to the heir after the death of the lessor, as against himself only, and shall charge the executors or administrators for any disturbance during the life of the covenanter; yet, (it is said) it shall not charge them for any disturbance afterwards; therefore, whosoever sues upon this covenant, must show that he was disturbed or evicted by one who had an elder title, *Touch.* 167.

Implied covenants are always controlled within the limits of an express covenant, for "expressum facit cessare tacitum," 4 Rep. 80; *Gainsford v. Griffith*, Saund. 60; *Darling v. Farrington*, 1 Mod. 113; *Frontin v. Small*, 2 Lord Raym. Rep. 418.

Implied covenants, by operation of law, are not to be taken so strictly as express covenants; see *Shubrick v. Salmond*, 3 Burr. 1637.

Express covenants (otherwise called covenants in deed) are agreements entered into between two or more by deed in writing, whereby one person lays himself under an obligation to do something beneficial to, or to abstain from an act, which if done, might be prejudicial to another, 1 New Abr. 526.

An express covenant is either real, whereby

a man obligeth himself to pass lands, to levy a fine, &c. or personal, whereby a man covenants with another to build him an house, to allow timber, &c. A covenant may also be in the affirmative or negative, executed, i.e. already done, or executory, i.e. to be done hereafter, *Wood's Inst.* 229.

Express covenants may again be divided into covenants running with the land, (which brings us to the consideration of the subject for our present inquiry) and collateral covenants.

Covenants running with the land, are such as are intimately connected with the land itself, and affects its nature, quality, or value; such as covenants to repair, not to commit waste, &c.; or affect the estate and interest in the land; as that the lessor hath a right to grant, for quiet enjoyment, &c. express covenants of this nature, and all implied covenants run with the land.

Covenants running with the land are binding upon all who claim under the grantor or lessor, both his real and personal representatives, 1 Rol. Abr. 521. Cro. Car. 503, 505. Spencer's case, 5 Rep. 17 a. *Palmer v. Edwards*, Dougl. 186.

In order to make a covenant run with the land, there must be a privity of estate between the covenanting parties; as it is not sufficient that the covenant is concerning the land. Per Lord Kenyon, *Webb v. Russell*, 3 Durn. & East. 393.; *Stokes v. Russell*, ibid. 678. 1 H. Bl. 562. There is always a privity of estate, when parties stand in the relative situations of landlord and tenant after entry, Litt. s. 459. 460. Co. Litt. 270 b.

It is somewhat difficult to determine what covenants run with the land, and what are merely collateral.

Covenants for quiet enjoyment, and further assurance (whether they relate to an estate in fee or for a term of years), have been held to run with the land. See *Muddlemare v. Goodall*, Cro. Car. 503.; *Campbell v. Lewis*, 3 Barn. & Ald. 392.; also cove-

nants to repair, Louther *v.* Williams, 2 Lev. 92.; Spencer's Case, 5 rep. 17 a.; Lord Raym. 553.; Smith *v.* Arnold, 3 Salk. 4.; to pay rent, Parker *v.* Webb, 3 Salk. 5.; that the lessee of mines shall build a new smelting mill on the land under which the mines were to be worked. Sampson *v.* Easterby, 9 Barn. & Cres. 505.; to restrain particular trades from being carried on on the premises, Doe d. Birts *v.* Keeling, 1 Maule & Lelw. 95.; as regards the cultivation of lands, Cockson *v.* Cock, Cro. Jac. 125.; to insure against fire, Vernon *v.* Smith, 5 Barn. & Ald. 1.; for renewal, Roe d. Bamford *v.* Hayley, 12 East. 469.; have all been held to run with the land. A covenant by the lessor, to supply the demised premises, (viz.) two houses with a sufficient quantity of water at a certain rate for each house; is a covenant that runs with the land, for the breach of which the assignee of the lessee may maintain an action against the reversioner. See Jourdain *v.* Wilson, 4 Barn. & Ald. 267.

Collateral covenants are such as do not at all, or not so immediately concern the thing granted; as to pay a sum of money; to build a house upon another's land; to give a security for performance of the covenants, or payment of rent; to make a lease of other land, &c. These covenants, instead of running with the land, and binding all parties who may stand in the position of landlord and tenant; only affect the covenantors during life, and the assets in the hands of their representatives after death; and does not affect the assignee though named, Spencer's case, 5 rep. 17.

Covenants affecting the land collaterally, and not having any effect upon the nature, quality, or value of the land, do not run with the land. A covenant by the lessee, to pay so much annually to the overseers for the use of the poor, will not bind the assignee, though named, Mays *v.* Buckhurst, Cro. Jac. 438.; Congleton *v.* Pattison, 10 East. 130. And

although the thing to be done may be beneficial to the land demised, yet if it be not to be done on the same land, it will not bind the assignee, though named; as a covenant to make a communication by water, through other person's lands, to facilitate the access to a market. See Harthy *v.* Peahall Peakes, rep. 131.

Collateral covenants are only such as are expressed, as they never run with the land; which implied covenants always do.

The rule as to the construction of covenants is, that all contracts are to be taken according to the intent of the parties, expressed by their own words: and if there be any doubt in the sense of the words, such construction is to be made as is most strong against the covenant, or lest by the obscure wording of his contract, he should find means to evade or elude it. Bac. Abr. tit. Covenant F.

HENRICUS.

Middle Temple,
August 2nd, 1839.

Imperial Parliament.

HOUSE OF COMMONS—ENGLAND.

August 6.

ENCLOSURE BILLS.

STANDING ORDER, made on the motion of Mr. Harvey, in consequence of a resolution passed on the 23rd of April.

“Resolved, that in all bills for enclosing commons or waste lands, provision be made for leaving an open space in the most appropriate situation, sufficient for purposes of exercise and recreation of the neighbouring population; and that the committee on the bill have before them the number of acres proposed to be enclosed, as also of the population in the parishes or places in which the land to be enclosed is situate; and also to see that provision is made for the efficient fencing of the allotment, for the investment of the same in the churchwardens and overseers of the parish in which such open space is reserved, and for the efficient making and permanent maintenance of the fences by such parish; and that in any case where the information hereby required is not given, and the required provisions are not made in the bill, the committee on the same be directed specially to report to the House

the reasons for not complying with such standing order?"

August 8.

RAILWAY BILLS.

The ATTORNEY-GENERAL's motion for reducing the amount of deposit upon these Bills from £10. to £5. per cent. was negatived.

Law Reports.

COURT OF CHANCERY—July 22.

SALE v. SALE.

Next friend of Infants—Liability to costs for improperly filing a Bill in their behalf.—Necessity for his shewing that he did so for the benefit of the Infants, and not for his own interest.

It appeared that the plaintiffs, James Sale and Robert Sale, were the infant sons of James Sale, deceased, and the defendant was Robert Sale, a brother of the deceased father, and also the brother of Thomas Sale, late of Penshurst, Kent, now deceased, who was the uncle of the infants. Thomas Sale was seized of an estate called Stonecrop Farm, consisting of about 43 acres, at Penshurst, which he held in gravelkind tenure. He had also some freehold land. Before his death, which happened last January, when he was drowned in the Medway, Thomas had made his will, but it was not so attested as to pass real estates. In it he had appointed George Newman trustee of the real estates, but as he died without issue and intestate as to real property, the freehold land descended to the eldest infant plaintiff, James Sale, his heir-at-law, and Stonecrop farm descended in equal moieties to the defendant, who took one-half, and to the two infants, who each took one-fourth. The bill was filed in the name of the two sons of James for a partition of the farm, the appointment of a receiver, and that the defendant might be restrained from occupying the farm.

Mr. Pemberton objected very strongly to the conduct of his next friend, Newman, who, he said, had no business to interfere, but ought to have left the infants, the eldest of whom would be of age in a year's time, to his own natural guardians. Newman, wishing to purchase the farm, had got into possession of it, had written letters to the infants abusing the uncle and prejudicing them against him, had gone down to Warwick, where the elder infant was an apprentice, and procured his execution to a power of attorney, giving him (Newman) the fullest au-

thority, and had desired the infant to keep his communications with him secret from his friends. One of his letters was—"Your uncle Robert desires to cheat you and your brother Robert. Write me a letter by return of post, and tell me to do for you what I think proper." On another occasion he wrote—"Your uncle Robert is trying to upset the will, for he is quite jealous." Mr. Pemberton remarked on this letter, that as the infant was the heir-at-law, and would gain by the will being upset, the charge was absurd. On another occasion he wrote—"Old uncle Robert has behaved so badly, that I have been obliged to file a bill in Chancery against him." Mr. Pemberton observed upon this letter, that Newman had not then filed the bill, but a few days afterwards filed it, in which he alleged that the defendant Robert had got possession of the farm (whereof he was half-owner), and had excluded the infants, when at the very time Newman was in possession of this farm and meant to continue in possession of it. It appeared by Newman's own affidavit, that the infant plaintiff Robert had appointed Newman his guardian, trustee, and steward to all his property he became entitled to from his uncle. Newman's solicitor afterwards wrote, that "he was willing to dismiss the bill, all costs being paid out of the estate, and was willing to give up possession on being paid for the crops, and also to pay the rent at which the farm was valued." Mr. Pemberton said, he would ask whether a more unnecessary and iniquitous suit had ever been instituted? The first alleged object was for a partition, dividing this small farm into four parts at a great expense. Newman alleged, that the infants were excluded from the farm, when he (Newman) was himself in possession of it. There was a suggestion that the title-deeds should be removed from the solicitor of the family, in whose possession they most properly were. One of the infants would be 21 next April, the other was 17. He concluded by moving that the plaintiff's bill be taken off the file of the Court, and that Newman, the next friend, should pay the costs of the suit.

Mr. Cooper appeared for Newman, and contended that several of the affidavits consisted only of information and belief, and were not evidence. The deceased, Thomas Sale, had intended to nominate Newman the trustee for his land, but the will was not executed so as to carry his intention into execution. Newman and his wife had very kindly adopted the sister of the plaintiff. Newman had certainly avowed that he had intended to purchase the farm, and that might be a reason why he should not remain next friend, but was no reason for taking the bill off the file. In the first instance Newman was called upon by all parties to act in the management of the property, but afterwards Robert

Sale, the defendant, became dissatisfied with him, and Newman swore that Robert claimed the whole of the farm. No instance could be produced where the Court had interfered where the plaintiff was so nearly of age. The proceedings were in lieu of the common law proceeding for partition, and the Court would leave Newman to do as he pleased with his own money, and to run the risk of paying the costs if the suit were decided against him instead of ordering the bill to be taken off the file. The first notice was for a reference to the Master to inquire whether the suit was proper, and it was only on the amended notice that the application was made for the bill to be taken off the file. That application was by the defendant Robert Sale, who was a debtor to Newman. The land in Kent was valuable, and it was not desirable that the parties should hold it between them in undivided shares. There was no improper motive, and what Newman had done had been fully sanctioned by those who now complained, and particularly by the defendant Robert himself.

Lord LANGDALE said, whilst it was necessary to protect persons who properly filed bills for the benefit of infants, for proper suits should always be protected, it was equally necessary to take care that crafty persons should not file them for their own benefit or to create cost. Thomas Sale, the uncle of the infant plaintiffs, made a will, dated August, 1837, and thereby appointed George Newman trustee of his estates, and he appointed Barker and Jane, the wife of George Newman, to be executors. The will was not executed so as to pass real estates, and the testator was entitled to a freehold estate of 16 acres, and also to a farm which he held in gavelkind. These lands did not pass by the will, but the freehold estate descended to James, the eldest son of Thomas, the eldest brother, and the farm in gavelkind descended in equal shares, one moiety to the defendant Robert, the brother of Thomas, and the other moiety to the two infants, James and Robert, the plaintiffs. James was 19 and Robert 16 at the death of their uncle. It appeared from the affidavits, that although Thomas Sale was stated to have died on the 5th of January, yet that he was drowned in the Medway, and that his body was not found until after the 10th of January, but before the body was found the operations of George Newman began, for he applied to and obtained from the infants an authority to act for them as their guardian. The authority was absurd in point of law, but by it we could judge of the intention of the party. It must have been to entrap the infants. It might be that Newman being connected with the family, his wife being a first cousin of the father of these infants, did, with consent of all parties, at first assume a degree of

management, and enter into possession of the property, and a letter of Mrs. Sale showed that she was at that time desirous he should do so. The eldest infant was apprentice to a draper at Warwick. Newman addressed a letter to the youngest, dated January 16, offering him kindness, showing a disposition to make the young man believe that he was the only person fit to act as his friend, and he then got prepared a power of attorney, giving most extensive powers to himself, which he took down to Warwick, where he applied to the elder brother, the apprentice there, and got him to execute it, and then Newman went to Penshurst, and there obtained the younger brother's execution, after which he applied to the defendant, the uncle, but he refused to sign it, on which Newman took great offence. The matter, however, was adjourned until there could be a meeting, which was held in March, at the house of the attorney of the defendant, who advised his client not to execute the power. While Newman was at Warwick with the elder infant, he said he should like to buy the farm, and that he would give him £100. for it. Newman admitted that he had wished to make a purchase, and had offered to give £200.; and he said that after this offer there was a threat by the defendant, Robert Sale, to take possession of the farm, but it appeared from the affidavits that the defendant said, that although he refused to execute the power, he wished to let Newman occupy the farm at a rent. Newman's account was, that on the 30th of March last, he and Clark, his solicitor, met the defendant at the farm, and defendant then threatened to farm it himself, to which Newman objected, and the defendant then told him to fix a rent. Newman would have been glad to buy the farm, but the defendant wished him to rent it at £50. a-year: but it was on the 30th of March that the defendant refused to execute the power of attorney. On the 1st of April, Newman wrote to the elder infant at Warwick, stating that he had filed a bill against his uncle Robert. The bill was not then filed; it was filed on the 5th of April, while these arrangements were on the carpet. The bill alleged that the defendant was about to take possession of the farm. The suit was not for the purpose of benefiting the infants, but to promote the views of Newman, who styled himself their next friend. He (Lord Langdale) had never witnessed a more crafty and more coarse attempt to entrap infants. Every man who came into this Court to give infants a *locus standi* was bound to show that he was doing it for their benefit, and not for his own interest. The bill must be dismissed with costs.

VICE CHANCELLOR'S COURT.—July 9.

STURGIS v. CHAMPNEYS.

HUSBAND and WIFE.—*Whether a married woman, tenant for life of real estates, has a right to a settlement out of the rents and profits, where her Husband has taken the benefit of the Insolvent Act.*

The plaintiff in this case was the official assignee of the Court for relief of Insolvent Debtors, and the defendants were Sir Thomas Champneys (the Insolvent debtor) and his wife—the receiver—and the assignees under a second insolvency. The bill was filed by the plaintiff as the official assignee, under the *first insolvency* of Sir Thomas Champneys on behalf of the creditors, for a declaration of the Court that he was entitled to the rents of Lady Champneys' estates during her coverture, and that the receiver should account to him accordingly.

It appeared by the bill that the estates in question, which produced £10,000. a-year, were devised in 1793 by Sir Roger Mostyn to trustees for a term of 500 years upon trust to pay his debts and legacies, and subject thereto, to his son, Sir Thomas Mostyn, for life, with remainder to his children, with remainder to Lady Champneys for life, with remainders over, subject, however, in the event of Lady Champneys succeeding, to a term of 1,000 years upon trust for raising additional portions for her younger sisters. Sir Thomas Mostyn died without children in 1829. Sir Thomas Champneys, who was a trustee of both of the terms, took the benefit of the Insolvent Act in 1827, and the plaintiff, Mr. Sturgis, was appointed official assignee, and had conveyed to him the interest in the estates to which Sir Thomas Champneys was entitled in remainder in right of Lady Champneys. At the time of the death of Sir Roger Mostyn, the legal estate was outstanding in a mortgage in fee, and after the death of Sir Thomas Mostyn the estates were further mortgaged for the term of two years, under a decree of the Court, for raising the additional portions. Subject to the mortgages, Sir Thomas Champneys entered into possession of the estates, notwithstanding his insolvency, and continued the receiver, in the receipt of the rents. In 1834, Sir Thomas Champneys a second time took the benefit of the Insolvent Act. Lady Champneys insisted that she was entitled to a provision out of her life interest. It was admitted that since the filing of the bill the creditors under the first insolvency had all accepted a composition in satisfaction of their debts, so that the claims of the plaintiff were fully satisfied, and the question was between

Lady Champneys and the assignees under the second insolvency.

The VICE-CHANCELLOR said the point came before him in a singular way, but he thought it might be considered in the same manner as though a petition had been presented to have a settlement made upon Lady Champneys. The case stood in this position:—There were certain legal estates outstanding at the time Sir Roger Mostyn made his will, and he devised the tenements to four trustees for a term of 500 years in trust in the first instance to pay his debts and legacies; and subject to certain estates which had since determined, he devised the same tenements to the same trustees for a term of 1,000 years in trust, to raise certain portions, and subject thereto to the estates and interests which in the events which had occurred had since come into possession: the effect of which was, that for all purposes whatsoever, except so far as there might be any interference on the part of those who had the legal estate, Sir Thomas Champneys and his wife, in right of the latter, became entitled to the estates for the term of her Ladyship's life. It appeared before the estates which were devised to Lady Champneys for life in remainder took effect in possession, Sir T. Champneys became an insolvent debtor, and Mr. Sturgis, the plaintiff, the provisional assignee. Under that insolvency Sturgis took all the interest Sir Thomas Champneys had in remainder, and when, by the death of the tenant for life, the estate came into possession, he was entitled as provisional assignee to all the rents and profits, as well as the entire management of the estates. It did not appear to him, that what had been actually done with the terms varied the case at all, except so far as appeared by the bill, that the 500 years' term remained in Sir T. Champneys as surviving trustee, the only term which he seemed to have assigned being the term for 1,000 years. Then the general question would be, whether, that being the nature of the estate, Sir T. Champneys had, supposing he had never taken the benefit of the Insolvent Act, it was competent to him to make a good title to the estate he had in the estates during the coverture. If, as it was said, the interest of the wife was so far equitable that Lady Champneys might at any time have filed a bill to have a settlement out of it, the consequence would be (certainly, to the profession a novel one), that Sir T. Champneys could not make any title during the coverture. He could not help saying, during all his experience when at the bar, and subsequently, he never heard it suggested, in such a case as the present, that the husband was disabled from making a title to the estate he had during the coverture in tenements devised during the life of the wife. It would, in his opinion, be a course pregnant with

fearful consequences if he were to hold that a devise to the wife, merely because the legal estate was outstanding, was so far a mere creature of equity in her, that she might file a bill, and compel her husband to make a settlement on her. He never heard that suggested, though it was plain the point must have occurred over and over again in common dealing with estates. During the argument no case had been cited in which, where the devise was like the present, the wife had filed a bill, and had a settlement. The common expression, that where a party came into equity he was bound to do equity, was used in this case; and then it was inferred with respect to such a devise as this, that a case must have arisen that made it necessary to come to equity on the part of those who claimed an interest in respect of the wife. Whether such a case might not arise as to entitle the wife to the equitable interference of the Court, it was not necessary now to determine; the question was, whether that hypothetical case had arisen in this suit? How was the suit constituted? Sir T. Champneys became insolvent in 1827, and then Mr. Sturgis, the plaintiff, became provisional assignee. The estate was reduced into possession in 1831, and subsequently the second insolvency occurred under which Gillett and Robinson were appointed assignees. Then it appeared, that prior to Lady Champneys' estate taking effect in possession, Maughan, who had been appointed as a sort of resident manager and agent of the estates, was afterwards continued in that employment when the estates came into possession, and received the rents and profits, and then Sturgis, having a claim to the rents, filed this bill against Sir Thomas and Lady Champneys and Maughan, and the two other assignees. His Honour could not think it was necessary to make Lady Champneys a party at all. The claim at the time the bill was filed was merely for the past rents which had been received by Maughan from the tenants, and which were the mere personal property of Sir T. Champneys, in the sense that they were mere debts from Maughan to him. There might possibly have been leases so constructed as that Lady Champneys should have been a party to any action for the rent; but here the rent had been actually paid to Maughan, the agent of Sir T. Champneys, for the suggestion of his appointment by Lady Champneys was a suggestion of a nonentity in point of law, and in no sense could they have been claimed by her had she survived her husband. The bill was filed, not for the purpose of settling any question of adverse possession, but virtually for giving to Sturgis those rents and profits, and for continuing Maughan in possession of the estates and the receipt of the rents for the benefit of Sturgis, so long as the marital interest which Sir

Thomas Champneys had in the estates would endure, or at least so far as was necessary for Sturgis to receive that portion of the assets applicable to the creditors under the first insolvency. Here it appeared there was nothing like coming to equity, as in the case of filing a bill against persons representing the wife's estate, nor against any person who might, in a limited sense, have been considered a trustee for her—no such thing: except the mere formal fact that the dry legal interest was outstanding, the matter was to be considered to all intents and purposes in precisely the same manner as if Sir Roger Mostyn had devised the legal estate, and if he had there would not have been the least question raised. His Honour was of opinion he ought not to do so dangerous a thing as to countenance the claim made in this suit on behalf of Lady Champneys, and that as against her the bill should be dismissed with costs.

QUEEN'S BENCH.—*May 31.*

Sittings in Banco.

STOCKDALE v. HANSARD.

JUDGMENT.

(Continued from p. 199.)

The Attorney-General told us of another case in point in his favour, Burdett v. Abbott. We must then examine that case fully. The plaintiff committed a breach of privilege by the publication of a libel; the defendant, the Speaker, stating that fact on the face of his warrant, committed him, by order of the House, to prison. An action was brought for this assault and false imprisonment. Did the House of Commons threaten the plaintiff, or his attorney or counsel, for a contempt of their privileges? On the contrary, by an express vote, they directed their highest officer to plead and submit himself to the jurisdiction of this Court. When the suit was pending, did they entertain questions on the course of the proceedings, or resolve that they alone could define their own privileges, or declare that judges who should presume to form an opinion at variance with theirs, should be amenable to their displeasure? They suffered the cause to make the usual progress through its stages, and placed their arguments before the Court. Their arguments were just: their conduct had been lawful in every respect. The Court gave judgment in the Speaker's favour. The grounds of the decision were not that all acts done by their authority were beyond the reach of inquiry, or that all which they called privilege, was privilege and sacred from the intrusion of law; but that they had acted in exercise of a known and needful privilege, in strict conformity with the law.

Let us now see what was acknowledged by the Court to be the privilege of the House of Commons. Lord Ellenborough, almost on opening his luminous commentary on all the learning so profusely poured out in the discussion, claims for the High Court of Parliament and each of the Houses of which it consists, "That authority of punishing summarily for contempts, which is acknowledged to belong, and is daily exercised as belonging, to every superior court of law, of less dignity undoubtedly than itself." This is the position established by him. The nucleus of Mr. Justice Bayley's careful argument is in these few words : "The House of Commons has not only a legislative character, but is also a court of judicature. If then the House be a court of judicature, it must have the power of supporting its own dignity as essential to itself, and without the power of committing for contempts, it cannot support its own dignity." Sir Vickary Gibbs, the Attorney-General, who argued for the defendant, took the same ground of justification (p. 85). It were easy to show that every Court in Westminster Hall has the same power of commitment for contempts, and that they could not long exist without such power.

If, then, the right exists in the Courts of Westminster Hall, upon what principle, it might then be asked, could it be contended that the same right did not exist, and in the same degree, in the House of Commons ? (86) Such was the principle on which the Exchequer Chamber affirmed the judgment; and the question proposed by Lord Eldon, in the House of Lords, to the Judges, before that tribunal of the last resort pronounced in favour of the House of Commons, confines it in the same manner (5 Dow). The decision manifestly rests on the privilege to punish for contempt, inherent, no doubt, in Parliament, and in each House, whether regarded in the legislative or in the judicial capacity, but which it only possesses in common with the courts of justice, and which was there exercised within the strictest bounds of the common law.

This great case solemnly argued at the bar, and on both sides with extraordinary learning and power, and in which the Court evidently pursued their own inquiries in the interval between the arguments, presents a striking contrast to the rash and unmeasured language employed by former judges in *ex parte* proceedings, as writs of habeas corpus, and motions for criminal informations. Lord Ellenborough and Mr. Justice Bayley carefully guard themselves against adopting such expressions, the former dissenting directly from Chief Justice De Grey, the latter quoting, without dissent, the doctrine laid down by Holt in the King *v.* Paty. With the same freedom Lord Ellenborough commented, in the King *v.* Creevy, on Lord Kenyon's dicta, in the King *v.*

Wright. But to the assertion that the courts have always acquiesced in the unlimited claim of privilege, I have already stated enough to authorize me in opposing the contrary assertion. I proceed to prove its truth in other instances. The phrases which I have selected for remark out of the cases cited are the exception, not the rule. From early times, the spirit of English judicature has been more free and independent. Numerous cases were cited in the argument for the plaintiff, in Burdett *v.* Abbot, not required for the decision, except as they removed the preliminary obstacle to all discussion. They have been repeated in able tracts ; most of them were criticised by the Attorney-General. He sought, and successfully in some, to show that the question of privilege, under the circumstances, did not arise. But they are not cited for their circumstances ; their use is to show that the courts exercised the right of examining matters supposed to be protected from their inquiry by privilege of Parliament. For this purpose, it is enough to enumerate, in the words of Prynne, "the cases of Lark, Thorp, Clark, Hyde, Alwell, Walsh, Cosyn, Ferrers, and Trewynyard, which (he says) the Chief Justice vouched and insisted on in his learned argument, to the great satisfaction of the gentlemen of the long robe, and most auditors then present, as well members of the Commons House of Parliament as others." Cook's, Phedell's, and others might be added.

The Duchess of Somerset's case, Fitsharris, and others not necessary to be named, were of later date. The Chief Justice, thus eulogized by Prynne, was Sir Orlando Bridgman, delivering the judgment of the court in Beuyon *v.* Evelyn, who brings this result out of his examination of ancient authorities, "That resolutions or resolves of either House of Parliament, singly, in the absence of parties concerned, are not so concludent upon courts of law, but that we may, nay (with due respect, nevertheless, had to their resolves and resolutions) we must give our judgment, according as we, upon our oath, conceive the law to be, though our opinions fall out to be contrary to those resolutions or votes of either House." That Chief Justice Bridgman took upon himself to decide on privilege is so clear from his own plain words, that the opinion of Holt, in Ashby *v.* White, and of Holroyd, in arguing Burdett *v.* Abbot, cannot make us more certain of the fact. The Attorney-General does not deny the proposition, but would parry its effect, by showing that the circumstances appearing there raised no question of privilege, and that what he was pleased to style the parade of learning on the subject was misapplied. But the Judge avowed his right and duty ; if he invaded Privilege of Parliament by laying down doctrines inconsistent with it, the invasion could not be

less culpable because uncalled for by the cause in hand.

The next case to which I advert, in truth embraced no question of privilege whatever; but as one of the highest authorities in the State has thought otherwise, I shall offer some comments upon it: I mean *Jay v. Topham*. The House of Commons ordered the defendant, their Serjeant-at-arms, to imprison plaintiff for having dared to exercise the common right of all Englishmen of presenting a petition to the King on the state of public affairs, at a time when no Parliament existed. For this imprisonment an action was brought. The declaration complained not only of the personal trespass, but also of extortion of the plaintiff's money, practised by defendant under colour of the Speaker's warrant. The plea of justification under that warrant, which could not possibly authorize the extortion, even if it could arrest, was overruled by this Court, no doubt with the utmost propriety, for the law was clear. Lord Ellenborough points this out in the most forcible manner, 14 East, 109. Yet for this righteous judgment Chief Justice Pemberton and one of his brethren was summoned before the Convention Parliament, when they vindicated their conduct by unanswerable reasoning, but were, notwithstanding, committed to the prison of Newgate for the remainder of the Session.

Our respect and gratitude to the Convention Parliament ought not to blind us to the fact, that this sentence of imprisonment was as unjust and tyrannical as any of those acts of arbitrary power for which they deprived King James of his Crown. It gave me real pain to hear the Attorney-General contend that the two Judges merited the foul indignity they underwent, as they had acted corruptly in concert with the Duke of York. In support of this novel charge, he produced no evidence, nor any other reason but that the plea, as set out in Nelson's Abridgment, appears to have been in bar and not to the jurisdiction. But the Commons, who knew their own motives, made no such charge; the record produced there, on which the Judges were said to have violated the law, exhibits a bad plea for the reasons assigned by Lord Ellenborough, and the judgment punished by the Commons, could not have been different without a desertion of duty by the Judges.

(To be continued.)

2 & 3 VICT.—CAP. XXIX.

An Act for the better Protection of Parties dealing with Persons liable to the Bankrupt Laws.

[19th July, 1839.]

Whereas by an Act passed in the sixth year of the reign of his late Majesty King George the

Fourth, intituled "An Act to amend the Laws relating to Bankrupts," it was among other things enacted, that all payments really and *bond fide* made by any bankrupt or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor) should be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and that all payments really and *bond fide* made to any bankrupt before the date and issuing of the commission against such bankrupt should be deemed valid, notwithstanding any prior act of bankruptcy committed, and that such creditor should not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not at the time of such payment to such bankrupt notice of any bankruptcy committed: And whereas, by an Act passed in this present Session of Parliament, intituled, "An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fights in Bankruptcy," (a) it is, amongst other things, enacted, that all conveyances by any bankrupt *bond fide* made and executed before the date and issuing of the fiat against such bankrupt shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed, had not at the time of such conveyance, notice of any prior act of bankruptcy by him committed: And whereas it is expedient that further protection should be given to persons dealing with bankrupts before the issuing of any fiat against them: Be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all contracts, dealings, and transactions, by and with any bankrupt really and *bond fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bond fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that nothing herein contained shall be deemed or taken to give

(a) See ante p. 104.

validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment, on a warrant of attorney, or cognovit given by any bankrupt by way of such fraudulent preference.

II. And be it further enacted, that this Act may be repealed or altered by any other Act in this present Session of Parliament.

COURT OF EXCHEQUER—June 12.

NEW GENERAL ORDERS.

FORMS OF WRITS.

(Continued from page 223.)

No. V.

Writ of Fieri Facias, on a Decree or Order of the Court of Exchequer for Payment of Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made the sum of , for certain costs which were lately before us in our Court of Exchequer at Westminster, in a certain cause, or certain causes (as the case may be), wherein A. B. is plaintiff, and C. D. is defendant, or in a certain matter there depending, intituled, "In the matter of E. F." (as the case may be), by a decree or order (as the case may be) of our said court, bearing date the day of decreed or ordered (as the case may be) to be paid by the said C. D. to A. B., and which costs have been taxed and allowed by G. H. Esq., one of the masters of our said court, at the said sum of , as appears by the certificate of the said master, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick, you further cause to be made interest on the said sum of , at the rate of £4. per centum per annum, from the day of , * and that you have that money and interest before us, in our said court, immediately after the execution hereof, to be paid to the said A. B., in pursuance of the said decree or order (as the case may be). And that you do all such things, as by the statute passed in the second year of our reign, you are authorised and required to do in this behalf; and in what manner you shall have executed this our writ, make appear to us in our said court, immediately after the execution thereof. And have then there this writ. Witness, &c.

* The date of the master's certificate, or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

(To be continued.)

COURT OF COMMON PLEAS, DURHAM.

2 Vict. cap. XVI.

An Act for improving the Practice and Proceedings of the Court of Pleas of the County Palatine of Durham and Sadsberge. [June 13, 1839.]

(Concluded from page 224.)

XXXV. And whereas it is expedient that due provision should be made for the compensation of the cursitor of the county of Durham for the losses he may sustain by the reduction of or abolition of his fees by virtue or in consequence of this Act: Be it therefore enacted, That from and after the commencement of this Act there shall be issued, paid, and payable out of, and charged upon, the Consolidated Fund of the United Kingdom of Great Britain and Ireland, to the said cursitor, free and clear of all taxes and deductions whatsoever, such sums of money, at such times, by way of annuity or otherwise, as, having regard to the manner of his appointment to such office, and the time and duration thereof, and all the circumstances of the case, shall be adjudged and determined to be due to such cursitor by any commission to be appointed by her Majesty or by virtue of any Act of Parliament for the purpose of determining the amount of the compensation that ought to be due and payable in such cases; and in the meantime and until such compensation shall be awarded and determined in manner aforesaid, or the time shall have elapsed that may be appointed for claiming the same, it shall be lawful for the Commissioners of her Majesty's Treasury of the United Kingdom of Great Britain and Ireland, or any three of them, to issue their warrants for the payment to such cursitor as aforesaid, out of the said Consolidated Fund, of such half-yearly or quarterly allowances as to the said commissioners shall seem reasonable, both as to the amount and time of payment, on account of such compensation as may be thereafter awarded to the said cursitor.

XXXVI. Provided always, and be it enacted, That such cursitor shall not be entitled to receive any such compensation or allowance as aforesaid unless he shall previously make a full and true statement to the said Commissioners of her Majesty's Treasury, to be verified on oath before a judge or Master Extraordinary in Chancery, if they shall think fit so to direct, of the amount of the salary, fees, and emoluments of such office, and of the disbursements and outgoings of the same, for the time they shall have held such office, or for the space of ten years before the passing of this Act, and the amounts of such fees during such period of time as aforesaid: ~~so as to~~

be abolished by this Act shall be set forth in such statement; and that such compensation or allowances shall cease altogether or be reduced in amount, as the case may be, whenever the party entitled to receive the same shall be placed in any other public office of which the salary and emoluments shall be equal to the whole or to part of such compensation or allowance, so that in such last-mentioned case such curitor shall not be entitled to receive more of such compensation or allowance than shall be equal to the difference between the full amount thereof and the amount of the salary and emoluments of the office in which he may be hereafter placed.

XXXVII. And be it enacted, That this Act shall commence and take effect on the thirteenth day of September, one thousand eight hundred and thirty-nine.

XXXVIII. And be it enacted, That this Act may be amended or repealed by any Act to be passed during the present Session of Parliament.

SCHEDULE TO WHICH THIS ACT REFERS.

No. 1.—Writ of Summons.

Victoria, &c.

To C. D. of, &c. in the County of Durham, greeting.

We command you [or as before or often we have commanded you], That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of Pleas at Durham in an action on promises [or of debt, &c. as the case may be], at the suit of A. B.; and take notice, that in default of your so doing the said A. B. may cause an appearance to be entered for you, and proceed therein to judgment and execution.

Witness at Durham, the day of , in the year of our reign.

Memorandum to be subscribed on the Writ.

N. B. This writ is to be served within four calendar months from the date hereof, including the day of such service.

Indorsements to be made on the Writ before Service thereof.

This writ was issued by E. F. of attorney for the said A. B.

or

This writ was issued in person by A. B. who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such].

The plaintiff claims for debt, and for costs, and if the amount thereof be paid to the plaintiff or attorney within eight days from the service hereof, inclu-

sive of the day of such service, further proceedings will be stayed.

Indorsement to be made on the Writ after Service thereof.

This writ was served by me, X. Y. on the day of , one thousand eight hundred and thirty X. Y.

No. 2.—Forms of entering an Appearance.

In the Court of Pleas at	The defendant, C. D., appears in person [or E. F., attorney for C. D., appears for him, or G. H., attorney for the plaintiff, appears for the defendant, C. D., according to the Statute.]
Durham,	
A.B. plaintiff against	
C. D.	
[or]	
C.D. and another,	
or	
Against C. D. and others.]	

Entered the day of , one thousand eight hundred and .

No. 3.—Writ of Distressing.

Victoria, &c.

To the Sheriff of Durham,

[or]

To the Coroners of the County of Durham], greeting.

We command you, That you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and distrain upon the goods and chattels of C. D. for the sum of forty shillings, in order to compel his appearance in our Court of Pleas at Durham, to answer A. B. in a plea of trespass on the case [or of debt, &c. as the case may be], and how you shall execute this our writ you make known to our justices at Durham on the day of [instant or now next ensuing].

Witness at Durham, the day of , in the year of our reign.

Notice to be subscribed to the foregoing Writ.

In the Court of Pleas	Between A. B. plaintiff, and C. D. defendant.
at Durham.	

Mr. C. D.

Take notice, That I have this day distrained upon your goods and chattels in the sum of forty shillings, in consequence of your not having appeared in the said Court to answer A. B. according to the exigency of a writ of summons bearing date on the day of ; and that in default of your appearance to the present writ within eight days inclusive after the return thereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution [or, if the defendant be subject to outlawry, will cause proceedings to be taken to outlaw you.]

REVIEW OF NEW BOOKS.

PRECEDENTS IN CONVEYANCING, adapted to the present State of the Law. Illustrated with Notes, Practical and Critical. By THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple; Author of "The Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen, &c. *In continuation of the Precedents by S. VALLIS BONE, Esq.* Vol. III. Part. I. London: John Richards and Co. Law Booksellers, 194, Fleet Street.—Price Four Shillings.

The press is very fertile with books of this description; some of the ponderous sort, others of the "pocket-book" sort; and all, no doubt, useful in their way. Each writer has his own notion of drawing a Deed, and each may be right in that notion. In the work before us, brevity (so much desired where it can be accomplished with safety) appears to be the object. The author expresses his opinion, that "most of the Deeds in common use may be very greatly abridged, with comparative safety to the parties;" and adds "THERE IS NO PERFECT SAFETY:" and as it appears that he is to complete his portion of this work in two volumes, we think he has worked a revolution in Conveyancing. He says—

"In writing this work, the author has studied three essentials—CONCISENESS, UTILITY, and SAFETY. He has endeavoured to avoid the paths of any of his contemporaries, and he trusts that in this he has succeeded.

"The Precedents will be found to be only such as are strictly applicable to the every-day practice of an attorney. They are all drafts of actual practice.

"To introduce any *special* forms of instruments (he submits) will be quite unnecessary; and there are two sufficient reasons for such an omission—1st, That an attorney, will not, in any case, take upon himself, the responsibility of preparing, any special instrument, without the aid of a conveyancer; 2dly, That every special instrument, depends upon its own peculiar

features, and no general rule, can consequently be laid down. The work will thus become concise and useful; and, as the law will be found written upon the subject-matter of every Precedent, the attorney, or his clerk, may work upon them with safety."

The Author then proceeds to observe upon "THE UNSETTLED STATE OF THE LAW," as it materially affects instruments of every kind, and tells us this startling fact, that "there is scarcely a Precedent in the whole work, which can be said to be founded upon any settled doctrine."

The value of the work to attorneys, independent of its utility, is in its conciseness and cheapness, compared with other works of a similar kind, as the whole will be completed in four volumes.

The present number contains "CONTRACTS," described by the Author, and truly so, as "the most fruitful source of litigation." The following extract may give to our readers some conception of the great usefulness of such a book, and we will only add, that the Law upon the subject-matter of every Precedent is shown in a similar manner.

EQUITABLE MORTGAGES.

Deposit of Title Deeds relating to Freeholds with Bankers for securing Money advanced. (a)

[*AGREEMENT to accompany such Deposit.*]

(a) For commercial purposes, this mode of securing money borrowed for *temporary purposes* is very frequently adopted. A man takes his title deeds to his banker, and deposits them for a credit or for a cash advanced, and often *without any written agreement* being entered into between the parties, a neglect that should be avoided by every prudent man; (see *ex parte Haigh*, 11 Ves. J. 403.; *ex parte Whitbread*, 19 Ves. J. 211.; *ex parte Hooper*, 1 Mer. J.; *ex parte Langston*, 17 Ves. J. 227.; *ex parte Mountfort*, 14 Ves. J. 606.); and such a written agreement cannot be contradicted by affidavit, *ex parte Combe*, 17 Ves. 389. Indeed these equitable mortgages (as they are termed), except for *temporary purposes*, cannot be recommended at any time: they are not only a security without absolute safety; but they are likely, and, indeed, if to be enforced, they must necessarily lead the lender into the Court of

Chancery ; and it depends upon the value of his security how he will get out of it ; and in the event of the bankruptcy of the borrower, the lender *must lose money*, because he will only be allowed the costs of his petition for sale when such an agreement is made, *but otherwise not*. See *ex parte Brightens*, 1 Swanst. 3.; *ex parte Trew*, 3 Mod. 372.; *Anon.*, 2 Mod. 281.; *ex parte Reynolds*, 2 Mont. & Ayr. 104.

"Where such an agreement is *not* made, and the lender has a mere naked deposit, he must file a bill in Chancery to obtain the benefit of his security, and he will be intitled to a decree for sale. See *Pain v. Smith*, 2 M. & K. 417.

"The doctrine of equitable mortgages by mere deposit of deeds, *without any agreement in writing*, was first established by Lord Thurlow, in *Russell v. Russell* (1 Bro. C. C. 269), who there decreed, upon a bill filed, that the deposit should be sold, and the plaintiff paid his money. In order to take such a security out of the Statute of Frauds, *it is said* (and, indeed, has been so decided), and perhaps wisely for the purpose of commerce, that the deposit is of itself *evidence of an agreement* executed for a mortgage of the estate, *of which agreement* the creditor may avail himself *as of an agreement in writing* for that purpose. See *ex parte Wright*, 19 Ves. J. 258. Previous to this doctrine being established, it was considered, that to give a creditor a charge on land *without an agreement in writing*, would be direct contravention of the Statute of Frauds ; and such was, in truth, the opinion of Lord ELDON, although he gave way to the doctrine of Lord THURLOW, because it was an advantage to the commercial interest of the country that he should do so ; at the same time he said that the statute must not be repealed by him further than it had been repealed by his predecessor. See *ex parte Whitbread*; *ex parte Kensington*, 2 Ves. & Bea. 83.; *ex parte Hooper*. It has, however, now become a settled doctrine. The present Lord CHANCELLOR, when Master of the Rolls, in *Parker v. Housefield*, 2 Myl. & K. 420, thus explained the law as it now stands. The question in that case which his Lordship had to determine was, whether in the case of an equitable mortgage by a deposit of the title deeds, the decree ought to give to the mortgagor six months to redeem, as in cases of legal mortgages. To determine this, his Lordship said, it was material in the first place to consider in what light courts of equity viewed such equitable mortgages ; and it appeared that a deposit of title deeds has always been considered as an imperfect mortgage, which the mortgagor is entitled to have perfected ; or rather, as a contract for a mortgage, which, according to the well-known doctrine of courts of equity, would give to the

party claiming the benefit of such contract all such rights as he would be entitled to if the contract had been completed. Accordingly, in the very commencement of the doctrine of equitable mortgages, *viz.* in the cases of *Feetherstone v. Penwick* (1784), and *Harford v. Carpenter* (1785), both cited in *Russell v. Russell*, Lord Thurlow was found saying, that a deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. In *Birch v. Ellames* (2 Anstr. 428.), the Chief Baron of the Exchequer says, "a deposit of title deeds, as security for a debt, is now settled to be *evidence of an agreement* to make a mortgage, and such agreement is to be carried into execution by the Court." The decree in that case was, that the defendant should pay, or stand foreclosed and convey. In *ex parte Wright*, Lord ELDON says, that a deposit of title deeds was *evidence of an agreement* for a mortgage, and that an equitable title to a mortgage was in equity as good as a legal mortgage. Such being the light in which Courts of Equity view equitable mortgages by deposit of title deeds, it would seem to follow, that the remedy to be afforded to such mortgagees should, as nearly as possible, correspond with that to which legal mortgagees are entitled ; and accordingly, from the search which his Lordship had directed to be made as to the form of decrees upon such subjects, he found that such had been the principle adopted. In *Newton v. Aldous* (18th July, 1804), the decree, which appeared to have been penned by Lord Eldon himself, was as follows :—"Declare, that the title deeds relating to the estate in question having been deposited by the said John Aldous, the bankrupt, in the hands of the plaintiff, the plaintiff is entitled to be considered, in this Court, as if he was a mortgagee of the premises therein comprised, and decree the same accordingly, and refer it to the Master to take an account of what is due for principal money advanced on the said deposit, and for interest thereon, and to tax his costs of this suit. And declare, that such principal, interest, and costs are to be considered as a charge upon the said premises. And upon the defendant paying unto the plaintiff, within six months after the Master shall have made his report, at —, let the plaintiff deliver up all deeds, &c. But declare, in default, &c. plaintiff will be entitled to the said premises, free and clear of all right, title, interest, and equity of redemption, of, as, and to the same, and to have an absolute reconveyance thereof accordingly. And in that case let the defendant execute such conveyance thereof to the plaintiff, to be settled by the Master in case the parties differ; with liberty to apply, &c." In *Lavender v. Roberts* (28 June, 1806), *Warring v. Barling* (10 April,

1818), and *Langdon v. Wilmot* (25 February, 1828), the decree was in the same form. In *Meux v. Ferne* (5 February, 1818), and *Spring v. Allen* (12 February, 1830), a sale was directed, instead of a foreclosure; but in both these cases the mortgagee was allowed six months to pay the debt. See also *ex parte Langston*. The same doctrine applies when the property is COPYHOLD, and the deposit of a copy of court roll will create an equitable mortgage. See *ex parte Warner*, 19 Ves. J. 211; *Whitbread v. Jordan*, 1 Young & Co. 303.; *Winter v. Lord Anson*, 3 Russ. 492.

"Sir WILLIAM GRANT held, in *Norris v. Wilkinson*, 12 Ves. J. 192, that these deposits must be made with the view and intent of an immediate security, and not *diverso intuitu*.

"An agreement of this nature must be stamped with the proper *ad valorem* duty for a mortgage, or it cannot be received in evidence; but when the agreement is *not stamped*, *parol* evidence will be admitted to establish the equitable mortgage. See *Hien v. Mill*, 13 Ves. J. 114.

"If the property be in a register county, the agreement should be registered; but if the deposit is made *without* an agreement, as there is nothing to register, so the equitable claim of the lender will not be lessened. (See *Sumpter v. Cooper*, 2 Barn. & Ald. 223.)"

Business of the Courts.

COURT OF CHANCERY.

Vanderghucht v. De Blaquiere, appeal motion, for judgment—*Smith v. Elgie*, appeal motion, by order.

Cause Petitions.

Attorney-General v. Dupre, petition by order—*In re Stafford Charity*, ditto—After which, 22 Lunatic Petitions, and

Attorney-General v. Wilson, petition by order.

VICE-CHANCELLOR'S COURT.

Unopposed Petitions and short Causes, after which Causes by Order.

ROLLS' COURT.

Codrington v. Johnstone, petition by order—*Pritchard v. Foulkes*, to be spoke to—*Day v. Croft*, petition by order, and remaining petitions.

ERRATA.

Vol. II. p. 154—COMMERCIAL CASE. The name of the Cause is "*Sturge v. Philipotts*."

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LECTOR.—We really do not understand you,—and your expression "table" only increases our darkness; probably you intended to allude to CITED cases.

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The Legal Guide.

VOL. II.]

SATURDAY, AUGUST 17, 1839.

[No. 16.

LEX LOCI DOMICILII.

PART I.

IN CASES OF LEGITIMACY.

THE PRESUMPTION OF THE LEGITIMACY OF A CHILD BORN IN LAWFUL WEDLOCK.

(Continued from p. 227.)

LORD LYNDHURST, in the case of *Morris v. Davis*, (cited in our last), after noticing the peculiar circumstances of that case, again entered upon the question of law. His Lordship referred to what was said in the *Banbury Peerage Case*, by Lord REDESDALE; that most learned, able, and acute lawyer, expresses himself thus, "I admit the Law presumed the child of the wife of A, born when A might have had sexual intercourse with her, or in due time after, to be the legitimate child of A; but this was merely considered as a ground of presumption, and might be met by opposing circumstances. The fact, indeed, that any child, is the child of any man, is not capable of direct proof, and can only be the result of presumption; understanding, by presumption, a probable circumstance drawn from facts, either certain or proved by credible testimony, by which may be determined the truth of a fact alleged, but of which there can be no direct proof." He also says, "It is, therefore, of high importance to consider, in a question of legitimacy,

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whether the fact of such acknowledgment as would demonstrate the legitimacy did take place, or whether by circumstances such acknowledgment was rendered impossible, as by the child being a posthumous child. If, on the contrary, it appears that the supposed father was ignorant of the birth of such a child, and that the fact of its birth, was concealed from him, such concealment is strong presumptive proof that there had existed no sexual intercourse, which could have made him the father of such child." Lord ELLENBOROUGH's opinion, though delivered in more general terms, coincides with that given by Lord Redesdale; these were followed by the opinion of Lord ELDON to the same effect. Lord ESKINE considered it necessary to prove the actual impossibility of sexual intercourse having taken place; but no lawyer will now contend that that opinion can be sustained. The case comes back, therefore, to the question of *fact* (about the *law* there is no doubt); are the circumstances of this case such as ought to satisfy the person who has to decide upon it, that sexual intercourse did not take place between Mr. and Mrs. Morris in the spring of 1792?

Having already stated the facts of the case, I shall not repeat, but merely refer to them. Mr. and Mrs. Morris, though separated, had, to a certain degree, communication with each other. It must, however,

R

be remembered, that, at that time, Austin was carrying on an adulterous intercourse with Mrs. Morris; and it must also be remembered (for that occurs in the evidence of several of the witnesses), that Mrs. Morris had a personal dislike to her husband, which she expressed in the strongest and coarsest terms. These things are not to be omitted in considering the question, whether sexual intercourse did or did not take place between them, notwithstanding the separation. When Mrs. Morris became pregnant, she made no communication of that circumstance to Mr. Morris; and no reason, in point of evidence, has been assigned for that concealment; she was exposing her character, without necessity, if sexual intercourse with her husband had taken place. At the time when the child was born, the birth of that child was concealed; it was industriously and carefully concealed, and concealed from Mr. Morris; and Austin was acting in that concealment. What reason, can be assigned, or, in point of evidence, has been assigned, for this conduct, except the desire that the fact should not be known to Mr. Morris? Mrs. Morris was hazarding her reputation; she was endangering the life of her child; she was depriving that child of its prospects, as the heir of Mr. Morris, and she was giving it only the hope of being the heir of a person who was destitute of property. Surely these are circumstances so strong, that they ought to be encountered by some evidence tending to show a probable reason why that concealment should have taken place. It was not a mere momentary act; it was followed up throughout. The mother allowed the child to be removed from her, and to be christened as "a base born child." She allowed it, during the life time of Austin, up to the period of his death, to pass as the child of Austin. When she was charged, in consequence of some reports, with having had a child, she strongly denied the accusation; and during the seventeen

years that Mr. Morris lived, she never whispered to him that she had any other child than Harriet Davis. I require, then, when I am coming to a conclusion of fact, as to whether or not sexual intercourse did take place between these parties,—I require some reasonable and satisfactory ground upon which that concealment may be explained.

But what is the representation which the present plaintiff himself gives of all those transactions as collected by himself—the result of his own inquiries. It was proved on the last trial, and is in evidence in the cause. "I was born," he says, "in the White House, Llanfair; when born, Saturday, market-day, my father came trembling, and said, 'Ann, what shall I do?'—'Don't be afraid—we shall do very well!' As soon as I was born, I was kept warm by him, taken into a malt-house, and sent on; and Ann followed at edge of night, and Ann rode within a mile of Wem before she alighted, and then gave me to my father, when she told Mr. Austin to take me to Wem; and they both turned back, and got to Llanfair at the night of next day, when she went to many shops to buy things, that people might not think she went out. Mrs. Morris at that time kept her bed. She took a flasket of wine and biscuit for me on the road. Miss Gwynne was not present at my birth, but was backwards and forwards at that time, and knew of it; and when Mrs. Morris and her fell out, she asks her, 'Where is the child without a father?' This is the history of the transaction, as collected by the plaintiff himself, in the course of the inquiries which he had made upon the subject, and which was contained in a book in his own hand-writing.

I endeavoured in the course of the argument to obtain some reason for this concealment. It was said at the bar, that it might be referred to this circumstance, that Mrs. Morris was not fond of Mr. Morris; that she disliked him; that she wished to continue to live separate; and

that she might have supposed, if the circumstance had been communicated to him, it would have affected the separation. This, however, is an argument against the probability of her having permitted sexual intercourse to take place between them. But the argument is also inconsistent with the statement she herself made, as proved by the evidence of Miss Gwynne, whom she compelled to go down upon her knees, and to promise that she would keep the affair concealed. It is quite inconsistent with the particular declaration she at that time made ; and to which declaration I refer, not for the purpose of proving that the child was the child of Austin, (for it cannot be made use of for that purpose), but for the purpose of negativing the speculative reason which has been assigned at the bar for the concealment.

Again, it has been suggested, that as she was attached to Austin, she might not wish him to be apprised of that species of infidelity on her part—her having connexion with her husband. But to adopt such a view of the transaction, would be to forget the character of the parties : it would be to suppose a degree of refinement, altogether incompatible with the established facts, to have existed in the intercourse between Austin and Mrs. Morris,—the servant and the mistress,—persons who appear, by the evidence, to have been of the coarsest character, as to morals and conduct. Such a theory is of too speculative a nature for the Court to adopt it as an ingredient in its judgment. The concealment, coupled with the other circumstances of the case, and the utter ignorance in which Mr. Morris was kept to his death, a period of 17 years, with respect to the transaction, satisfies me as a conclusion of fact, that *no* sexual intercourse did take place between Mr. and Mrs. Morris at such a period as could have rendered the child the offspring of Mr. Morris.

In giving this judgment, I affect *no rule of law*. I state the rule as I find it. It is

founded on sound sense : and, as I am bound to do, I acquiesce in it. I have come, like a jury, to a conclusion of *the fact*. The circumstances of the case are such as to lead me to that conclusion, not, as I think, upon a bare balance of probabilities, but as the result of the thorough conviction of my mind, founded upon a careful and patient attention to all the evidence in the case. I am bound, therefore, having this impression, to state my opinion, that the plaintiff is *not* entitled to the property in dispute, as the son of Mr. Morris.

(To be continued.)

PROBLEM XVI.

VOL. 2.

CONTRACTS.

What Contracts are void at Common Law, as affecting Public Policy ?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 14. VOL. II.

WHAT IS A FEOFFMENT ?

A Feoffment is a conveyance which operates by *transmutation of possession*, it is essential to its completion that the seisin be passed, (livery of seisin will not be *presumed* within any period less than twenty years. Doe v. Marq. of Cleveland, 9 Bar. & Cress. 864. Doe v. Davis, 2 Mee. & Wel. 503.) hence it can only be adopted in cases where the seisin may be, and actually is, to be conveyed, as in transfer of estates of freehold in possession. In the transfer of chattel interests there is no seisin to be conveyed, as the seisin remains in the freeholder, hence a term of years cannot be conveyed by Feoffment. In the transfer of reversions, or remainders, or a freehold, the actual or corporeal seisin is not concerned, as it continues in the particular tenants : hence they cannot pass by Feoffment but by grant. Hence too

Feoffments can only be made by a person in *the actual seisin* to a person who is *not in the actual seisin*, and therefore one joint tenant cannot *enfeoff his companion*, because his companion has the seisin already: each joint tenant being seised *per une et per tout*. But as tenants in common and coparceners as to some purposes have several freeholds, they may enfeoff their companions of their respective shares. But a Feoffment by a person having *no right of property in the lands* will pass them, because the moment he enters to give seisin he gains the fee simple. This mode of conveyance was in many instances the most advisable, as it cleared all disseisins, &c. and turned all other estates into rights, so that a fine levied by a feoffer to the feoffee, or by thefeoffee to a stranger, would (before the operation of the statutes abolishing fines) have barred them, if not avoided within the time prescribed by the statute, but to give a fine this effect one of the parties must have had the *freehold* (a) The giving of livery is often attended with inconvenience and expense when the feoffer resides at a distance from the lands, but this may be easily prevented by executing a power of attorney, and we may remember that aggregate Corporations must always make attorneys under their common seal to deliver and receive seisin. A Feoffment therefore is incompatible with any conveyance operating by *way of use*. A Feoffment and bargain and sale cannot be made by the same person of the same lands at the same time, for the Feoffment conveys the seisin or possession to the feoffee, while it is absolutely essential to a bargain and sale that it remain in the *bargainer*. If the Feoffment take effect the possession *must be out of him by the very act of livery*, and if the possession *be out of him* he cannot be seised to the use of the bargainer. A bargain and sale is a contract

to convey, and not an absolute conveyance as a Feoffment. A person cannot contract to sell what he has actually parted with. If he convey the possession to another he can have none in himself to supply the use. A clause of warranty (which is now abolished by statutes 3 & 4 W. 4, c. 74, s. 14; 4 & 5 Ib. c. 92, s. 11, and 3 & 4 Ib. c. 27, s. 39,) was (before these statutes) usually added to a Feoffment, but it was preferable to insert a covenant by the Feoffer for himself, his heirs, executors, and administrators, as the warranty only bound the *heirs*. Yet it was deemed sometimes prudent to insert a clause of warranty in addition to the covenant, as it might possibly bind a reversioner or remainder more when no assets descended, and be even a bar to a latent entail.

A Feoffment is a mode of assurance seldom resorted to at present, being superseded by lease and release, operating by means of the Statute 27 Hen. 8, c. 16, s. 1, for "transferring uses in possession."

H. T. D.

Law Reports.

COURT OF CHANCERY—Aug. 7.

MURRAY v. WALTER AND OTHERS.

APPEAL FROM THE VICE-CHANCELLOR.

PRACTICE.—PARTNERS—JURISDICTION of the COURT to make an order under a Bill filed by one partner to produce documents in the hands of another partner, appointed for himself and other partners as a common agent, for the benefit of all in the absence of the other partners.

Mr. Richards and Mr. Romilly appeared for the plaintiff; Mr. K. Bruce and Mr. Bacon appeared for the defendants.

Mr. Richards said, he had to apply to his Lordship that the defendants might be ordered to produce and deliver into the hands of the Clerk of the Court, the several documents and papers enumerated in a schedule appended to the answer of the defendants, or that the plaintiff might be allowed to inspect the same at the office of the *Times* newspaper, on giving reasonable notice; and that so much of an order of the

(a) See Doe v. Lynes, 2 Barn. & Cress. 388; Reynolds v. Jones, 2 Sim. & Stu. 206.—ED.

Vice-Chancellor, bearing date 6th of June last, as directed the plaintiff to pay the costs of an application made to the Vice-Chancellor, for the same purpose, and refused by him, be discharged. A bill had been filed by Mrs. Murray, widow of the late Rev. James Murray, against the defendants, who were some of the proprietors of the *Times* newspaper, the prayer of which was that it might be declared by the authority of the Court, that the plaintiff continued, subsequently to the 30th of June now last past, and still was, one of the proprietors in co-partnership, conducting the said newspaper, and that an account might be taken, under the direction of the Court, of what were the gains and profits to which the plaintiff was entitled in virtue of that character. The bill stated that in the year 1815, the defendants, Messrs. J. Walter, T. M. Alsager, and J. Lawson, entered into an engagement with Mr. Murray to employ him in the superintendence and general management of certain articles published in the *Times* newspaper relating to foreign intelligence and politics ; that afterwards, in the month of November of that year, Mr. Walter agreed with Mr. Murray to admit him as partner in the newspaper, and sell to him one moiety of 1-16th part of the newspaper and the profits to arrive therefrom for the sum of £1,400. ; that after the execution of this assignment, Mr. Murray continued to superintend the department of foreign politics until in 1831 he became one of the principal editors of the *Times*, and that under the assignment he was entitled to 1-32d part of the profits accruing from the *Times* ; that Mr. Murray died in 1834, and that Mrs. Murray, as the legal representative had become entitled to the share of her deceased husband. The bill proceeded to state, that since the death of Mr. Murray large profits had been made in respect of the before-said copartnership, and that no account had been rendered of the annual proceedings ; that the plaintiff had, since the death of Mr. Murray, made various applications for such an account, and that a pretence was now set up by the defendants, that in the indenture executed in November, 1819, Mr. Walter had reserved to himself the right of repurchasing the share of Mr. Murray, on giving six months' notice of his intention to do so, for the sum of £1,400. The bill went on to state that the parties defendant had in their possession various deeds, documents, and papers, containing the accounts which the plaintiff had applied to see. The answer of the defendant, Mr. Walter, stated that in the year 1819, having withdrawn from the management of the *Times* newspaper, he formed the intention of parting with certain profits accruing to him from his interest in publishing that paper ; and at Mr. Murray's solicita-

tion, in the November of that year, he agreed to assign to him such part of the profits as had been stated by the defendant, reserving to himself the right of at any time resuming the share. The answer of the defendant then set forth the indenture under which the assignment took place, in which, besides the right to repurchase the share for the sum of £1,400., it was stipulated that Mr. Murray should claim no share in the management of the newspaper. The defendant admitted that large profits had accrued from the sale of the *Times*, all of which were, as the defendant believed, duly accounted for to, and received by, Mr. Murray, the treasurer having been directed to pay to Mr. Murray the half of the one-sixteenth to which he was entitled ; that the plaintiff had, since the death of Mr. Murray, been duly informed of the amount to which she became entitled in virtue of the share possessed by her ; that she had regularly received the same, and given receipts in the usual form ; that defendant believed such receipts and payments had been so taken and made, and such accounts kept by the treasurer and common agent of the proprietors, authorized by them for that purpose. The answer proceeded to state, that Mr. Murray, from his knowledge of the affairs of the newspaper, was well acquainted with the mode and nature of ascertaining the accounts and the balance of profit ; that the defendant believed that the accounts might at all times have been inspected by Mr. Murray during his lifetime, and that he fully acquiesced in the mode of keeping them ; that Mr. Murray's share of the profits was regularly handed to him, and a receipt was given by Mr. Murray in which he stated that he had received his share ; that Mr. Murray did not at any time dispute or question the correctness of the statement of the accounts ; that the defendant could not set forth a gross account of the annual receipts and expenditure of the newspaper ; that in June, 1836, the defendant determined to repurchase the half of the one-sixteenth share in the possession of Mrs. Murray, and gave notice accordingly, in terms of the indenture, to J. Goldie, executor of the deceased Mr. Murray, not knowing at the time that Mr. Goldie had renounced probate ; that notice was afterwards given to Mrs. Murray, who demanded the production of the account-books before referred to ; that she was then informed by the defendant's agent that it was not in his power to produce them. The answer also stated that the names of all the proprietors were therein set forth, and that defendant believed that the treasurer, as agent of the proprietors, had in his possession all the account-books of the newspaper, the particulars of which defendant did not know. In another part of his answer, the defendant stated that the indenture before re-

fferred to and certain other deeds were in his possession. In a further answer put in by him the defendant stated that he had caused application to be made to the treasurer for a list of all receipts and books of account in his possession, and that the treasurer had informed him that he had in his custody the several books, receipts, and vouchers mentioned in the former answer, but the defendant denied that they were in his possession or power, or in the custody or power of the other defendants, except so far as they were in possession of the treasurer. The learned Counsel went on to say, that the case had come on before the Vice-Chancellor, who had determined that the plaintiff was entitled to the deeds, documents, and papers admitted to be in Mr. Walter's own possession.

Mr. K. Bruce.—That part of the application was not resisted.

Mr. Richards.—The Vice-Chancellor had determined that the plaintiff had no right to have an inspection of the documents and books in possession of the treasurer, and that the plaintiff should defray the costs of the application. In support of the application he made on behalf of the plaintiff, he would direct the attention of the Court to a case which they had not cited before the Vice-Chancellor, which seemed to show that the plaintiff in this case was entitled to the possession of the books, although all the parties in partnership were not before the Court. The case was that of "Wallborne and Ingilby," 1st Mylne and Keene, decided by Lord Brougham. In that case certain books and papers, in which parties not before the Court had an interest, were admitted to be in the possession of a common agent. An order was made to allow the inspection of the books, on the principle that the Court had a right to give whatever inspection the defendant himself was entitled to.

The LORD CHANCELLOR.—The parties might be called on to produce the books, but the Court does not exercise jurisdiction in such a case, all the parties being interested—those not before the Court as well as those who are.

Mr. Richards contended that the jurisdiction in that case was plainly exercised. In this case it was quite plain, from the assignment made by Mr. Walter to the deceased Mr. Murray, that the latter had become entitled to a 32d share in the newspaper. That was admitted by the defendant. It was also admitted that considerable gains had been made by the sale of the newspaper down to and after the time of Mr. Murray's death, and before there could be a pretence for saying that the interest possessed by his representative in the concern had ceased. He thought this admission would be completely sufficient to induce the Court to say that the plaintiff's interest in the books kept by the concern was proved. Mr. Walter

and the other defendants might attempt to set up a defence that the plaintiff had no right to inspect the documents because those who were placed precisely in the same situation as themselves with respect to the plaintiff were not brought before the Court. That was no fault of the plaintiff's; they had not been parties to the record, because the plaintiff was ignorant of their names, and in the mean time it might be extremely material to her interest that she should have an opportunity of inspecting the books as soon as possible. It was also important on this ground that the books would enable her to see who the partners in the concern really were. He submitted to the Court that the objection which the Vice-Chancellor had taken to the application, on account of the absence of the other proprietors, could not be sustained. He conceived it was not sufficient for the defendant to say that accounts of the profits had been rendered from time to time to Mr. Murray and his widow. They admitted that books and documents relating to the matters mentioned in the bill were in the possession of their agent, and that at once gave the plaintiff a right to inspect them.

The LORD CHANCELLOR.—The application proceeds on the supposition that this person is the accountable agent of all the parties.

Mr. Richards.—Of all the parties.
Mr. K. Bruce.—Present and absent.

Mr. Richards said, this person was admitted to be the treasurer, and therefore must be taken to be the treasurer, not only of the parties who had filed the bill, but of all the parties interested in the newspaper. In the case of "Wallborne and Ingilby," the party who stood in the analogous position was not only the agent of the parties who had answered the bill, but of those who had demurred.

The LORD CHANCELLOR.—You can only have such an order as the Court can enforce. How can an order be enforced against the defendant, he not having the controul over the books which the plaintiff wished to inspect?

Mr. Richards.—One partner might have the controul over the books of the concern. The defendant admitted that he was a partner, and as his share appeared to have been the largest, the inference was that the books were under his controul.

Mr. K. Bruce.—Mr. Walter's share is but small. It has been much diminished by such grants as the one he made to Mr. Murray.

The LORD CHANCELLOR.—The question is, whether one partner can have the controul over books which are in the custody of another acting on behalf of himself and others?

Mr. Richards submitted that the case of "Wallborne and Ingilby," which was even stronger than the present, was sufficient to establish the propriety of his application.

The LORD CHANCELLOR.—There are certain cases the other way.

Mr. K. Bruce.—Oh, certainly. It is an application which cannot be supported on the face of it.

Mr. Romilly said, the defendants contended that Mr. Murray might in his lifetime have inspected the account-books, and if he had not done so, it was because he was satisfied without having recourse to that step. If that were so, then the deceased's legal representative might also inspect the books, standing in exactly the same position. With respect to the right of persons to inspect documents where some of the parties interested were not before the Court, a material distinction arose as to the party applying. It would be very different if the party applying were a stranger; but here it was admitted that the applicant was a partner up to the 30th of June, 1838. The rule that documents could not be inspected because some of the parties interested were not before the Court, might apply to the case of a stranger, or to the case of the plaintiff after June, 1838, but up to that time she was admitted to be a partner, and her right to inspect the books was undeniable, for the rule of refusing the inspection of books could not be applied where a partner made the demand. If that were not so dangerous consequences might ensue; for, in order to prevent any partner from inspecting account-books, and ascertaining the accuracy of the accounts, it would only be necessary to place the books in the hands of a common agent. He was quite sure that it would not be said this motion was to be defeated on the ground that Mr. Walter had not the means of making an inspection of the books.

The LORD CHANCELLOR.—One partner may have the power of doing as he likes with those who are absent; but that can make no difference as to the rule, which must be the same whether the proprietor be influential or not.

Mr. K. Bruce.—Mr. Walter's share is much less than that of others.

Mr. Romilly said, that no account of the partners could be depended on as accurate without the production of the books. There might be a complete failure of justice if the application was to be eluded, because the names of all the proprietors were not on the record. The defendants might say, "No, there are other parties interested besides those enumerated," and the plaintiff might go on amending the return from time to time, without ever being able to ascertain the true state of the case. It was alleged that a smaller dividend had been paid on the plaintiff's share up to the 30th of June, 1838, than ought to have been paid. It was for the interest of the defendants that their books should be inspected, in order that it might be shown that a sufficient

dividend had been paid. He hoped that the Court, seeing that the interests of the defendants were really the same as those of the plaintiff, would not consider the fact that all of the proprietors were not before the Court, an objection fatal to the motion.

(*To be continued.*)

QUEEN'S BENCH.—*May 31.*

Sittings in Banco.

STOCKDALE v. HANSARD.

JUDGMENT.

(Continued from p. 235.)

We have arrived at the Revolution, in which Holt took a conspicuous part. He owed to it the seat which he filled with such unrivalled reputation. On three several occasions he found himself compelled to deal with questions of Privilege, and on all he gave his judgment against the claim. I shall not dwell minutely on Knolly's case, where he with the whole Court came to a different conclusion from the House of Lords, as to the supposed Earl of Banbury's right to that title. The Attorney-General asserted that that was no question of Privilege, but merely whether an individual was a Peer or not. One might have supposed that the issue, whether one claiming to be a Member of either House of Parliament was such or not, had some relation to Parliamentary Privileges, especially when the restraint of his person on a criminal charge was involved in that question.

The Lords considered it matter of Privilege, and questioned the Judges. But the matter, it seems, had not been formally referred to the House of Lords, and was not duly brought before them. They had, however, formally given judgment, and of that the Court was informed. How could the Court know that the Lords had proceeded extra-judicially if utterly ignorant of Parliamentary matters, or be permitted to inquire into those methods of proceeding if their own subordinate station estopped them from questioning any act done by the paramount authority of a House of Parliament?

Without further pressing Knolly's case, I confess it was not without difficulty that I could trust the evidence of my own senses, when the Attorney-General set aside the authority of *Ashby v. White*, by declaring that it was not a question of Parliamentary Privilege. If not, the three Judges who differed from the Chief Justice were strangely deceived; the Chief Justice himself misapprehended both their reasoning and his own; the House of Lords was mistaken in their view of the subject, when they adopted the Chief Justice's opinion against that

of his three brethren ; and the House of Commons was most of all ignorant of the truth, when (17th January, 1704, three days after the Lords had reversed the judgment of the Queen's Bench) being " informed that there had been an extraordinary judgment given in the House of Lords, upon a writ of error from the Queen's Bench, in a cause between Matthew Ashby and William White, wherein the Privileges of the House were concerned," they brought the proceedings before them, and after great debate, resolved that " Ashby having, in contempt of the jurisdiction of the House, commenced such action, was guilty of a breach of their Privileges, and that whoever should presume to do the like, and all attorneys, solicitors, counsellors, serjeants-at-law soliciting, prosecuting, or pleading in any such case, are guilty of a high breach of the Privileges of this House." The Lords, after full inquiry by a Committee, resolved, on the other hand, that the declaring Matthew Ashby guilty of a breach of the Privileges of the House of Commons, for prosecuting an action against the constable of Aylesbury for not receiving his vote at an election, after he had in the known and proper methods of law obtained a judgment in Parliament for the recovery of his damages, is an unprecedented attempt upon the judicature of Parliament, and is, in effect, to subject the law of England to the votes of the House of Commons."

And now we are gravely informed that this case concerned not the Privileges of Parliament. If, however, the opinion of all the Judges, and of both Houses, and of all historians, and all lawyers, till that assertion was made, be correct, then that case decided that the Courts of Law were not bound by the opinion of the Commons' House on matters of election, whereupon they claimed the sole right of judging, and had actually given judgment, but that the law must take its course as if no such judgment had been given by the House of Commons, and no such Privilege claimed. On this point the decision has never, to my knowledge, been impugned in any of our Courts : Lord Mansfield is supposed to have dissented from it, but his doubt applies to the form of declaration merely ; and his own practice at the bar (14 East, 138, in the note), of asking leave of the House of Commons to commence such actions, proves only his cautious desire to avoid and avert from his clients the doom denounced against Ashby, Paty, and their brother burgesses and others, in *pari delicta*, their counsel and attorneys.

In their case, commonly designated as the case of the Men of Aylesbury, a question of the utmost difficulty and importance was brought before the same Chief Justice and the Court of Queen's Bench. The House of Commons,

acting on the resolution just cited, pronounced those persons guilty of the breach of Privilege there prohibited, and sent them to Newgate for a contempt in bringing their action. They sued out their habeas corpus. Holt, in a judgment of the highest excellence, gave such reasons for restoring them to liberty, as it is easier to outvote than answer; the other three Judges thought the adjudication of the House of Commons on a contempt brought before them could not be gainsayed in that proceeding. The Judges of the other Courts are understood to have concurred with the majority in the Queen's Bench ; and the opinion just cited must be taken as that of eleven Judges against one ; but the other eight could only have stated their first impression, without publicity, and without hearing the argument.

(To be continued.)

COURT OF THE SHERIFF OF MIDDLESEX.

Aug. 6.

HATTON v. WILSON.

SERVANTS.—*The right of a servant to a month's wages in lieu of a month's warning.*

The action was brought to recover a quarter's wages at the rate of £50. a-year, together with £4. 3s. 4d., in lieu of a month's warning. The former sum was paid into Court. The right to the latter was disputed.

Mr. Adolphus appeared for the plaintiff, who had been a butler in the service of the defendant, John Wilson, Esq. a gentleman in independent circumstances, residing at 16, Devonshire-street, Portland-place. It was sufficient to state, said the learned Counsel, that the servant, because he told his mistress that he would leave defendant's service, was accused of being saucy, and ordered to quit that moment. This happened at ten or eleven o'clock at night, and because he delayed a few moments to pack up some little necessaries, a police-constable was called to turn him out.

Frederick Bannister, D 85, deposed to this circumstance. Plaintiff did not appear impertinent. He said to Mr. Wilson that he had no wish to hurt his feelings, and he would leave his house directly. When the plaintiff asked for his wages, including the sum for the month's warning, the defendant replied, " Make out your bill, and I'll pay you to-morrow." He then left. Witness was told to call in next morning, which he did. Mr. Wilson spoke about the plaintiff's wages. Witness advised him to pay the additional month.

Elias Belham—Was in the service of defendant, as under-butler. On the 22d of May

Hatton and his mistress had a few words. Plaintiff said he would leave her service. She replied, it should be that night then. Hatton said, of course he should expect a month's wages instead of the usual notice. Mrs. Wilson said he had warning from his master three or four weeks ago, and that warning was going on. Plaintiff made answer that he had made it up with his master, who had desired him to go on steadily, and take no further notice of it. That happened while they were at Bath. He never saw Hatton in liquor. He was a steady man as far as he knew. It was understood amongst the servants that they might be sent away at twenty-four hours' notice. Plaintiff told him when he first came to Mr. Wilson's that nothing of the kind was mentioned to him on engaging with defendant. While he was in the house, three or four servants had left on the general understanding of twenty-four hours' notice.

Mr. Flower, for the defendant, submitted that there was no proof of a hiring at £50. a-year.

Mr. Adolphus replied, that in ninety-nine out of a hundred of these cases it would be scarcely possible to prove this. He hoped the Under-Sheriff would allow the case to go to the jury.

The UNDER-SHERIFF reserved the question as to the pleadings for the Court above, and said, the question was, whether the plaintiff was entitled to a month's wages in lieu of a month's warning. A common understanding generally prevailed on that point. He believed it was law—at least he never heard to the contrary. He believed it was for the convenience of both parties that it should exist; but at the same time every person was at liberty to make a contract to the contrary. Whether that had been so in this instance the jury would judge from the evidence.

Verdict for the plaintiff; damages, £4. 3s. 4d.

PALACE COURT, Aug. 9.

BERENSTEIN v. HODGSON.

SUGAR BAKERS' WORKMEN—being yearly Servants. Their legal right to certain HOLYDAYS during the year.

This action was brought by the plaintiff to determine his legal right (and consequently the right of all the workmen in the sugar baking warehouses) to certain holydays in the year, notwithstanding they were yearly servants, and paid their salaries quarterly.

The plaintiff, Karl Berenstein, a German, was employed in the factory of Mr. John Hodgson sugar-refiner of Dock-street, Whitechapel, the

defendant. Plaintiff, with the other in-door workmen were engaged by the year. Their salaries were paid quarterly, but when the payments were made, one month's wages was always detained by the master in case of misconduct on the part of the men. Now the men, for upwards of 20 years it was proved, had been in the habit of enjoying certain holydays, namely, Christmas and the two following days, also Easter, Whitsuntide, with the two succeeding days consecutively, and Good Friday. This was the established practice of that particular trade, both in the metropolis and at Bristol. The masters wished to deprive them of this privilege, but the men resisted and were consequently dismissed for disobedience, and their last month's wages detained. It was further alleged, on the part of the men, that they were Lutherans, and attended divine service on the holydays in question. That was the plaintiff's statement. He now, on behalf of himself, and to settle the point with his fellows, brought his action to recover first, the one month's wages up to the period of his abrupt discharge by the defendant, which, at the rate of £26. a-year, was £2. 3s. 4d.; secondly, £1. 12s. 6d. for odd days; and thirdly, another month's wages in lieu of warning. Defendant's statement was that the trade had been at a stand for several months in the spring of 1838, and also for some time in the present year. Soon after, trade became brisk, and wishing to make up for lost time, they requested the men to work on the holydays at Easter. Some complied. They received, in addition to their yearly salary, five shillings a-day for their additional work. On requesting them to do the same at Whitsuntide, they declined, and were therefore discharged. They were not legally entitled to any part of their wages for that current quarter. Plaintiff's reply was, that during the stagnation of trade they had always been employed about odd jobs, oftentimes much more disagreeable than sugar boiling, and they had not refused to obey lawful commands. The claim was originally for £5. 19s. 2d., but to prevent the removal of the action to another tribunal, the damages were laid at £4. 19s. No special contract had been entered into on the engagement of the workmen. They had been told merely to go to work, which they did, trusting to defendant's good faith that he would fulfil the usual conditions.

The JUDGE addressed the jury, and said, if they were of opinion that the workmen had acted with no impropriety, they would return a verdict for the plaintiff for the full amount.

The jury, after being locked up for a considerable time, found for the plaintiff; damages, £4. 19s.

Summer Assizes.

HOME CIRCUIT.—*August 7.**Croydon.**Before LORD CHIEF JUSTICE TINDAL.**DENCH v. WEBB.*

INFANCY.—Whether *Damask Goods and expensive Upholstery are to be considered as necessaries for a YOUNG LADY of 15, occupying apartments, and who did not appear to have the means of paying for them.*

This was an action brought by the plaintiff, an upholsterer, to recover from the defendant, Maria Webb, also sued as Anne Angerstein, the sum of £67., being the balance of an account for goods sold and delivered, and for labour done.

The defendant pleaded infancy, and that the goods were not necessaries.

Mr. Petersdorff said that his client was an upholsterer, carrying on business in Seymour-street, Bryanstone-square, and he had first had dealings with the defendant in the year 1837. She represented herself as the lady of Colonel Angerstein, and her appearance was that of respectability, and was such as, in his opinion, to justify the plaintiff in furnishing her with the articles he had sent, which were only such as be-fitted her station. The bill originally amounted to £170., but a considerable portion had been paid, which reduced it to £67., which was the sum now sought to be recovered. His client admitted the infancy of the defendant, and the only question for the jury to decide was whether the goods were necessaries or not.

Charles Dench deposed that he was the plaintiff's son. He knew the defendant, who first had dealings with them in 1837. At that time she lived in a first-floor in Star-street, Bryanstone-square. The rooms were partly unfurnished, and different articles were sent in to complete them. A middle-aged woman, who appeared to be a servant, was also in the house. Among the articles sent in were aloo table, for which sixteen guineas were charged; eight stained rose-wood chairs, bell-pulls, damask curtains, a seven-foot sofa, covered with damask, with feather pillows, hyacinth artificial flowers, carpets, cheffoneers, fenders, &c. A sofa had also been hired by the defendant, for which hiring four guineas and a half were charged.

Lord Chief Justice TINDAL asked the witness what would have been the full value of the sofa?

The witness replied, between five and six pounds.

Lord Chief Justice TINDAL—And so you charge four guineas and a half for the hire of an article not worth more than five or six pounds? That can't be a reasonable charge.

Witness—The lady agreed to pay so much per week for the time she kept it.

Cross-examined by Mr. Shee—Did you make any inquiry about the defendant before you began to supply her?

Witness—I believe not.

Mr. Shee—Don't you think it is rather an extraordinary proceeding to trust a young lady under age with a hundred guineas worth of upholstery, without making some inquiry about her?

The witness, in reply, said that she represented herself as the wife of Colonel Angerstein. They thought she might have had “a quarrel” with her husband. He did not consider it at all extraordinary that a colonel's wife should be furnishing apartments in such a manner. He admitted that he had since been informed that the “middle-aged woman” who acted as servant to the defendant was, in reality, her mother. They had charged twelve guineas for eight stained rose-wood chairs, and this he considered a fair price. They charged sixteen guineas for the sofa, and this he also thought a reasonable charge. He thought that a sofa was an article necessary for a young lady.

The COURT asked the witness whether he thought such articles as he had mentioned were necessaries for a young female who did not appear to have any means of paying for them?

The witness said he thought they were suited to her rank and station.

He then admitted, on being questioned by Mr. Shee, that the greater portion of the money paid by the defendant was in small sums, weekly, but said that he did not know that this was what was called “on tally,” or not.

John Scott was then called to prove the delivery of other goods.

In answer to a question from Mr. Petersdorff, he said that upon one occasion he heard the defendant playing upon a piano.

Mr. Petersdorff said he merely proved this to show that the defendant was a person of talent and education, suitable to the rank she assumed.

Mr. Shee asked the witness, Scott, what he meant by saying he heard the defendant play upon the piano; and he said that she was merely making a noise upon it, as though she was “trying to play.” [laughter.] In point of fact, she could not play at all.

Mr. Shee—My learned friend ought not to have put the playing of the piano upon us. [roars of laughter.]

Mr. Petersdorff—That is my case, my Lord.

Lord Chief Justice TINDAL—Then it is no case at all.

Mr. Shee—We can prove that at the time these goods were delivered, the defendant was only fifteen years old.

Mr. Petersdorff submitted to the Court that there was sufficient evidence to go to the jury.

Lord Chief Justice TINDAL—You have not given us the slightest proof that these articles were necessaries. Damask goods and sofas of such a description could not be necessary for a young female in the defendant's station. If you press me, the case shall go to the jury, but my opinion is that there is no case made out.

Mr. Petersdorff said, that after such an intimation from the Court, he could not press the case further.

The plaintiff was accordingly nonsuited.

Croydon, Aug. 12.

Before LORD DENMAN, C. J.

Special Jury.

LANE v. BARDSEYE.

MINING ADVENTURERS—*Their liabilities to their engagements for shares, notwithstanding misrepresentation.*

The defendant in this case had given his acceptance to a bill of exchange for some shares in THE WEALD MORGAN MINE, in Devonshire, belonging to the plaintiff, and when the bill became due he refused payment, and the present action was brought to recover the amount.

The defendant pleaded, first, that he had not accepted the bill; and secondly, that if he had done so, he was induced to do so by fraud, covin, and misrepresentation; and without receiving any consideration for it.

Mr. Chambers addressed the jury for the defendant. The learned counsel said that he was of opinion that the first plea put upon the record by the defendant ought to be abandoned, but he should with confidence rely upon the other plea, that the acceptance had been obtained by fraud, covin, and misrepresentation. He then proceeded to state that the plaintiff in the present action was what is called the lord of certain mines in Devonshire, and with respect to one of these mines, called the Weald Morgan Mine, he had established a company, and issued shares. He had offered some of these shares to the defendant, and represented that the mine was in a flourishing state, that the copper was very rich, and the concern exceedingly prosperous; and in consequence of these representations the defendant had been induced to become a purchaser of a number of shares. He should be enabled to prove that at the time these representations were made the mine did not yield enough to pay its expenses; that it was £700. in debt; and that the shares were, in point of fact, not worth one farthing. He should also prove that almost immediately after these shares were sold, the mine

was stopped from working by the plaintiff, the consequence of which was that the whole of the property on it reverted back to him. He submitted that this was such a case of fraud as would justify the jury in returning a verdict for the defendant. He called the following witnesses:—

Mr. Thomas Johnson deposed that he was a dealer in shares of all descriptions. He knew the plaintiff, and had received instructions from him relative to the sale of some shares in the Weald Morgan mine. His instructions were to state that the mine was in a flourishing condition, that it was very rich, that the copper was very fine, and that it would yield a high price; and he was also instructed to state that the mine was at work in the usual way, and that a number of men were employed in it. The defendant in the month of March made some application to him relative to purchasing these shares, and he made these representations to him relative to the prosperous state of the mine. The plaintiff and the defendant subsequently communicated with each other, and the plaintiff made the same representations to the defendant, and upon one occasion he produced some ore, which he alleged to be the produce of the mine. The plaintiff afterwards informed him that the defendant had purchased twenty shares at £15. each, and that he had got his bill at two months. After this the plaintiff wished witness to sell as many more shares as he could, and told him if he could not get £15. a share, he might take less. Soon afterwards the plaintiff told him that if the shareholders did not come forward with their calls, he should shut up the mine. The effect of shutting up the mine would be that it would revert to the lord. He understood that the mine was afterwards stopped from working.

Cross-examined:—The reversion of the mine would of course depend upon the deed for the formation of the company. He had sold some of the shares in the Weald Morgan Mine for £20. and one for £24. This share he sold to the defendant in 1838. The defendant is clerk to a stock-broker, and is an extensive agent for the sale and purchase of shares of all descriptions. Prospectuses were issued as to the flattering prospects of this mine. The mine, according to witness's belief, was not now at work.

Re-examined: The defendant was not anxious to purchase the shares, but the plaintiff pressed him to do so, and told him that the mine must turn out “a good thing.”

William Trenerry deposed that he was formerly Secretary to the Weald Morgan Mining Company. He went down to inspect the mine in January last. At that time the bottom level was inundated, and no work could be carried on in it. On the upper level, a few men were employed in drawing ore lode, which was very unproductive. There might have been about 20

men employed altogether, but the work was in a very unprosperous condition. The ore that was discovered would not have amounted to more than ten tons. In fact, the mine could not pay its expenses, and must have been in debt at that time.

Mr. Chambers.—What do you consider the shares were worth at this time?—Witness: Nothing. They had no marketable value whatever.

Cross-examined: Had acted as secretary to other mining companies. Mining was a very chance sort of thing. A mine might be unproductive for several years, and then become altogether as profitable.

Mr. Rowland Nicholson produced the books of the company, and stated that in March last it was £700. in debt.

Mr. Wm. Oswald deposed that he was one of the directors of the Weald Morgan Mining Company. He was at the mine in the month of March. Before this time the mine had been very poor. For a short time only it paid its expenses, but it had always been a losing concern. The plaintiff knew the state of the affairs of the mine, because he paid all the men, and had the chief management. He stopped the mine in April without witness's consent or concurrence.

Cross-examined: The shares are not marketable at the present time. At the time they fetched £25.

Re-examined: In the month of March the shares were not saleable in the market.

This was the case for the defendant.

Mr. Wallinger then called two witnesses who proved that they had applied to the defendant for payment of the bill, and that he had admitted his liability, and made no allusion to any fraud having been committed.

Mr. Wallinger then addressed the Jury in reply, and said that he could not help considering that the defence to this action was of a most extraordinary character, and if the jury were to give any countenance to it, it would tend to upset and prevent all kinds of speculation. The jury were aware that undertakings were put forward and representations were made respecting them, and if parties chose to purchase shares without satisfying themselves as to the prudence of investing their money, it was too much to say that, because the speculation turned out unproductive, that they were to have their money back. He begged the jury to remember that the defendant was not an innocent person from the country, unacquainted with the world, but that he was an agent for the sale of shares in all kinds of speculations, and had ample means of obtaining information.

The jury returned a verdict for the plaintiff, for the amount claimed.

NORFOLK CIRCUIT.—August 7.

Norwich.

Before Mr. Justice VAUGHAN.

SILVER v. BARNES.

BENEFIT LOAN SOCIETIES.—Whether to be considered as a contrivance to lend money at usurious interest, under colour of a partnership.

This was an IMPORTANT CASE, and the decision in which will affect a great number of similar societies, more particularly in the North of England.

The action was brought on a Promissory Note of the defendant for £80., payable on demand.

The defendant pleaded the statute of USURY.

Mr. Kelly, for the plaintiff. In the year 1836, a number of persons formed themselves into a "mutual benefit society" at Woodbridge. By the code of rules, each member was to contribute 10s. monthly, which was sufficient to raise every month the sum of £120. This money was put up to auction at the monthly meetings in sums of £40. each, and the members bid against each other for them, the bidding consisting of the premium or bonus which the bidder was willing to give for the privilege of having the loan of £40. The highest bidder became, of course, the purchaser; and thereupon the treasurer handed over the money to him, and he gave a promissory note to the treasurer for the repayment of the loan on demand. This security was only held by the treasurer for the purpose of being enforced in the event of the purchaser of the money making default in payment of any of the instalments. The money was to be repaid by the purchaser in the following singular manner. He was to continue to pay his monthly subscription of 10s., which were placed to his account in reduction of the principal; he was also to pay each month 2s. upon every £10. of the sum purchased, which was to be applied to the liquidation of the bonus; and he was to pay in addition interest monthly upon the whole sum of £80. at £5. per cent. Thus, although by the monthly payments of 10s. the principal money was constantly reducing in amount, the borrower continued to pay interest upon the whole sum borrowed, and that not by an annual payment of interest, but by monthly payments. The amount received for bonuses and the interest upon these loans was put up to auction as well as the monthly subscriptions. It was provided by the rules that no member was to hold more than five shares, and the society was to continue in existence only until each member had purchased as many loans of £40. as he held shares. Now, it was obvious that out of this

state of things two consequences must result: one was, that the monied men in the society who could manage to hold out longest without purchasing loans, must be greatly benefited; because, by the periodical purchase of the loans the number of members entitled to bid at succeeding sales was undergoing constant reduction, and the number of competitors being reduced, the amount of bonus to be paid upon the purchase was less and less at each sale. The second consequence was this: that as the bonuses were added to the stock of the society, and formed part of the loans sold, the higher the bonuses which were given the sooner the society would cease to exist; and it followed, therefore, that the borrowers might become eventually gainers, although they paid large premiums, inasmuch as they were not liable to any payments after the dissolution of the society.

In April, 1836, the defendant, who held two shares in the society, became the purchaser of two sums of £40., for each of which he gave a premium of £15., which was to be paid in the manner before described, by payments of 2s. monthly, upon £10. of the money purchased. He received the £80., and gave to the plaintiff, as the treasurer of the society, the promissory note for the amount, which was expressed to be payable on demand, but which, in fact, was enforceable only upon default being made by the defendant in any of his payments. After having paid nearly £50. in principal, bonus, and interest, he became a defaulter, and the present action was thereupon commenced. It appeared, that in consequence of the reduction in the number of competitors, by reason of most of the members having had their loans of £40., the loans are now selling at a bonus of only 6d.; and there must eventually be a time when there being only one member who has not had his £40., he will receive it without the payment of any premium whatever. The society will then die a natural death, and the members who have held out the longest without purchasing the loan will get each £40. upon the payment only of £25., or thereabout.

It appeared that a great number of these societies have been formed in this county, and the result of the present trial was looked to with very great interest.

Mr. Justice VAUGHAN, in summing up the evidence, left it to the jury to say whether this singular proceeding was adopted by the society as a trick and contrivance to conceal an usurious contract to pay and receive more than 5 per cent. under the guise of a partnership or mutual benefit. If it was, the defence was established; otherwise, not. It was evident that the scheme was one by which the monied men in the society would be considerable gainers; but it did not follow as a necessary consequence that the contract

in question was usurious, if, in consequence of the amount of premiums, the society should, (as it appeared probable it would) die a natural death before the defendant should have paid, in monthly subscriptions, payments on account of his bonus, and interest, the full sum of £80., he would become a gainer. There was, therefore, one event in which the contract now sought to be set aside would be a benefit to him, and not usurious. He was therefore of opinion that the contract was not illegal, unless the jury should be satisfied that the entire scheme was established for the purpose of lending money at usurious interest, under the colour and appearance of a partnership or mutual benefit; and that question his Lordship left to them.

The jury retired, and, after a lengthened absence, found a verdict for the plaintiff, being of opinion that the scheme of the society was "not a contrivance to lend money at usurious interest under colour of a partnership." A verdict was therefore entered for the plaintiff, with £45. damages, being the difference between the £80. and the sums which the defendant had paid in respect of it.

Mr. Justice VAUGHAN reserved leave to the defendant to move and enter a nonsuit upon the construction of the rules of the society, and upon the question whether such a society is in its nature a legal one or not.

COURT OF EXCHEQUER—June 12.

NEW GENERAL ORDERS.

FORMS OF WRITS.

(Continued from page 236.)

No. VI.

Writ of Elegit on a Decree or Order of the Court of Exchequer, for Payment of Money, or Money and Interest.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Sheriff of greeting.

Whereas, lately in our Court of Exchequer at Westminster, in a certain cause or certain causes (as the case may be) there depending, wherein A. B. and others are plaintiffs, and C. D. and others are defendants, or in a certain matter therein depending, intituled, "In the matter of E. F." (as the case may be) by a decree or order (as the case may) of our said court, made in the said cause or matter (as the case may be), and bearing date the day of , it was decreed and ordered, or ordered (as the case may be), that the said C. D. should pay unto A. B. the sum of , (if interest be given by the order, say "together with interest thereon, after the rate of £ per centum per annum, from the day of .") And afterwards the

said E. B. came into our said Court of Exchequer, and according to the form of the statute in such case made and provided, chose to be delivered to him, her, or them (as the case may be), all the goods and chattels of the said C. D. in your bailiwick, except the oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyholds or customary tenure in your bailiwick, as the said C. D., or any one in trust of him, was seized or possessed of on the day of in the year of our Lord ,* or at any time afterwards, or over which the said C. D. on the said day of ,† or at any time afterwards had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said sum of , together with interest thereon, at the rate of £4. per centum per annum, from the said day of ,† shall have been levied. Therefore we command you that, without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seized or possessed of on the said day of ,* or at any time afterwards, or over which the said C. D. on the said day of ,* or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit. To hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Exchequer aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ. Witness, &c.

No. VII.

Writ of Elegit, on a Decree or Order of the Court of Exchequer, for Payment of Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Sheriff of greeting.

Whereas, lately in our Court of Exchequer at Westminster, in a certain cause or certain causes (as the case may be), there depending, wherein A. B. and other are plaintiffs, and C. D. and others are defendants, or in a certain matter therein depending, intituled "In the matter of E. F." (as the case may be), by a decree or order (as the case may be), of our said court, made in the same cause or matter (as the case may be), and bearing date the day of , it was decreed and ordered, or ordered (as the case may be), that C. D. should pay unto A. B. certain costs as in the said decree, or order (as the case may be), mentioned, and which costs have been taxed and allowed by G. H. Esq., one of the masters of our said court, at the sum of , as appears by the certificate of the said master, dated the day of . And afterwards the said A. B. came into our said Court of Exchequer, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold, or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seized or possessed of, on the day of , in the year of our Lord ,* or at any time afterwards, or over which the said C. D. on the said day of ,* or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of , together with interest thereon at the rate of £4. per centum per annum, from the said day of ,† shall have been levied.

Therefore we command you, that without delay, you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold, or customary tenure, in your bailiwick, as the said C. D. or may per-

* The day on which the decree or order was made.

† If the order be for money and interest, the day mentioned in the order. If for money only, the day on which the decree or order was made, or in case it was made prior to the 1st day of October, 1898, say, in the 1st day of October, 1898."

son or persons in trust for him, was or were seized or possessed of, on the day of , or at any time afterwards, or over which the said C. D. on the said day of ,* or at any time afterwards, had any disposing power, which he might without the assent of any other person or persons, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and his assigns, until the said sum of together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Exchequer aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ. Witness, &c.

* The date of the master's certificate of taxation.

§ The date of the master's certificate of taxation, or if that were prior to the 1st day October, 1838, say, "from the 1st day of October, 1838."

No. VIII.

Writ of Elegit on a Decree or Order of the Court of Exchequer, for Payment of Money and Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the Sheriff of greeting.

Whereas, lately in our Court of Exchequer at Westminster, in a certain cause or certain causes (as the case may be) there depending, wherein A.B. and others are plaintiffs, and C.D. and others are defendants, or in a certain matter there depending, intituled, "In the matter of E.F." (as the case may be) by a decree or order (as the case may be) of our said court, made in the said cause or matter (as the case may be), and bearing date the day of , it was decreed and ordered, or ordered, (as the case may be), that C.D. should pay unto A.B. the sum of , together with certain costs as in the said decree or order (as the case may be) mentioned, and which costs have been taxed and allowed by G.H. Esq., one of the masters of our said court, at the sum of , as appears by the certificate of the said master, dated the day of . And afterwards the said A.B. came into our said Court of Exchequer, and according to the form of the statute, in such case made and provided, chose to be delivered to him all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including

lands and hereditaments of copyholds, or customary tenure, in your bailiwick, as the said C.D. or any one in trust for him, was seized or possessed of, on the day of , in the year of our Lord for at any time afterwards, or over which the said C.D., on the said day of for at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels, as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of and together with interest upon the said sum of at the rate of £4. per centum per annum, from the day of , † find on the said sum of at the rate aforesaid, from the day of , || shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A.B. by a reasonable price and extent, all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold, or customary tenure, in your bailiwick, as the said C.D. or any person or persons in trust for him, was or were seized or possessed of, on the said day of , for at any time afterwards, or over which the said C.D. on the said day of , for at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A.B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of and , together with interest aforesaid, shall have been levied; and in what manner you shall have executed this our writ, make appear to us in our Court of Exchequer aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ. Witness, &c.

† The day on which the decree or order was made.

‡ The day on which the decree or order was made, or in case it was made prior to the 1st of October, 1838, say "from the 1st day of October, 1838."

|| The date of the master's certificate of taxation, or if that were prior to the first of October, 1838, say "from the 1st day of October, 1838."

(To be continued.)

USURY LAWS.

1 & 2 Vict. Cap. XXXVII.

An Act to amend, and extend until the first day of January One thousand eight hundred and forty-two, the provisions of an Act of the first Year of Her present Majesty for exempting certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury.

[29th July, 1839.]

Whereas by an Act passed in the first year of the reign of Her present Majesty, intituled "An Act to exempt certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury," it was enacted, that Bills of Exchange payable at or within twelve months should not be liable, for a limited time, to the laws for the prevention of usury: and whereas the duration of the said Act was limited to the first day of January one thousand eight hundred and forty; and it is expedient that the provisions of the said Act should be extended: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this Act no Bill of Exchange or Promissory Note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money, above the sum of ten pounds sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, be void, nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons or body corporate drawing, accepting, endorsing, or signing any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; any thing in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding: provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein.

II. Provided always, and be it enacted, That nothing in this Act contained shall be construed to enable any person or persons to claim, in any court of law or equity, more than five per cent. interest on any account or on any contract or engagement, notwithstanding they may be relieved from the penalties against usury, unless it shall appear to the Court that any different rate of interest was agreed to between the parties.

III. Provided always, and be it enacted, That nothing herein contained shall extend or be construed to extend to repeal or affect any statute relating to pawnbrokers, but that all laws touching and concerning pawnbrokers shall remain in full force and effect, to all intents and purposes whatsoever, as if this Act had not been passed.

IV. And be it enacted, That this Act shall continue in force until the first day of January one thousand eight hundred and forty-two.

V. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this session of Parliament.

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This work will be completed in 4 vols.—Part II. Vol. III. will be published Sept. 1.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 17th August, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, AUGUST 24, 1839.

[No. 17.

LEX LOCI DOMICILII.

PART I.

IN CASES OF LEGITIMACY.

WHAT IS CIRCUMSTANTIAL EVIDENCE?

(Continued from p. 243.)

WE have shewn the Law, as it now stands, upon the *presumption* of the Legitimacy of a child, born in lawful wedlock, (for the fact of issue, by a particular man, is not in its nature capable of direct proof,) looking at the term *presumption*, as a probable consequence only, which, as in the case of *Morris v. Davis*, may be rebutted, by shewing, that, for the husband to have begotten the child, was either physically or morally impossible: *physically*, by being at variance with the laws of nature;—*morally*, by an improbability, that leaves no room for doubt. Under the first division, may be classed impotency and non-access; and under the second, all those circumstances which can have the effect of raising in the minds of the jury or judges (when exercising the function of a jury) a preponderating presumption that the child is not the issue of the husband.

Lord ELDON, in the *Bunbury Peerage case*, describes *circumstantial evidence*, to be nothing more than evidence of those circumstances which usually accompany facts, from the proved existence of which circumstances, both law, and reason, infer the existence of the facts themselves. A murder is committed—

nobody saw the deed done, but many persons saw, or were acquainted with several circumstances, constituting what is called circumstantial evidence; these persons give their evidence, and from that evidence, law and reason, deduce a conclusion respecting the fact really in issue, namely, whether the prisoner did or did not murder the deceased.— His Lordship considered that *evidence of the supposed Parents of the Child was admissible evidence* upon such a question, and thus illustrated his opinion. When two women each claimed a particular child, as hers, and called upon a person to decide between them, he advised that the child should be severed into two parts, and that each take half,—the true mother instantly waived her claim; and he decided upon that, that the child was hers. What is the lesson which this story teaches? Not perhaps that mere declarations are evidence in such a case, for such declarations may be made for a temporary purpose—in that case both women made declarations, and one of course made false declarations,—but it teaches that the conduct of a parent, the feelings of a parent—those feelings being inferred from such conduct—afford us some evidence, assisting us in arriving at a right conclusion as to the matter in controversy. His Lordship did not go so far as to say, that all simple declarations are evidence in such a case, but he said that the conduct of a husband and wife towards a person, claiming to be their legitimate child, is in some cases admissible

VOL. II.

evidence, upon the question whether the husband and wife had sexual intercourse at such time, as by the course of nature, that child might have been the fruit of that intercourse. It is often a most material species of evidence. It is not always, but it is frequently a safe ground for inference, for it comes from the least suspicious source, that is, from the very individuals who are the most interested to give a different testimony. But the late Sir SAMUEL ROMILLY, in the same case, observed, that we must not overlook the danger of *trusting too implicitly* on circumstantial evidence. If the connexion, between cause and effect, in the material world, has so long baffled every philosophical enquirer, surely, we ought to approach with diffidence a similar investigation in the moral world. Who can pretend to ascribe to each act of man its real motive, and to hit with an unerring aim, the hidden and indefinable source of human impulse? That eminent Lawyer maintained that a *mother* is an *incompetent witness* to prove her child's illegitimacy. Upon that point (he said) her mouth is closed: a vicious woman is too likely to make an unnatural mother, and as the nature of her guilt, must necessarily cause her own testimony to be conclusive; she would retain a power, over her children, which her hatred for her husband, might induce her to exercise to their destruction, without any regard to truth.

It would be superfluous to cite the numerous authorities in support of this proposition; but the following case occurred in FRANCE, (which may be found in the pleadings of the celebrated D'AGUESSEAU,) where this doctrine was completely established after much discussion. The husband held an office about the Court, which required his frequent absence from home. His wife, after many years of marriage, proved unfaithful to him. She became pregnant, as she believed, by her paramour. She was clandestinely delivered, the child was reared and educated by its real father, and it was baptized as an

illegitimate child. The pregnancy of the mother, the birth, nay, even the existence of the child, was long unknown to her husband. He at length discovered the guilt of his wife, and its consequences. He resorted to legal proceedings. His wife made an ample confession, which included the most explicit declarations of the illegitimacy of her child. A divorce was granted, but the guardians of the child refused to release the husband from the obligations imposed upon him by his marriage contract. They sued him before the Parliament of Paris, and that learned body established the *legitimacy of the child*. There are similar cases in the French books. One of an earlier date (that of *Madame de Cognac*,) was cited in the House of Lords, by LORD NOTTINGHAM, with marked approbation. These decisions do not rest on local usage, or technical rules; they are founded on the CIVIL LAW, which is the source of all the authorities. They draw a just deduction from the principles laid down in those authorities, and one that we may safely follow, though delivered by a foreign tribunal. Reason is reason every where. But these principles are not new in the House of Lords, for LORD NOTTINGHAM, in the claim of the Viscountcy of Purbeck, one of the most important cases ever agitated, there expressly pronounced the declaration of the *father or mother*, to the prejudice of a child's legitimacy, was not to be endured, in as much as "*filiatio non potest probari*." His Lordship cites the case of *Madame de Cognac*, where the child, having established her legitimacy in the mode prescribed by the law, her disavowal, by her mother, was not allowed to have any weight. LORD ELLESBOROUGH repeatedly maintained the same doctrine in the *Court of King's Bench*.

It was said by LORD MANSFIELD, to have been solemnly determined by the delegates, (Cwpp. 594.) that where the child is born in wedlock, the evidence, or declarations of the

parents seem inadmissible to bastardize such issue.

LORD HARDWICKE, in the *King v. Reading*, (Rep. *temp. Hardwicke*, 140.) said, the wife is not a competent evidence in point of law, to prove *the whole fact*; though it seems she may be a competent witness to prove the criminal conversation between the defendant and herself, by reason of the nature of the fact, which, from being usually so secret, admits of no other evidence, and that the wife was in that case the only evidence to prove the want of access of her husband, which his Lordship said might be made to appear by other witnesses, and that, therefore, the wife should not be admitted to prove it, since there was no necessity that could justify her being an evidence in that case. In *Pendrell's* case the non-access was proved by the husband's relations.. His Lordship added,—“ But the opinion the Court is of at present, will not be a precedent to determine any other case, wherein there are other sufficient witnesses as to the want of access ; but the foundation that is now gone upon, is, the wife's being the sole witness.”

It is said in *Rolle* 1, 358. ; that if a woman, being with child by A., be married to B., it is clear that the latter becomes the legal father. And let no one reproach the law ; the rules it has laid down, have been usually framed for the security of families, for the protection of marriages, and for the general extension of public convenience. It is an evil inseparable from the most perfect of human institutions, if, in particular circumstances, and to particular persons, they may operate to mischief.

(To be continued.)

PROBLEM XVII.

VOL. 2.

WARRANTY upon the SALE of GOODS.

What amounts to a Warranty?—Shew the Rights and Liabilities of the Parties.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 15. VOL. II.

STOPPAGE IN TRANSITU.

Stoppage in *transitu* is the technical term for that right, which an unpaid vendor has of stopping goods, after he has parted with the actual possession, and whilst they are in *transitu*, on the bankruptcy or insolvency of the vendee.

In order fully to comprehend this subject, it will be necessary to consider the law relating to it under the following divisions, viz.—

1st. The nature of this right, its origin, and the principles upon which it depends ?

2nd. Its effect upon the contract between the parties?

3rd. Who may exercise it, and how ?

4th. How long it continues ?

5th. When it determines, and how it may be defeated ?

1st. *The nature of this right, its origin, and the principles upon which it depends.* We cannot shew the nature of this right better than by quoting the case of the assignees of Burghall, bankrupt, *v. Howard*, 1 H. Bl. 366. In that case B. at London, gave an order to A., at Liverpool, to send him a quantity of goods. A. accordingly shipped the goods on board a ship there, whereof the defendant was master, who signed a bill of lading, to deliver them in good condition to B. in London. The ship arrived in the Thames, but B. having become a bankrupt, the defendant was ordered, on behalf of A. not to deliver the goods, and accordingly refused, though the freight was tendered. An action on the case upon the customs of the realm having been brought against the defendant as a carrier, Lord Mansfield was of opinion that the plaintiffs were not entitled to recover,

and said, he had known it several times ruled in Chancery, that where the consignee

becomes a bankrupt, and no part of the price has been paid, it was lawful for the consignor to seize the goods, before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property. See Selwyn's *Nisi-Prius* Title Stoppage in transitu.

Stoppage in *transitu* owes its origin to Courts of Equity having been first recognized there in the cases of *D'Aguila v. Lambert*, 2 Eden, 75, Ambl. 399.; *Wiseman v. Vandeput*, 2 Vern. 203.; and *Snee v. Prescott*, 1 Atk. 246.; but in consequence of its great importance, as connected with the mercantile law of this country, this right has since become so great a favourite with Courts of Law, that it is now regarded "as a right which those courts are always disposed to assist," and it has been decided that equity has no longer jurisdiction in any case to stop goods in *transitu*, *Goodhart v. Lowe*, 2 J. & W. 349.

The principle upon which this right depends is, that it would be unjust and unreasonable, that the goods of one person should be applied in satisfaction of the debts of another, where no consideration has been given for them; and on this account is defined by Lord Kenyon, in *Hodgson v. Loy*, 7 T. R. 440., to be "a kind of equitable lien, recognized and acted upon by the Common Law Courts, for the purposes of substantial justice."

2nd. *Its effect upon the contract between the parties.*

Whether its effect be to rescind the contract or not, seems to be a question as yet undetermined, as the Court remarked in the case of *Stephens v. Wilkinson*, 2 B. & Adol. 323. This question was much discussed in *Clay v. Harrison*, 10 B. & C. 99. In favour of the former view of the question, viz.: that the effect of stoppage in *transitu* is to rescind the contract. Mr. J. Chitty,

in his work, Contracts not under Seal,

p. 342, remarks—"It may admit of considerable doubt whether the stoppage in *transitu* has not the effect of altogether rescinding the contract, and re vesting the property in the vendor; at least, of entitling him to treat the contract as wholly determined. If the effect be merely to restore to the owner a right of possession (not of absolute property), and to place him in the same situation as if he had not parted with the goods, it is obvious, that the seller is not justified in re-selling the goods, until the assignees of the insolvent vendee have elected whether or not they will sanction and act upon the contract, by taking to and paying for them."

"The benefit of the privilege of stopping in *transitu*, would be considerably diminished, were it incumbent on the vendor to wait, perhaps for an indefinite period, until the choice of assignees, and until they come to a decision as to the course they intend to pursue."

On the other hand, the circumstance that part payment by the vendee does not defeat the right, (except *pro tanto*) gives support to the contrary doctrine; and it might be contended, that it cannot have that effect, when the contract has never been perfected by delivery of the goods, for until the arrival of the goods, at the termination of their transit (which would divest the right of stoppage) the constructive possession still remains in the vendor, and he has a lien upon them until the price is paid. Lord Kenyon, in *Hodgson v. Loy*, (*supra*) was of opinion that it did not rescind the sale, and Mr. Justice Bailey seems to have been of the same opinion in *Bloxam v. Saunders*, 4 B. & C. 948.: for he in that case held, "that the buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, or they may still act on their right of property, if any thing unwarrantable is done to that right."

3rd. *Who may exercise it, and how?*

The vendor or his agent, *quod* the bankrupt, or his agent, can alone exercise this right, and not a mere surety for the price of the goods.—See Siffken and another, assignees of Browne *v.* Wray, 6 East, 371.; and Feise *v.* Wray, 3 East, 93.; and Newsom *v.* Thornton, 6 East, 17.; where a person who had consigned goods to be sold on the joint account of himself and his consignee, was held entitled to stop them in *transitu*, the consignee becoming insolvent.

A claim made by the vendor or his agent, without obtaining actual possession (which in many cases would be impossible), is sufficient. Northey *v.* Field, Esp. 613. Kenyon; Holst *v.* Pownall, 1 Esp. 240.; and Mills *v.* Ball, 2 B. and P. 457. Nor will a subsequent delivery by the carrier to the vendee, transfer any property in the goods, but they may be recovered even from the assignees in trover. Litt. *v.* Cowley, 7 Taunt. 169.

4th. *How long it continues?*

The right of the vendor to stop the goods only continues so long as they are in *transitu*, and consequently a troublesome question frequently arises as to whether the transit has terminated or not before the claim is made.

The result to be collected from the cases seems to be, that, whilst the goods remain in the possession of a carrier, or wharfinger, as such, or are merely in the hands of a middle man, as a packer—(Ellis *v.* Hunt, 3 T. R. 467.; Loeschman *v.* Williams, 4 Camp. 181.) or of a warehouseman, at a stage upon their transit (Smith *v.* Goss, 1 Camp. 282.), or even though they may have been conveyed to the wharf of the vendee, if certain acts are to be performed by him before he can obtain possession, such as payment of freight, &c. for the carriage, or dues for weighing, &c. (Withers *v.* Lys, 4 Camp. 237.) the vendor may exercise the right of stoppage; but if the vendee have given the carrier or wharfinger notice to hold the goods as agent for

him, or having no warehouse of his own, employs that of a wharfinger on the goods arriving at the termination of their transit, or have taken possession, or exercised other acts of ownership,—the vendor's right of stoppage is defeated. See Bartram *v.* Farebrother, 1 M. and P. 526.; 4 Bing. 579.; Leeds *v.* Wright, 3 B. and P. 320.; Scott *v.* Pettit, id. 472.

5th. *When it determines, and how it may be defeated?*

If the ship by which the goods are consigned is one chartered by the vendee himself, and not a general ship, the delivery on board such ship seems to be of itself a delivery to the vendee, so as to divest the vendor's right of stoppage in *transitu*, unless indeed such stoppage could be effected in a foreign part, in conformity with the foreign law there prevailing, as was done in the case of Inglis *v.* Usherwood, 1 East Rep. 515.—See Bunney *v.* Pointz, 4 B. and Ad. 570.

It has been already observed, that the right determines as soon as the vendee has taken possession of the goods; but it seems that he has no right to anticipate the regular determination of the transit, by going to meet the goods upon their journey. Holst *v.* Pownall (*supra*)—Lord Kenyon, (though this doctrine has been questioned).

A negotiation of the bills of lading, with a bona fide indorsee for valuable consideration, will also defeat the vendor's right of stoppage in *transitu*, which was decided in the famous cases of Lickbarrow *v.* Mason, 2 T. R. 63.; 1 H. Bl. 357.; and 6 East, 21.

This case involved the following important propositions, viz.—

1st. That the vendee of goods may, by assignment of the bills of lading to a bona fide transferee, defeat the vendor's right to stop in *transitu*, in case of the vendee's insolvency.

2nd. That the consignor may stop goods in *transitu* before they get into the hands of the consignee, in case of the insolvency of

the consignee: but if the consignee assigns the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested. There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person.

Lord TENTERDEN, in his work on Shipping, p. 388, gives a history of the law on this subject, and says—"It is now the admitted doctrine in our Courts, that the consignee may, under the circumstances before stated, confer an absolute right and property upon a third person, indefeasible by any claim on the part of the consignor."

Lastly. It seems that an indorsement by a holder of any of the instruments named in the Stat. 6 Geo. 4. c. 94. (Factor's Act), will defeat a vendor's right to stop in transitu.—See Smith's Mercantile Law, p. 334.

J. A. M.

There are instances in which the right of stoppage in transitu does not exist, although the goods may not have been removed since the sale. As, if they remain upon the vendor's premises, upon the terms that warehouse rent shall be paid, and the same is paid accordingly, by a person to whom the vendee resold the goods (*Hurry v. Mangles*, 1 Camp. 452.): or if the goods, being in the hands of a third person, be transferred into the name, or marked with the mark, of the vendee, by the consent of the seller.—See *Harman v. Anderson*, 2 Camp. 243.; *Spear v. Travers*, 4 id. 251.; *Whitehouse v. Frost*, 12 East, 614.; *Stoveld v. Hughes*, 14 id. 308.—EDITOR.

Law Reports.

COURT OF CHANCERY—Aug. 7.

MURRAY v. WALTER AND OTHERS.

APPEAL FROM THE VICE-CHANCELLOR.

PRACTICE—PARTNERS—JURISDICTION of the COURT to make an order under a Bill filed by one partner to produce documents in the

hands of another partner, appointed for himself and other partners as a common agent, for the benefit of all in the absence of the other partners.

(Continued from page 247.)

Mr. K. Bruce, who appeared for the defendants, called the attention of his Lordship to the fact that the Vice-Chancellor had given the costs of the motion from which this was an appeal, on the ground that there never would have been any objection to produce what his Honour thought fit to grant—namely, the documents in Mr. Walter's possession, if they had ever been applied for. The same course had been adopted by the two immediately preceding Lord Chancellors, and followed, he believed, by his Lordship himself: where a motion related mainly to matter improperly applied for, and successfully resisted, the mere circumstance of something being appended which the Court thought fit to order, but which the party might have had for the asking, did not exempt from costs. The practice in the Vice-Chancellor's Court was invariable in that respect. It perpetually occurred, for instance, that a party applying for a receiver prayed for the production of documents. If his Honour were satisfied that the documents might have been had for the asking, and that no appearance could have been made but for the other matter which had been successfully resisted, he gave the costs of the application. This, however, gave the costs of the application, which was against three defendants, Mr. Walter, Mr. Alsager, and Mr. Lawson. No order was made as to Mr. Alsager and Mr. Lawson, or either of them. It was quite clear there could be no pretence for not giving costs as to Mr. Alsager and Mr. Lawson, and with regard to Mr. Walter the reason was as had been stated. The motion now before his Lordship had assumed a shape which he never recollects to have seen before; and conceiving it to be his duty, however valid a defence he might have on other grounds, to state every objection, so that if the terms of the notice were wrong, it might not be quoted as a precedent, and lead to a change of practice, he wished to apprise his Lordship that the defendants, Mr. Walter, Mr. Alsager, and Mr. Lawson, having answered severally, only one notice of motion had been given combining the three, and calling for a production against the three. That, he apprehended, was wholly irregular; but the motion was so plainly wrong in principle, that he willingly proceeded to the discussion of other parts of the case. There were two reasons upon which the Vice-Chancellor proceeded in the decision to which he had come. First, there was no *constat* before him that he could enforce the order if made; and secondly, there was a joint interest in the subject matter of the order in parties both

present and absent. Either of these grounds was alone sufficient to support the decision. First, with respect to the power of the Court to enforce an order for the production, he averred, without knowing of any exception to the rule, where a possession was in two, and only one before the Court, the order could not be made. In such a case they could not make the order. If the party disobeyed, he must be committed to the Fleet, or the Court would be executing a nugatory office and exposing the administration of justice to slight and disregard. The Court was bound to see that it could enforce an order before it was made. How, then, could a man who was only one of two joint custodiers be able to produce the documents? He could not. The possession was as much in the hands of both as if it were in a trunk with two locks and two keys, the keys being in two different hands. How, then, could an order be made against one having only one of the keys, to open both locks and produce the documents? If, indeed, the plaintiff had set forth a case of collusion and fraud, alleging that the substantial control was in the party before the Court, and if the defendant had admitted that, having had his attention called to it by bill, the state of things would have been altogether different. But the plaintiff had done nothing of the kind. She seemed to be actuated, or her advisers were, by a determined—he must not, he supposed, say, in such a case, by a dogged—resolution to make a code for herself, and to be the founder of an entirely new system of practice. Any ordinary party would at once have amended the bill, which was an ordinary bill for an ordinary sole possession. She obtained an answer, admitting sole possession of some documents, and joint possession of others; and there she left it without presenting a record to the Court, on which it could reasonably and safely act. That was not a course of proceeding to be encouraged or tolerated by the Court. Sure he was that no precedent could be produced to warrant it. In the Vice-Chancellor's Court, which had most to do with motions, it was quite a matter of course when a defendant admitted possession not in himself alone, or if in himself alone in behalf of himself and others, the bill must be amended. Hitherto he had put the case of joint custody and control; but the same principle applied, not where there was possession, but merely an interest. Nothing could be more unsafe in the administration of justice than to enforce the production of a document in which absent parties had an interest. There was a case in *Merivale* where the Court refused the production of a document which was in the possession of a present party in the absence of the mortgagor. The other Court acted on the rule every seal, uniformly refusing to interfere by ordering the production of papers which

absent parties had an interest in withholding. The very point had occurred in "Bridges v. Bramfill," which came before the Vice-Chancellor, and where his Honour expressly laid it down that in the absence of a party interested they could not proceed. There was a similar case in that court in which Messrs. Brooks and Cooper were concerned, and his Lordship declined to grant any order to Mr. Cooper because Brooks was not there. He really felt almost ashamed of occupying the time of the Court in asserting a principle which must have been familiar to his Lordship ever since he was at the bar, and the converse of which would certainly inflict the most grievous injustice. In the present instance it was supposed because these persons were partners in a trade or concern of the nature of a trade, one therefore must have a joint control as well as all the others. The object of this motion was to have the document brought into the custody of the clerk in court.

The LORD CHANCELLOR.—The plaintiff's own case is the best proof that cannot be acted on, for she is a party too.

Mr. K. Bruce.—Precisely so. The alternative was, that the Court would permit an inspection; that, of course, must mean an useful inspection, not an inspection by halves, not with respect to one interest. The case of "Wallborne and Ingleby" had excited a great deal of surprise in his mind; for there an order was made on an absent party over whom the Court could by no possibility have any jurisdiction. There must have been some misapprehension in that case; and as learned judges before him had been mistaken, the learned Judge who pronounced that opinion must, in his view, have been labouring under mistake; certainly, it was at variance with the whole current of authorities. He knew it to be an order contrary to the rule and practice which had always prevailed and now prevailed in the courts. It was clear there was no *constat* that Mr. Walter, Mr. Alsager, or Mr. Lawson, or any of them, had sole control. Their possession was joint, and no order for production could be made, or, if made, executed, in such a case. He now came to the question of the interest of the absent parties, a consideration which was quite distinct. "Wallborne and Ingleby" was undoubtedly a very singular case. It was not a question of account; it was an equitable *assumpsit* for money had and received, like "Hutchins and Congreve," not seeking an account of a partnership, but to extract from individual directors for the benefit of the partnership certain sums which they had acquired for their individual benefit, and which should, as alleged, have been thrown into the common chest. Some of the defendants had successfully demurred, by reason of the plaintiff's loose and defective title;

but there remained behind them four unfortunate defendants who had not demurred, and on whom the whole operations of the Court were directed. They were ordered, or the agent of the company was ordered, to produce all the books of the concern, in order that individual directors might be proceeded against for individual misdeeds. But that case did not involve the question of an account of the profits of the partnership. Looking to the prayer of this bill, it was obviously of an extremely different nature from "Wallborne and Ingleby," for it prayed that an account be taken, under the decree of the Court, of all and every the partnership deeds and transactions for conducting the *Times* newspaper from the 1st of December, 1819, till the 1st of July last, and the profits which had accrued, and that the plaintiff's share might be duly ascertained and paid to her. Was the Court to help towards such a decree in the absence of the interested parties? Would the Court produce all the partnership accounts without hearing what those had to say who had not only a deep interest in the books, but in the account thus sought to be taken? The bill was not filed by the plaintiff on behalf of herself and all other parties interested; she could not file such a bill. Nor was it a case analogous to "Adare v. the New River Company," where the bill was filed against certain defendants representing a greater number whose names were unknown. The apology suggested by the bill, for not making the parties who were partners defendants, was, that she did not know them. The allegation of numerousness or inconvenience was absent from the record. The answer stated distinctly the names of all those individuals, and that they ought to be made parties. This information the plaintiff had been in possession of for months, without amending or altering the form of the bill. He took it to be plain as plain could be, that, shaped, as the bill now was, no relief could be granted; for the bill admitted there were other parties, and the plaintiff had been informed of them. His Lordship was now asked to order the production of these books, in a case where it was manifest on the record no such relief could be given. If the case were not to come on for hearing, it must stand over, the bill not being in a shape or form to enable the Court to entertain it, because for a partnership account the parties could never be dispensed with. The case was one on which the Court could not act; and the plaintiff having deliberately elected to leave it in this most inconvenient and embarrassing position, the plain object of the whole proceeding seemed to be, by an indirect pressure, by seeking for the discovery and disclosure of that which it might be thought would be inconvenient to a concern like the *Times*, to procure a submission to unjust demands. Why did he say so?

Because the facts appeared to prove it. If substantial relief had been the object, the plaintiff would, no doubt, have proceeded in the usual way; but this motion was the real object, and his Lordship was now, in fact, hearing the case. He submitted, as the matter now stood, the absent parties had a plain interest in preventing a disclosure of their concerns to the public, or the plaintiff whom they rejected as a partner. He considered the interests of absent parties a conclusive reason why these books should not be produced. What did she want with them? Partner she was not, according to the statement in the answer. The deed of assignment contained a clause for repurchase, and though by a manœuvre or stratagem the time for effecting the purchase was finessed off, in consequence of Goldie, who had acted as personal representative up to a certain time, having disclaimed, and when served with notice of repurchase, not intimating the fact, yet subsequently the plaintiff herself was regularly served, and therefore, according to the deed, she had ceased to be a partner. The case in the bill was, that there existed a collateral parole agreement beyond the deed, having the effect of a contract that the power of repurchase should not be exercised. That, however, was distinctly denied in the answer, and must be put totally out of the question; it was not even suggested in the opening of his learned friend. Having, then, ceased to be a partner, what did she want with the books? To show the past profits of the concern? They must be matter of account. All the books in the world would not make her case better than a matter of account. The answer swore distinctly that the accounts and profits of the concern were arranged to the satisfaction of all the shareholders, the accounts being made up by the treasurer, and the profits allotted in the shape of dividends to all. It was sworn that the plaintiff had received every shilling to which she was entitled; that her husband during his life had received the whole of the profits which had from time to time accrued in respect of his share; that he expressed himself perfectly satisfied with the mode in which each payment was made; and that not a shilling was now due to the plaintiff. He admitted they were not bound by that for the purposes of the suit; but the question now was, what could be done in the present state of the record? The deed was admitted under which she had ceased to be a partner. Did she want these books for the account? No; nor was there any charge in the bill that their production would serve any other purpose than the account. If she had wanted any thing substantial, she ought to have pointed out something particular she wished to ascertain from the books, which would be material to produce in evidence at the hearing.

ing of the cause. The books might be useful if an account were directed, although there could be no account in the present state of the record. All she wanted was to see the books from curiosity, or that other motive to which he had referred. Partner she was not; according to the answer, she had received every shilling she was entitled to, and no special case was made out for inspecting these documents. The principle which applied to such cases is laid down in "Adams and Fisher," Mylne and Craig, 544, where his Lordship entirely displaced the notion that it was a matter of course to produce documents merely because they had been scheduled to the answer: there must appear substantial and rational grounds for the application. The learned counsel in conclusion submitted, that either of the three grounds he had laid down would be sufficient to secure the rejection of the present motion.

Mr. Bacon followed on the same side. The defendants had no means of complying with the order asked for by the plaintiff, if any such order were to be made. They had no right to take the books out of the treasurer's hands, without the consent of those who for so many years had concurred in his appointment and the manner of keeping the accounts of the concern. He hoped no order would be made for the production of papers against these defendants, whose interests were joined with others not before the Court. There was a charge in the bill, that several of the names of the partners had been concealed from the plaintiff. On the contrary, they had been all scheduled to the answer; and yet the plaintiff had omitted every opportunity of amending her bill in that respect.

Mr. K. Bruce wished to observe, before his learned friend replied, that he had not alluded in his observations to the answer of Mr. Alsager or Mr. Lawson, for this reason—his learned friend Mr. Richards had not alluded to them. The Court should know, there was no schedule to either of them, nothing on which the Court could make an order against either, even if the principle were adopted for which his learned friend on the other side contended.

Mr. Richards, in reply, contended, that although the Court would not make an order for production from a trustee in the absence of the *cestuique* trust, it would interfere on the application of one partner against another. The plaintiff was admitted to be a partner down to a certain time, and of course had an interest in the gains and profits of the concern; on what pretence, then, could she be refused access to the books? Mr. Walter had admitted that he had a certain portion of the documents, the receipts, in his own possession, and the Vice-Chancellor had ordered them to be produced.

The LORD CHANCELLOR.—That part of your application was not resisted before the Court.

Mr. Bacon.—Not at all. They would have been produced at once, had they been asked for.

Mr. Richards argued, if it were necessary to have all the partners before the Court, there being thirty-six in number, of whom eight were out of the jurisdiction, the plaintiff must be entirely defeated.

The LORD CHANCELLOR.—If the defendants who were out of the jurisdiction had a common interest with the others, you might have a dispensation. Take the case simply as it affects the two before the Court; how can you maintain the order as against Mr. Alsager and Mr. Lawson? These are books in the common possession of the three. Suppose there are no others, you have no admission in the answer of the two that they have any books at all. How can you move on the answer of one for the production as against the three?

Mr. Richards relied on the admission by Mr. Walter, that he had some documents in his possession, and by excepting to his answer they found out what those papers were.

The LORD CHANCELLOR.—You cannot read Mr. Walter's answer against Mr. Alsager and Mr. Lawson. You have no case against two of the three.

Mr. Richards contended that the admission of one defendant included the others.

The LORD CHANCELLOR.—The act of one partner may bind another, but you cannot read the answer of one defendant against another.

Mr. Richards.—Supposing Mr. Walter admitted that he had the entire control over these documents, but insisted that other parties were interested in them, would that be sufficient to protect him from the production? He did not deny he had the power of production. The authority of "Wallborne and Ingilby," he contended, was strictly in point, and upon that he was content to leave the plaintiff's case.

The LORD CHANCELLOR.—In this case, the plaintiff claiming to be a partner in a concern, the *Times* newspaper, up to a certain period, filed her bill against three defendants, whom she alleged were partners with others, whose names she did not know. One of the defendants, by an answer and a second answer, stated that there were certain documents relating to this concern, not in his own hand. I am not referring to those which were ordered to be produced, but certain other documents in the hands of the treasurer, for the proprietors of the *Times* newspaper—namely, the party answering the two defendants who were parties to the cause, and several other persons whose names are scheduled to the answer. The motion was against the three defendants that they may produce the

documents in the hands of the treasurer. In the first place, two of the defendants had not by their answer made any admission with respect to documents on which any order could be made. The other defendant, on whose answer alone any application could be made, states that there are such documents in the hands of the treasurer, but that he holds them for himself as one proprietor, for the other two defendants and certain other persons named in the answer. The only order that could possibly be maintained would be against the defendant who had made that admission. It would be contrary to what I have always considered the practice of the Court, where documents are in the hands of A. for A. B. and C. to make an order of production upon A. in the absence of B. and C. The Court could not make such an order unless the defendant was in a situation to justify the Court in enforcing it. How can the defendant be in such a situation when he is not proprietor, having the exclusive control over these documents? He is only one of many, and the Court cannot consider whether he has more or less control. The defendant has not the possession in fact; the documents are in the hands of an agent appointed by himself and other proprietors. I never thought it a matter of doubt; according to the regular practice, the Court cannot order production against a defendant so circumstanced. The case of "Wallborne v. Ingilby," seems, as reported, to infringe on the rule. That case was decided in 1833. I never considered the practice altered by it. There must have been some peculiarity in the case not stated in the report, for it was an order made by the Vice-Chancellor, and confirmed by the Lord Chancellor. It is very shortly reported, both applications only occupying about half a page. If this is the only report, so exceedingly short, of what took place, it is impossible to form any judgment as to how far it should be considered as authority. As it stands, no doubt it is a case which appears to infringe on what I have always understood to be the rule of the Court. I must refuse this motion.

Mr. Wigram said the case of "Wallborne v. Ingilby," had been mentioned by Lord Brougham the other day at the Privy Council, who considered it to stand on some very special circumstances.

The LORD CHANCELLOR.—I am inclined to think such must be the fact. The plaintiff must pay the costs of this proceeding.

Mr. Richards.—A portion of our application was granted.

The LORD CHANCELLOR.—The rule is when the plaintiff in the real substantial contest between the parties fails, the mere fact of succeeding in some small matters with respect to which

there was no resistance, should not affect the costs. I must refuse the application with costs.

BACON v. JONES.

APPEAL from the MASTER of the ROLLS.

PRACTICE.—*Jurisdiction of the Court to grant an Injunction precious to the trial of a legal right.—LACHES.*

This was an appeal from an order of the Master of the Rolls, dismissing the plaintiff's bill with costs. The bill was filed in 1835, and complained of an infringement of a patent obtained by the plaintiff for a newly-invented gas-burner. The alleged piracy having gone on for more than four years, the Master of the Rolls dismissed the bill, leaving the plaintiff to establish his right at law.

Mr. Richards, for the plaintiff, argued that the Court might grant an injunction previously to a trial of the legal right, "Bailey v. Taylor," 1 Russ. and Myl., 78.

The LORD CHANCELLOR said that the jurisdiction of the Court in all cases of this description was intended solely to protect or to maintain the legal rights of the parties. Now when a party came to the Court to ask for its interference, three courses were left to the discretion of the judge in granting the relief which was prayed. The first was to grant an injunction simpliciter, on the strength of the case made by the plaintiff for the interference of the Court. That was a course that might be, but very rarely, adopted, because it required a combination of very strong circumstances to induce the Court to interfere at once, and before the hearing of the cause, with such a remedy as an injunction. The next course was to grant an injunction, but put the plaintiff on terms to take immediate measures for establishing his legal right by an action at law; and the third course was to grant an injunction at the hearing of the cause if the Court was satisfied that such a case was made on affidavits and evidence as would warrant it in doing so. Now in the present case it appeared that the bill was filed in August, 1835, and that some time before that period the plaintiff knew the defendants were making burners, which he considered an infringement of his patent. What course did he adopt? Instead of applying then for an injunction, or taking steps to establish his legal right, he allowed four years to elapse before he moved to bring his cause to a hearing; and now, when that cause was brought to a hearing, he asked, as a matter of course, to have a perpetual injunction. If the Court was satisfied by the evidence of the force of the case made by the plaintiff, it would be a subject of consideration how far such a injunction might be granted; but the Court was by no means satisfied with the

evidence, and particularly when it was recollected that the plaintiff had four years for its preparation, during the whole of which the bill had been kept hanging over the heads of the defendants. It was no light matter that such a bill should be so kept, for it involved the question of whether, at the hearing the cause, and a decision in the plaintiff's favour, the defendants might not be called on to account for the whole of the profits made in the interval by their business. Looking, therefore, at the time that had elapsed, and the nature of the proceedings, his Lordship could not bring himself to grant any such injunction as was prayed, and he thought that the Master of the Rolls had come to a very sound conclusion when he declared that to grant an injunction as a matter of course at the hearing, would be to establish a most inconvenient and improper precedent. It was a course for which it appeared there was no precedent, and his Lordship was happy to hear it. Without expressing any opinion on the plaintiff's right, that he might not prejudice any proceedings at law that might hereafter be taken, his Lordship thought he could not, under the circumstances, do otherwise than dismiss the appeal with costs, leaving the plaintiff to his remedy at law, if he was advised to prosecute it.

QUEEN'S BENCH.—*May 31.*

Sittings in Banco.

STOCKDALE *v.* HANSARD.

JUDGMENT.

(Continued from p. 248.)

There is no satisfaction in dwelling on the angry contests between the two Houses which ensued. The peculiarity of the circumstances leaves a doubt whether the law can be considered as settled by what then occurred. But even supposing that this Court would be bound to remand a prisoner committed by the House for a contempt, however insufficient the cause set out on the return, that could only be in consequence of the House having jurisdiction to decide upon contempts. In this case we are not trying the right of a subject to be set free from imprisonment for contempt, but whether the order of the House of Commons is of power to protect a wrong-doer against making reparation to the injured man.

When the judges were supposed to have unanimously agreed to surrender their right of examining whatever may have been done by authority of Parliament, some very important declarations by some of the most eminent among them must have been forgotten. Lord Chief Justice Willes moved the contrary resolution:

"I declare for myself that I will never be bound by any determination of the House of Commons, against bringing an action of common law for a false or double return, and a party may proceed in Westminster Hall notwithstanding any order of the House." *Wynne v. Middleton.* (1 Wilson, 128.)

What was said by Lord Mansfield in the House of Lords, respecting the privileges of the other House in the Middlesex election, is the more weighty, because he was then upholding the privilege of the latter in election matters. (Parliamentary History, Vol. 16, 653.) "Declarations of the law (said he), made by either House of Parliament, were always attended by bad effects; he had constantly opposed them whenever he had an opportunity, and in his judicial capacity, thought himself bound never to pay the least regard to them." He exemplified this remark by reference to general warrants; "although thoroughly convinced of their illegality, which indeed, naming no persons, were no warrants at all; he was sorry to see the House of Commons, by their vote, declare them to be illegal; it looked like a legislative act, which yet had no force or effect as a law; for supposing the House had declared them to be legal, the Courts in Westminster would nevertheless have been bound to declare the contrary, and consequently to throw a disrespect on the vote of the House. He made a wide distinction between general declarations of law, and the particular decision which might be made by either House in their judicial capacity, on a case coming regularly before them, and properly the subject of their jurisdiction. Here" (that is, in a case of election) "they did not act as legislators pronouncing abstractedly and generally what the law was, and for the direction of others, but as judges drawing the law from the several sources from which it ought to be drawn for their own guidance in deciding the particular question before them, and applying it strictly to the decision of that question."

The dispute between the two Houses in 1784, when the Commons issued a kind of mandate to the treasury, to suspend the payment of certain bills, till the House should further direct, was, in fact, a struggle between the two great parties in the country. The Lords, by a large majority, condemned that proceeding, and resolved (as the same House had almost in the corresponding terms resolved in 1704, at the close of the Aylesbury case), "That an attempt in one branch of the legislature to suspend the execution of the law, by separately assuming to itself the discretionary power, which by an Act of Parliament is vested in any body of men, to be exercised as they shall deem expedient, is unconstitutional." The doctrine was enlarged upon by Lord Thur-

low, who spoke of the resolutions of the House of Commons in terms preserved by tradition, which there might be impropriety in repeating. The Commons defended their resolution by asserting, that in fact, it did not fairly bear the import ascribed to it. Lords Mansfield and Loughborough took the same line in answering Lord Thurlow, both fully admitting with him, that the Commons have no power to suspend the law by their resolutions. The former said that, "For either branch of the Legislature to attempt to suspend the execution of the law, was undoubtedly unconstitutional. It had been stated, as a ground for voting it, that the House of Commons had come to a resolution militating against a clause of the 21st of the King. What then? A resolution of the House of Commons would not suspend the law of the land. A resolution of the House of Commons, ordering a judgment to be given in any particular manner, would not be binding in the Courts of Westminster Hall."

(24 Parliamentary History.)

(To be continued.)

Summer Assizes.

NORTHERN CIRCUIT.—*August 21.*
Liverpool.

Before Mr. BARON MAULE.
Special Jury.

BLAIN AND ANOTHER v. DANIEL AND
ANOTHER.

COMMERCIAL CASE.—*Liability of a Mercantile Agent to damages for not implicitly obeying his orders by which his principals sustained a loss.*

The plaintiffs are wholesale tea-dealers in Liverpool. The defendants are merchants in London, having an agent at Bombay, and also engaged as agents in the China trade. The present action arose out of a speculation in tea made at the period when the China trade was opened. The plaintiffs employed the defendants to remit to China for them a very considerable sum of money to be laid out in the purchase of teas of the following description, namely, Congou, very best small black leaf, strong full Pekoe flavour, and free from admixture of brown and faded leaf; Twankay, fine small curled leaf, on the bloom, or Hyson skin flavour; Hyson, very fine bright wiry bluish leaf. The plaintiffs were particular in requiring that the teas should be of the specified quality, to be sent home by Captain Rickets, in a new ship then about to be launched, called the Ingleborough; and if teas of the specified qualities could not be obtained, the defend-

ants were at liberty to return the money in silk, at not more than 15s. to the pound, or in good bills payable in England. In 1837, the Ingleborough arrived, and the teas were delivered to the warehouses of Hornby and Co., of London, when the plaintiffs procured them to be inspected by Mr. Brodrribb, a tea-broker, who reported that they were not of the qualities specified in the order. They were then submitted to the inspection of several other London tea brokers, who separately examined them, and made reports in writing, all of which agreed in the inadequate quality of the goods. The deficiency in value was estimated at £6,950, and the plaintiffs proposed to refer the question to any three London merchants, and to abide by their award. This was refused by the defendants, and the plaintiffs thereupon put up the teas by auction. The present action was brought to recover the difference between the price which the plaintiffs had paid for them and what they brought at the sale.

For the plaintiffs, several tea-brokers spoke to the quality, classes, and value of the teas, and all agreed that only about one-third of the bulk answered the description of the teas ordered, and that, in their judgment, two-thirds must be decidedly rejected.

Mr. Alexander, for the defendants, disclaimed any intention of unfair dealing on the part of the defendants, and insisted that they had done the best in their power. He contended that the instructions given were not to be taken literally, for in that case it would be impossible that any tea should have been sent at all, and that the season must be taken into the account. Thus, when the very best congou was ordered, it must mean the best which the season afforded, and which could be procured. So, when it was required to be free from brown or faded leaf, it must be intended not to be absolutely without; for that was impossible, but free, in a general sense, in such manner as to answer the description, not literally, but according to the general understanding of the trade.

Some examinations of witnesses in China were then put in, and a witness who had for many years acted as a tea-inspector to the East India Company, at Canton, deposed that there was great difficulty in choosing teas for purchase. The teas must be engaged, and money sent up the country by the Hong merchants in the autumn, before their arrival at Canton in the spring, and the only alternative on their arrival was that of rejecting, if they did not answer the description purchased; but there was no choice of purchasing other and better teas in their stead. The usual way was to select five chests out of every hundred, and to test them. Witness performed that office on the occasion in question, but the season was a bad one, and the whole

quantity he could select fell far short of the order of the plaintiffs. It was not an open market, the Hong merchants exposed what they pleased, and it was impossible to say that what was exposed was the best, because better might possibly be secretly kept behind. The best was done that could be under the circumstances, and witness thought that on the average it was a fair fulfilment of the order. He admitted, however, that part of the tea was not sufficiently good to answer the description required.

MAULZ, B. said, that in his opinion the insufficiency of the quantity and quality of the tea in the market at Canton afforded no defence, as the defendants were not to purchase teas at all events, the very best if they could, and if not, then the best in the market—but they were expressly instructed, in as plain terms as could well be used, that if they could not get teas of the descriptions required, not to send any, but to return the money, either in silk or in bills; but he thought the measure of damages should be the lowest which either of these methods afforded.

Verdict for the plaintiffs—damages £6,000.

COURT OF EXCHEQUER—June 12.

NEW GENERAL ORDERS.

FORMS OF WRITS.

(Continued from p. 255.)

No. IX.

Writ of Elegit on a Decree or Order of the Court of Exchequer for Payment of Money, Interest, and Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the Sheriff of *[redacted]*.

Whereas, lately in our Court of Exchequer at Westminster, in a certain cause or certain causes as the case may be) there depending, wherein A.B. and others are plaintiffs, and C.D. and others are defendants, or in a certain matter there depending, intituled, "In the matter of E.F." (as the case may be) by a decree or order (as the case may be) of our said court, made in the said cause or matter (as the case may be) and bearing date the day of , it was ordered and decreed, or ordered (as the case may be) that C.D. should pay unto A.B. the sum of together with interest thereon, after the rate of 4 per centum per annum, from the day

, together also with certain costs, as in the said decree or order (as the case may be) mentioned, and which costs have been taxed and allowed by G.H. Esq., one of the masters of our said court, at the sum of , as appears

by the certificate of the said master, dated the day of . And afterwards the said A.B. came into our said Court of Exchequer, and according to the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C.D. or any one in trust for him was seized or possessed of on the day of , in the year of our Lord , or at any time afterwards, or over which the said C.D. on the said day of * or at any time afterwards had any disposing power, which he might without the assent of any other person exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of , and , together with interest upon the said sum of , at the rate of £4. per centum per annum,(1) from the said day of , and on the said sum of , at the rate aforesaid from the said day of . I shall have been levied. Therefore we command you, that without delay, you cause to be delivered to the said A.B., by a reasonable price and extent, all the goods and chattels of the said C.D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C.D., or any person or persons in trust for him, was or were seized or possessed of on the said day of * or at any time afterwards, or over which the said C.D. on the day of *

* or at any time afterwards had any disposing power which he might, without the assent of any other person, exercise for his own benefit to hold the said goods and chattels to the said A.B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of and together with interest as aforesaid, shall have been levied; and in what

* The day on which the decree or order was made.

† The day mentioned in the decree or order.

‡ The date of the master's certificate of taxation, or if that were prior to the 1st day of October, 1838, say "from the 1st day of October, 1838."

(1) See 1 and 2 Vict. c. 110, s. 17.

manner you shall have executed this our writ make appear to us in our Court of Exchequer aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ. Witness, &c.

No. X.

Writ of Venditioni Exponas.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the faith, To the Sheriff of greeting.

Whereas by our writ we lately commanded you that of the good and chattels of C.D. (here recite the fieri facias to the end). And on the day of , you returned to us in our Court of Exchequer aforesaid that by virtue of the said writ to you directed, you had taken goods and chattels of the said C.D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers; therefore, we being desirous that the said A.B. should be satisfied his money and interest aforesaid, command you, that you expose to sale and sell or cause to be sold the goods and chattels of the said C.D. by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Exchequer aforesaid, immediately after the execution hereof, to be paid to the said A.B. And have there then this writ. Witness, &c.

ABINGER,
J. PARKE,
E. H. ALDERSON,
J. GURNEY,
W. H. MAULE.

NEW POSTAGE BILL.

2 & 3 Vict. Cap. LII.

An Act for the further Regulation of the Duties on Postage until the Fifth Day of October, One thousand eight hundred and forty.—[17th August, 1839.]

Whereas it is expedient that the present rates of inland postage on letters should be reduced to one uniform rate of a penny charged on every letter of a given weight, to be hereafter fixed and determined, with a proportionate increase for greater weights, parliamentary privileges of franking being abolished, and official franking being strictly regulated, and Parliament pledging itself to make good any deficiency of revenue which may be occasioned by such alterations of the rates of existing duties: and whereas it is expedient and necessary to give by law a temporary authority

to the lords of her Majesty's treasury to take the necessary steps to give effect to such reduction, and to make orders and regulations for the same; which reductions, orders and regulations shall have force and effect to the fifth day of October, One thousand eight hundred and forty, and no longer; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the law, that it shall be lawful for the lords of the treasury, from time to time, and at any time after the passing of this Act, by warrant under their hands, to alter, fix, reduce, or remit all or any of the rates of British or inland, or other postage payable by law on the transmission of post letters, and to subject such letters to rates of postage according to the weight thereof, and a scale of weight to be contained in such warrant, (without reference to the distance or number of miles the same shall be conveyed), and to fix and limit the weight of letters to be sent by the post, and from time to time, by warrant as aforesaid, to alter or repeal any such altered or reduced rates, and make and establish any new or other rates in lieu thereof, and from time to time, by warrant as aforesaid, to appoint at what time the rates which may be payable are to be paid, that is to say, whether on posting the letter or on receipt thereof, or at either of those times, at the option of the sender: provided always, that all such warrants shall be inserted in the London Gazette ten days at least before coming into operation, and shall within fourteen days after making the same be laid before both Houses of Parliament (if then sitting), or otherwise within fourteen days after Parliament shall meet.

II. And be it enacted, that the rates of postage from time to time to be altered or reduced and fixed by any such warrant shall be charged by and be paid to her Majesty's Postmaster-General, for the use of her Majesty, on all post letters to which such warrant shall extend.

III. And be it enacted, that it shall be lawful for the lords of the treasury, by warrant under their hands, to suspend, wholly or in part, any parliamentary or official privilege of sending and receiving letters by the post free of postage, or any other franking privilege of any description whatsoever, as well under an Act passed in the first year of the reign of her present Majesty, intituled, "An Act for regulating the sending and receiving of letters and packets by the post free from the duty of postage," as under any other Act or Acts of Parliament now in force, and to make such regulations for the future exercise of official franking as they shall think fit: provided also, that every warrant so issued by the lords of the treasury for the suspension of the parts

mentary privilege of franking shall be inserted in the London Gazette ten days at least before coming into operation, and shall, within fourteen days after making the same, be laid before both Houses of Parliament (if then sitting), or otherwise within fourteen days after Parliament shall meet.

IV. And be it enacted, that it shall be lawful for the lords of the treasury, by warrant under their hands, and inserted in the London Gazette ten days at least before coming into operation, to suspend, wholly or in part, the regulations and privileges established and given by law in respect of letters sent by the twopenny post in London and Dublin, and also by any penny post, and in respect of any other letters which may be now sent by the post at a low or reduced rate of postage, or free of postage, and to declare and direct that all and every or any of such post letters shall be charged and chargeable with the like rates of postage as any other letter transmitted by the post, or to make such other regulations in respect thereof as in any such warrant shall from time to time be expressed.

V. Provided always, and be it enacted, that it shall be lawful for the lords of the treasury, by warrant under their hands, to be inserted in the London Gazette, (which warrant may be rescinded, varied, or altered, as they shall from time to time think fit), to direct that letters written on stamped paper, or enclosed in stamped covers, or having a stamp affixed thereto, (the stamp in every such case being of the value or amount in such last-mentioned warrant to be expressed, and specially provided for the purpose under the authority of this Act,) shall, if within the limitation of weight to be fixed under the provisions of this Act, and if the stamp have not been used before, pass by the post free of postage, and also to require that every letter sent by the post shall in the cases to be specified in any such last-mentioned warrant, be written on such stamped paper, or enclosed in such stamped cover, or have such stamp as aforesaid affixed, or that in default thereof, or in case the stamp on which any letter shall be written, or the stamp on the cover in which it shall be enclosed, or to which it shall be affixed, shall be of less value or amount than in such warrant shall be expressed, or shall have been used before, such letter shall be charged and chargeable with such rate of postage as such warrant shall direct.

VI. And be it enacted, that it shall be lawful for the Lords of the Treasury to order and direct the Commissioners of stamps and taxes from time to time to provide proper and sufficient dies or other implements for expressing and denoting the rates or duties which shall be directed by any such warrant as aforesaid, and to give any other orders and make any other regu-

lations relative thereto they may consider expedient.

VII. And be it enacted, that the Commissioners of stamps and taxes shall cause a separate account to be kept of the stamp duties arising under this Act; and it shall be lawful for the Lords of the Treasury and they are hereby employed, by warrant under their hands, from time to time to authorize and require the said Commissioners of stamps and taxes to direct their Receiver-General to pay over such sum and sums of money arising from the said stamp duties as the Lords of the Treasury shall think proper, to the Account of the Receiver-General of her Majesty's Post Office at the Bank of England; and all such sums of money which shall be so paid over shall be held by the said last-mentioned Receiver-General subject to all annuities and yearly sums now charged by law on or payable out of the Post Office revenue, and all other charges, outgoings, and disbursements to which the Post Office is at present liable.

VIII. And be it enacted, that the rates or duties which shall be expressed or denoted by any such dies as aforesaid shall be denominated and deemed to be stamp duties, and shall be under the care and management of the Commissioners of stamps and taxes for the time being; and all the powers, provisions, clauses, regulations, directions, fines, forfeitures, pains, and penalties, contained in or imposed by the several Acts now in force relating to stamp duties, (so far as the same may be applicable) shall be of full force and effect with respect to the stamps to be provided under or by virtue of this present Act, and to the paper on which the same shall be impressed, or to which the same shall be affixed, and shall be observed, applied, enforced, and put in execution for the raising, levying, collecting, and securing of the rates or duties denoted thereby, and for preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully and effectually, to all intents and purposes, as if such powers, provisions, clauses, regulations and directions, fines, forfeitures, pains, and penalties, had been herein repeated and especially enacted with reference to the said last-mentioned stamps and rates or duties respectively.

IX. And be it enacted, that all post letters shall be posted, forwarded, conveyed, and delivered under and subject to all such orders and directions, regulations, limitations, and restrictions, as the Postmaster-General, with the consent of the Lords of the Treasury, shall from time to time direct.

X. And be it enacted, that the penalty which by an Act passed in the first year of the reign of her present Majesty, intituled "An Act for consolidating the laws relative to offences against the

post office of the United Kingdom, and for regulating the judicial administration of the post office laws, and for explaining certain terms and expressions employed in those laws," is imposed on every master of a vessel outward bound to Ceylon, the Mauritius, the East Indies, or the Cape of Good Hope, who shall refuse to take a post letter bag delivered or tendered to him by an officer of the post office, shall henceforth extend and apply to the master of every vessel outward bound, who shall refuse to take a post letter bag delivered or tendered to him by an officer of the post office for conveyance; but every such master shall be entitled to the same gratuities as the master of any other vessel, not being a post office packet, conveying letters for or on behalf of the post office.

XI. And be it enacted, that it shall be lawful for the Lords of the treasury to make any reduction or alteration they may consider expedient in the gratuities allowed by law to masters of vessels for letters conveyed by them, for or on behalf of the post office, between places within the United Kingdom and between the United Kingdom and the Islands of Man, Jersey, Guernsey, Sark, and Alderney, and to allow any gratuities for the conveyance of letters to masters of vessels passing to or from or between any of her Majesty's colonies or possessions beyond the seas, if they shall think fit, not exceeding the gratuities payable to masters of vessels for the conveyance of ship letters from the United Kingdom to places beyond the seas.

XII. And be it enacted, that whenever the word "Letter" or "Letters" is used in this Act, the same shall be held to include newspapers, and any other packet, paper, article, or thing transmitted by the post, but not so as to deprive newspapers of any privilege they now legally possess of passing free of postage; and that the provisions of this Act shall be construed according to the respective interpretations of the terms and expressions contained in the said Act of the first year of the reign of her present Majesty, intituled "An Act for consolidating the laws relative to offences against the post office of the United Kingdom, and for regulating the judicial administration of the post office laws, and for explaining certain terms and expressions employed in those laws," so far as those interpretations are not repugnant to the subject, or inconsistent with the context of such provisions.

XIII. And be it enacted, that wherever the order, consent, or direction, or any other Act of the Lords of the Treasury is prescribed or required by this Act, such order, consent, direction, or other Act may be signified under the hands of the Lords of the Treasury or any three of them.

XIV. And be it enacted, that this Act, and all warrants issued under the authority of the same, shall absolutely cease and determine on the fifth

day of October, one thousand eight hundred and forty, unless Parliament shall declare to the contrary, except in respect of any postage duties which may then have become payable under or by virtue of this Act, and of any proceeding for recovery of such duties, and except also as to any offence committed against the provisions of this or any other Act, and any fine or penalty incurred by reason of any such offence, and any proceeding for recovery of any such fine or penalty, or for the punishment of any offender.

XV. And be it enacted, that this Act may be amended or repealed by any Act to be passed during the present Session of Parliament.

NOTICE TO SUBSCRIBERS.

NEW POSTAGE ACT.

The Statute 7 W. 4, and 1 Vict. c. 35, referred to in the New Act, shall appear in our next.

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ERRATA.

Vol. 2, p. 212, 1st col. 4th line from the top, for East 212, read 1 East, 212.

Same page and column, lines 24 and 25 from the top, for D. Bing. 186. read 8 Bing. 186.

Same page, 2nd column, top line, read 4 Car. and Payne.

On Sept. 1 will be published, price 4s. to be continued Monthly, Vol. III. Part II.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 24th August, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, AUGUST 31, 1839.

[No. 18.

LEX LOCI DOMICILII.

PART II.

IN CASES OF ILLEGITIMACY.

WE will now consider, 1st, Whether the circumstance of a British-born subject, dying domiciled in a foreign state intestate, being a **BASTARD**, makes any and what difference.

2ndly.—What is the nature of the claims of the **CROWN** in *this country*—the true foundation of that claim, and how far it affects or alters the case.

The laws of different countries differ as to the disposition of the personal property of a bastard, dying intestate. In many parts of the British dominions, such property is appropriated by the *Lex loci* to various purposes, and is not transmitted to England. In *Ceylon*, for instance, a *child by adoption*, succeeds to personality, in case of intestacy, and in many cases it goes to charitable purposes. Then, on what footing does the right of the Crown, to the property of bastards, dying intestate without relations, stand; for we presume the same principles must, in a great measure, at least, apply to both cases. Does the Crown take, by the *Lex loci rei sitæ*, by the *Lex loci domicilii* of the owner, or by reason of the personality belonging to British-born subjects?

That the Crown does not take, by the *Lex loci rei sitæ*, we think is evident,

VOL. II.

because, whenever the personality belongs to aliens, domiciled abroad, the grant passes to the personal representative constituted by the foreign state; *because*, also, (as we apprehend,) that a similar grant would be made to the personal representative of a British-born subject, dying domiciled intestate, and a bastard, in one of our *Colonies*, where the mode of disposing of the property differs; because gross injustice, would follow, if it were not so; for in such a case, the Crown would take the moiety of the personality in England, of a *French*-born subject, dying intestate, and a bastard, domiciled in his native country, where he left a widow and no children, or next of kin. *Because*, similar injustice might happen in the case of a British-born subject, dying domiciled in the Colonies, who might omit to make a will, on the natural presumption that the Law of the Colony would govern personality where ever situate.

All the reasons against the *Lex loci rei sitæ*, operate against such a rule, which would be more especially unjust, in a country like *England*, where personal property, belonging to foreigners, and persons domiciled abroad, is constantly coming in the shape of ships and merchandize, and originating in the form of debts of every description.

Such a rule would be in opposition to the principles laid down by **LORD KENYON**, as to personal property, (a) and decidedly con-

(a) *Hunter v. Potts*, ante p. 120.

try to the interest and policy of this country, which has a large national debt, as observed by Lord HARDWICKE (*b*). The Crown, therefore, does *not* take the personality of bastards dying intestate, by the *Lex loci rei sitae*.

There is a strong affirmative ground, however, to believe that the *Lex loci domicilii of the Crown* does prevail in these cases, and that the Crown does in such cases take, because the owner was domiciled here.

In practice, the Crown always takes the personality of *ALIENS* dying domiciled in England intestate, bastards, or without relations, and upon no other principle, than that they died domiciled subjects of England. All the general principles seem to shew, that the title of the Crown is founded in such cases, upon the *Lex loci domicilii* of the owner.

It appears, therefore, to us, that the claim of the Crown to such personality, extending to that of *domiciled aliens*, must stand on a footing different from that of a right, accruing from the circumstance of the owner being a British born subject. We cannot conceive on any principle, that such right can stand on the foundation, of the owner having been born a British subject; indeed, if it were so, we see no reason why a similar claim should not be made to his personality, wherever situate.

When a person dies in England, a bastard and intestate, or intestate, and without relations, the Crown takes the personality as *ultimus hæres*, subject to the debts of the intestate. This we consider to be the right principle, and that the doctrine asserted in *Manning v. Napp*, (*c*) cannot be law. There it was held, that in case of an intestate without kindred, the ordinary may dispose in *pius usus*, but the usual course was for some one to procure the King's Letters

Patent, and then the ordinary admits the patentee to administration; but the Court thought this was rather of respect than of right, and they denied the opinion in *9 Co. Hensloe's* case, and held, that administrations originally belonged to the bishops, and the instance of some lords of manors was not a proof of the contrary.

(To be continued.)

PROBLEM XVIII.

VOL. 2.

GUARANTEES.

What is the general nature of a guarantee?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 10. VOL. II.

Covenants in Leases not to carry on certain Trades. What acts amount to a breach of this contract?

The following cases will shew the view the Courts have taken in putting a construction upon covenants with respect to trades:— where a lessee of a house covenanted not to lease a shop, yard, or other thing belonging to the house to one who sold coals, nor that he himself would sell coals there, and afterwards he leased all the house to one who sold coals; it was held that he had broken the covenant. (Bac. Abr. tit. Condition (*o*)). A covenant in a lease that the lessee shall not exercise the trade of a butcher upon the premises, is broken by there selling raw meat by retail, although no beasts were there slaughtered, (Doe d. Gaskell v. Spry, 1 Barn. & Ald. 617.); but carrying on the business of a retail brewer has been held to be no breach of a covenant not to carry on the bu-

(*b*) *Ripon v. Ripon*, Ambl. 27.

(*c*) 1 Salk. 37.

* See *Woodfall's Landl. and Ten.* by Garrison, ed. 3. 464.—EDITOR.

siness of a common brewer or retailer of beer. (*Simons v. Farren*, 1 Bing. N. S. 126.) Where the lessee of a house and garden covenanted with the lessor not to use, or exercise, or permit, or suffer to be used or exercised upon the demised premises, or any part thereof, any trade or business whatsoever, &c., without the license of the lessor, and afterwards, and without the license, assigned the lease to a schoolmaster, who carried on his business in the house and premises, it was held that the assignment was a breach of the covenant, and that the lessor was entitled to re-enter, under a proviso for re-entry for non-performance of covenants. (*Doe d. Bisk v. Koeling*, 1 Man. & Selw. 85.) In a lease of a house there was a covenant with a clause of forfeiture not to use or exercise the trades or businesses of a butcher, baker, &c. or any offensive trade, without license; it was held that the house was not forfeited by carrying on any occupation besides a trade; and that it was not a trade to use the house as a private lunatic asylum; the word in the covenant being applicable only to a business conducted by buying and selling. (*Doe d. Wetherall v. Bird*, 4 Nev. & Man. 285.) In a lease for years of a messuage and premises in a public street, the lessee covenanted that he, his executors, &c. should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses; or any other trade or business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the other tenants of the lessor, &c.; and the lessee granted an under-lease of the premises (subject to the like covenant) to A. who opened them as a public-house, in the business of a licensed victualler, which was not one of the businesses enumerated in the covenant; it was held that such an act did not amount to a breach of covenant. (*Jones v. Thorne*, 3 Dowl. & Ryl. 152.) If a lessee exercise a trade upon the demised

premises, by which his lease is forfeited, the landlord does not by merely lying by and witnessing the act for six years waive the forfeiture, as some positive act of waiver is necessary; but if he permit the tenant to expend money in improvements to adapt them to that trade, it would seem that it is evidence to be left to the jury of his consent to their being so occupied. (*Doe d. Sheppard v. Allen*, 3 Taunt. 78.) Where there is a covenant against carrying on a particular trade without a written license, the mere fact of a lessor's suffering the tenant to carry on one trade on the premises, will not afterwards authorize his carrying on another without a written license. (*Macker v. Foundling Hospital*, 1 Ves. & Beam. 182.)

W. T. K.

Law Reports.

COURT OF CHANCERY, Aug. 10.

IN RE MARKBY, A LUNATIC DECEASED.
APPORTIONMENT ACT, 4 and 5 Wm. IV. c. 22, sec. 2.—*Construction of the word "Lease," whether it was intended to be a lease in writing; and if so, what is the operation of the statute upon a tenancy at will?* (1.)

A petition was presented in this matter for the apportionment of a sum of £196 between the petitioner, who is the personal representative of the lunatic, and another person, who is his heir-at-law. The sum in question is the produce of the real estates from Lady Day, 1838, to the day of the lunatic's death, the 28th of June. The lands were let by *parole* *demise* from year to year, there being *no written agreement* between the tenants and the lunatic's committee. Under these circumstances the application was made, under the 2nd section of the Apportionment Act, 4th and 5th William IV., c. 22.

Mr. Sidebottom supported the petition, and submitted that the word "lease," in that section, was not intended to be a lease in writing. A lease, as defined in "*Shepherd's Touchstone*," (266) and other books of authority, might be a *demise by parole* as well as in writing.

The LORD CHANCELLOR said he was of opinion that all "rents service reserved on any lease" must be qualified by the words "any instrument that shall be executed after the passing

of the Act," which refer to such rents service, and that the Legislature intended the word "writing" to follow the different instruments mentioned in the section, and that "lease," the most worthy of them, was intended to be in writing. The petition must therefore be dismissed.

(1) This section enacts, that "all rents service reserved on any lease, by a tenant in fee, or for any life interest, or by any lease granted under any power, (and which leases shall have been granted after the passing of the Act), and all rents, charge, and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments, of every description in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of the Act, or (being a will or testamentary instrument) that shall come into operation after the passing of the Act, shall be apportioned, and in such manner in the Act directed.—ED.

ROLLS COURT.—Aug. 6.

DAVIES v. COLEMAN.

Practice—Pleading—Whether upon a Bill filed by the person entitled to administration of an Intestate's effects before obtaining the letters, such letters when obtained pending the suit will have reference to the time of filing the Bill.

This was a bill filed by the administratrix of a creditor, against the personal representative of a debtor, for an account of the debtor's estate. The debt was £50. The defendant filed a plea that the plaintiff was not administratrix of the intestate. The plaintiff filed her replication to this plea on the 8th of January last, but her letters of administration bore date on the 15th of January, seven days after the replication.

Mr. Cooper contended that these letters of administration had relation back to the time of filing the bill, in the same manner as a probate when once granted had relation back to the testator's death. This was decided in Humphries v. Humphries, 3 Peer Williams, 351 (a). When

a plea was replied to, the only question between the parties was the question raised by the plea, and here it extended to the whole suit. Beame's Elements of Pleading, 317.

Mr. Koe, for the defendant, said—The truth of the plea was proved by the letters of administration. The bill stated that the money was advanced by William Tindall; that he died intestate in March, 1826, leaving the plaintiff, his widow, surviving, and that the plaintiff had taken out administration, and that all interest had been paid to the intestate before, and to the plaintiff as administratrix since his death, down to June, 1835, but when the administration was produced it appeared to have been taken out after the bill was filed. As it was not granted when the bill was filed, as stated in the bill, the subsequent taking it out after the objection was taken, and the plea pleaded, would have no effect. The letters showed that the plaintiff was not administratrix when the bill was filed.

Lord LANGDALE said—if the defendant had a substantial defence, and desired to have an opportunity of putting in an answer, he should not be precluded; otherwise, there must be a decree for the plaintiff.

An order was made for the common amount.

served, that there the bill was amended by order, after the letters of administration had been obtained, and they were charged by way of amendment to the bill. The LORD CHANCELLOR (TALBOT) having previously allowed a demur to the bill for want of them, his Lordship observing, that there could be no account taken of the personal estate of the deceased, without making his executor or administrator a party to the bill, as, for ought appeared to the contrary, there might be debts due from the deceased, which might take up great part of the assets; and therefore the administrator must be made a party, else no proper account could be taken; and if any account should in fact be taken, it might be overhauled again when such administration should be taken out.

After the bill was amended, the defendant pleaded that the taking administration was subsequent in time to the original bill, and therefore it ought to be charged by way of a supplemental, not an amended bill; and the rather, forasmuch as every amendment, though made after filing the original bill, is fixed to, and becomes part thereof; so that the bill was filed by an administratrix, as such, and yet would appear to be filed before the administration taken out, and consequently before the right to sue, commenced. But the LORD CHANCELLOR overruled the plea, observing, that it was sufficient that the administratrix had the taken out letters of administration, which, when granted, related to the time of the death of the intestate; like the case where an executor, before his proving the will, brings a bill, yet his subsequent proving the will makes such bill a good one, though the probate be, after the filing thereof; wherefore his Lordship resented this plea as an affected delay, and held that the taking out letters of administration might be charged either by way of supplement or amendment.—See also Cleland v. Chalmer, Prec. Chan. 64.—ED.

(a) This was a similar case, but it should be ob-

QUEEN'S BENCH.—*May 31.**Sittings in Banco.*

STOCKDALE v. HANSARD.

JUDGMENT.

(Continued from p 268.)

Nor could I refrain from quoting the characteristic trait of sentiment with which Lord Erskine remarked, in 1810, on some censure cast on Sir F. Burdett, for appealing to the law against the legality of the Speaker's warrant: "No man would more zealously defend the privileges of Parliament than he should, and he admitted that what either branch of the Legislature had been for the course of ages exercising with the acquiescence of the whole Legislature would, in the absence of Statutes, be evidence of the common law of Parliament, and, as such, of the common law of the land. The jurisdiction of courts rested in a great measure upon the same foundation; but besides that these precedents, as applicable alike to all of them, were matters of grave and deliberate consideration, they were and must be determined in the end by the law. The contrary was insisted upon by the Commons when they committed Lord Chief Justice Pemberton for holding plea of them in his court; but so far was he from considering such a claim as matter of argument under this government of law, that I say, advisedly," said his Lordship, "that if upon the present occasion a similar attack was made upon my noble and learned friend (Lord Ellenborough) who sits next me, for the exercise of his legal jurisdiction, I would resist the usurpation with my strength, and bones, and blood. Why was any danger to be anticipated by a sober appeal to the judgment of the laws? The Judges had no jurisdiction over the privileges of the House of Commons; they would say they had no jurisdiction. If they thought they had, they would give a just decision according to the facts and circumstances of the case, whatever they might be." (Hansard's Parliamentary Debates.) After these decisions in our courts, and these strong and vehement declarations of opinion by some of the greatest luminaries of the law, it is too much to seek to tie our hands by the authority of all our predecessors.

On Lord Brougham's judgment in the case of Mr. Long Wellesley, lately published by himself, and reported also in 2 Mylne and Russell, 637. 660, for obvious reasons I shall observe but shortly. He adopted, in its fullest terms, the resolution expressed by Chief Justice Willes, and carried it no further, though his form of expression is perhaps more striking and forcible. "If instead of justly, and temperately, and wisely abandoning this monstrous claim, I had found a unanimous resolution of the House in

its favour, I should still—(and it is this which made me interpose to assure the learned council that I needed not the resolution of the House of Commons in favour of the Court of Chancery)—I should still have steadily pursued my own course, and persisted in acting according to what I knew to be the law." A declaration the more remarkable, as proceeding from a judge long known as the champion of all popular rights, the jealous asserter of all the real privileges of the House of Commons, where his station and his services may be thought to place his name on a level at least with the greatest of all those, either lawyers or statemen, who have come after him upon the same stage.

It is indeed true that that avowal of opinion was no more necessary for the decision, than perhaps the discussion of the Chief Justice Bridgman and the declared resolution of Chief Justice Willes. But would that circumstance render the sentiment less offensive, if it really assailed the independence and dignity of the House of Commons? Quite the contrary. Yet there was no committee, no resolution, no menace.

Two admissions were made by the Attorney-General in the course of his argument here, either of which appears to me fatal to his case. He very distinctly recognized the words of Lord Mansfield, that if either House of Parliament should think fit to declare the general law, that declaration is undoubtedly to be disregarded, adding that it should be treated with contempt. Now such declaration would be a proceeding of the House, and so above all inquiry.

Again, if the due subordination of the courts is the guiding principle, the declaration, even if against law, by a superior court, demands respect and deference, if not acquiescence. But the declaration of general law may arise in the course of an inquiry respecting privilege; the claim advanced by the report of the Committee, is that "the House is the sole and exclusive judge of the extent of its own privileges," and the Attorney-General in the same spirit informed us on the part of the House of Commons, of his and their "confidence that when we should be informed that the act had been done in the exercise of a privilege, we should hold that we could no longer inquire into the matter." He warned us that, this being a question of privilege, we have no power to decide it, and told us that, whenever either House claims to act in exercise of a power which it claims, the question of privilege arises. But if the claim were to declare a general law, the Attorney-General agrees that no weight would belong to it. Clearly then the Court must inquire whether it be a matter of privilege or a declaration of general law; as indisputably, if it be a matter of general law, it cannot

cease to be so, by being invested with the imposing title of privilege.

The other concession to which I alluded is, that when matter of privilege comes before the courts, not directly, but incidentally, they may, because they must, decide it. Otherwise, said the Attorney-General, there would be a failure of justice. And such has been the opinion even of those judges who have spoken with the most profound veneration of privilege. The rule is difficult of application. Lord Ellenborough and the Court, as well as the defendant's learned counsel, felt it to be so in *Burdett v. Abbot*. The learned report of the Select Committee states in direct terms that they "have not been able to discover any satisfactory rule or test by which to ascertain in all cases whether the question of privilege would be deemed to arise directly or incidentally; there are many cases which might be decisively placed in the one class or the other, but there may be also very many which cannot be so assigned." Your Committee are of opinion that the courts have no jurisdiction to decide upon privilege either directly or incidentally in any sense inconsistent with the independence and exclusive jurisdiction of Parliament. If such a jurisdiction did exist of deciding incidentally upon privilege, uncontrolled by Parliament, it would lead to proceedings as incongruous and as effectually destructive of the independence of Parliament as if the direct jurisdiction existed, a consequence which, together with the extreme uncertainty of the extent of the rule, makes it indispensably necessary that it should be investigated."

The report seems to consider that the question of privilege arose incidentally in the former trial between the parties, and points out very serious inconveniences that may flow from, according to courts of justice, this power of deciding incidentally. The "opinion that the courts have no jurisdiction to decide upon privilege either directly or indirectly," undergoes some apparent qualification by a reference to the sense in which the words are used. It appears that the courts had "no such jurisdiction in any sense inconsistent with the exclusive jurisdiction of Parliament." I would not venture to speak with absolute certainty of the meaning of this passage, but I imagine that a body which has no jurisdiction to act in any sense inconsistent with the exclusive jurisdiction of another body, can possess no jurisdiction at all. I think then it must be assumed, that the Committee of the late House of Commons declared that the courts have no jurisdiction whatever to decide even incidentally on any matter of privilege, their resolutions having reference to this preceding part of their report.

Now this power is denied to the courts by

this report for the first and only time. Even the appendix to it, which being published by the same authority, I know not well how to disjoin from it, returns to that same distinction between the direct and incidental occurrence of questions of privilege which the report and resolutions appear to repeal. It were to be wished that the late House of Commons had laid down their rule for the guidance of the courts in language less open to dispute as to its meaning, but we in this case must feel relieved from all embarrassment by the frank acknowledgment of the Attorney-General. If then we may be under the obligation of deciding on privilege, even though incidentally, it follows that we have some knowledge on the subject, or at least the means of obtaining that knowledge. The report takes for granted, that if either House has actually come to a decision on the point thus raised, we should be bound to adhere to it; and the Attorney-General insisted, that even if in the present case the question did but arise incidentally, we should be bound by the declaration of the law set forth by the House, in any formal statement of its opinion.

Our duty would then be to interpret the law laid down by one House, by discovering its meaning. But after ascertaining it as best we might from those stores of parliamentary learning, from which we are pronounced to be excluded, we might possibly find that the other House (or the same House at another time) had come to an opposite declaration. What course must we then take? How reconcile the discrepancy? Perhaps it may be said that the fact is not to be presumed. I agree that it is not; but it exists at this moment, with reference to the legal rights of parties in the matter that arose in *Ashby v. White*. This Court could not decide the matter either way, without overruling what has been laid down either by Lords or Commons, and thus violating the privileges of Parliament and rendering ourselves amenable to just displeasure.

But suppose an entirely new point to arise, and some party litigating here to set up a claim of privilege never heard of before, as to which therefore neither House had ever framed a resolution. Since the courts may give judgment on matters of privilege incidentally, it is plain that they must have the means of arriving at a correct conclusion, and that they may differ from the House of Parliament, as Holt and the Court of Queen's Bench differed from the Lords in the Banbury case, as he did in Paty's case; as the same and many other of the judges, as well as the Lords, did from the Commons in the case of *Ashby v. White*; and as I trust every court in Westminster Hall would have done, if an order of either House, purporting to be made by virtue of the privilege of Parliament, had been brought

before them as a justification for the imprisonment of a subject of this free state for killing Lord Galway's rabbits, or fishing in Admiral Griffin's pool.

In truth, no practical difference can be drawn between the right to sanction all things under the name of privilege, and the right to sanction all things whatever, by merely ordering them to be done. The second proposition differs from the first in words only. In both cases the law would be superseded by one assembly; and however dignified and respectable that body, in whatever degree superior to all temptations of abusing their power, the power claimed is arbitrary and responsible, in itself the most monstrous and intolerable of all abuses.

Before I finally take leave of this head of the argument, I will dispose of the notion, that the House of Commons is a separate court, having exclusive jurisdiction over the subject matter, on which for that reason its adjudication must be final. The argument placed the House herein on a level with the spiritual courts, and the Court of Admiralty. Adopting this analogy, it appears to me to destroy the defence attempted to the present action. Where the subject matter falls within their jurisdiction, no doubt we cannot doubt their judgment; but we are now inquiring whether the subject matter does fall within the jurisdiction of the House of Commons. It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer; it is perfectly clear that none of these courts could give themselves jurisdiction, by adjudging that they enjoy it.

(To be continued.)

PREROGATIVE COURT.—July 4.

IN THE GOODS OF RICHARD HAYES.
NEW WILL ACT, SEC. 11.

Construction of the term "Mariner" in this Section—Whether it comprehends Commissioned Officers as well as Common Seamen.

Richard Hayes, the testator, was a PURSER in Her Majesty's service, and died at sea on the 27th August, 1838, having previously made his will, dated the 26th April, 1833, which was duly executed. He subsequently made a codicil to his will, dated the 18th January, 1838, whereby he bequeathed all his property to his wife. He signed the codicil, but it bore no attestation. The New Will Act, sect. 9, declares that no will shall be valid unless it shall be in writing, and executed as follows. It shall be signed at the foot or end thereof by the testator, or by some other person, in his presence and by his direction, and such signature shall be made and

acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator. But sec. 11 provides that *any Mariner or Seaman being at sea*, may dispose of his personal estate as he might have done before the making of the Act.

The question therefore arose here upon the unattested codicil, whether a Purser of a man of war (a Warrant Officer) dying at sea, is within the meaning of the 11th section, as coming within the description of a "Mariner or Seaman."

The case of *The Earl of Euston v. Lord Henry Seymour* (not reported) was cited in the argument in support of the codicil which related to the will of *Admiral Lord Hugh Seymour*, when Sir W. Wynne had given an opinion *obiter* that the will of an officer of his Lordship's rank came within the exception of the 23d sec. of the Statute of Frauds.

SIR H. JENNER said, that the question was, whether a Purser of a man of war comes under the description of "Mariner or Seaman." The only case of the kind of which I have any information is that cited of the *Earl of Euston v. Lord Henry Seymour*, (a) in which, on reference to the notes of Dr. Arnold and Sir C. Robinson, I find that Sir W. Wynne was inclined to hold that the term "Mariner" included the whole profession, because he did not know where to stop. Some of the reasons assigned for the exception (which was not merely to protect illiterate persons) it was said applied just as well to the Commander in Chief, as to a common seaman: the same emergency might happen by which it might become necessary for either person to dispose of his property by word of mouth, and while at sea, the one might be *inops consilii* as well as the other. It is very difficult where to draw the line of exclusion. Under such circumstances, and being of opinion that the reasons for the exemption applying equally to the Commander in Chief as the common seaman, the codicil is within the 11th sec. of the act, the deceased being "a Mariner at Sea." I give this opinion according to Sir W. Wynne's construction, and according to the reason of the thing that the term "Mariner or Seaman" does not exclude *any* person in her Majesty's navy, though superior officers of the ship, *being at sea*, from the 11th sec. I therefore decree probate of the will and codicil.

(a) Admiral Lord Hugh Seymour was Commander in Chief on the Jamaica station, and made a nuncupation will, while *resting on shore*, at the official residence, by which reason his will was declared invalid, Sir W. Wynne being of opinion it could not be said that at the time of nuncupation the Admiral was *at sea*.—ED.

Summer Assizes.

NORTHERN CIRCUIT.—*August 26.*
Liverpool.

Before Mr. BARON MAULE.
Special Jury.

RUTTER v. CHAPMAN.

*The VALIDITY of the MANCHESTER CHARTER
of INCORPORATION.*

This was an action brought against the Coroner of the Municipal Borough of Manchester. The plaintiff disputed his right to the office, by reason that the charter was not granted upon the petition of the inhabitants of Manchester, and that they did not accept it.

The *Attorney-General* appeared for the defendant, and claimed his privilege to address the jury first. He stated that the case rested on the Municipal Corporation Act, by which all who have paid poor-rates for the year before are burgesses. The corporation conducts all the affairs of the borough. A number of large towns had sprung up, which had no corporations, accordingly by section 141 of that Act, provision was made for granting corporations to towns so situated, that if the inhabitant-householders should petition his Majesty, it should be lawful for his Majesty in council to extend to any inhabitants of such town or borough the powers and provisions of the Act. It contained powers and provisions for enlarging the means of the corporations in England. Before it, they could not raise a pound for any purpose however useful. This Act conferred a power to raise a borough rate, and also that where a quarter sessions was held and a recorder appointed, a coroner should be appointed. The Crown may grant a corporation, but could not grant the power of raising a rate; for this purpose the act was necessary. One of the places to which it was desirable to apply this Act was Manchester, which had increased beyond example, being now the second town in population in the kingdom. By the Reform Act it was enabled to send burgesses to Parliament, but it still had no power of internal management. It consists of nine townships, all under separate and distinct governments, which might have done very well under King Alfred, but the government of which was very unfit for the times of Queen Victoria. In each was a court under the lord of the manor, where the leet jury appointed officers, called boroughreeves, who were no better than constables. In Manchester itself were two boroughreeves, named by the lord, and elected by the leet jury. There was a separate Act for police in almost every one of the nine townships, but the constables in one town-

ship could not pursue a culprit into another township. This produced great inconvenience. The whole constabulary force in Manchester amounted to only thirty-six, and disturbances had happened in which the military were called in—a measure always to be avoided if possible, and which an efficient police would have rendered unnecessary. It also became very difficult to procure respectable constables. They were fined, they disregarded it, and the whole went on with the utmost difficulty. Application had been made to Lord Liverpool on the subject. At last, in 1837, a remonstrance from the leet jury stated that some change had become indispensable. In consequence, in 1838, there was a requisition of respectable rate-payers, signed by 944 persons, addressed to the boroughreeve and constables, for the purpose of having a public meeting called, to petition her Majesty, under the Corporation Act, for a charter. The greatest pains were taken that this should be a full and fair meeting. From all the townships all rate-payers, and none other were to be admitted, and accordingly the meeting took place on Friday, the 9th of February, 1838, when all had an opportunity to address the meeting, and give their votes, and all who did not attend must be considered to have assented. The meeting was numerous. The resolution was moved and fully discussed, that a petition should be presented to her Majesty in council for a charter. An amendment was proposed by a Mr. Rowe. He disapproved of the act. Both the boroughreeve and the constables declared that there was a large majority. Another resolution was then put, for a committee to prepare the petition. The committee was appointed, and the petition prepared. Signatures were then to be obtained, and being a population of near 300,000 spread over these townships, districts were formed, and gentlemen employed themselves from that time till the beginning of March, in obtaining signatures. None but those persons who paid rates were to sign, and on the 10th of March, 11,383 had signed, representing property to the value of £315,000 a-year. This was thought sufficient. The petition was then made up, and on the 12th of March, the petition was lodged. On the 21st of March an order was made that the petition should be considered on the 12th of May. On the 23rd of April a counter-petition was presented, which was in the course of preparation from the 9th of February, till five weeks after the other petition was presented. The privy council deputed two gentlemen to come down to Manchester to inquire. They made a report: and on the 15th of August the privy council ordered the charter, which is dated the 23rd of October, 1838. Mr. Rushton, a barrister, was appointed to revise the burgess list, and Mr. Hyde as re-

turning officer. The charter left the choice of mayor, aldermen, and council to the burgesses, so that they might all be the true representatives of the constituent body. On the 28th of October Mr. Price, who had been appointed for that purpose, made up the lists, and advertised for claims and objections, which were posted, and opportunity given to all parties to see them. On the 23rd of October Mr. Rushton advertised that on the 28th of November he would revise the list. A burgess list was completed, and handed over to Mr. Hyde, the returning officer. He gave notice for election of councillors in the various wards on the 15th of November. There voted 3,458 burgesses in the election of councillors. On the following day the aldermen were elected, and they elected the mayor, and thus the corporation was complete. They appointed a watch committee to superintend the police. They hired new police to the number of 400. There were three townships in the Parliamentary borough which were not in the municipal borough. Five of the townships surrendered their own peculiar police without difficulty. By the 84th section of the Act, a notice of the day when the constables were to begin to act was to be put on the church doors. The township of Manchester proper thought fit to retain their own police. (Mr. Cresswell stated that Chorlton also dissented.) I understand that Chorlton depends upon the new police entirely as much as any other part of the borough. A petition was presented by the new town council for a grant of quarter sessions, which was successful, and my honourable and learned friend, Mr. Armstrong, was appointed recorder. He tried the prisoners, and one he was under the painful necessity of transporting beyond the seas. We are told all this was unlawful, and Mr. Armstrong himself ought to be tried. (Mr. Cresswell.—They have all at least actions.) This may cause a smile or a moment, but it is a very serious matter whether a judge sitting on the bench and trying prisoners has or has not any jurisdiction. It ought to be on great consideration, and some show of reason, that such objections are raised. On the 3rd of April, 1839, my client was appointed coroner under the 39th section, by which none should take inquisition as coroner in the borough except the person so appointed. The defendant was appointed, and he held various inquests, and among others upon the body of a woman, and in action was brought against him for that act. He is deemed a wrongdoer. There was a charter granted; there was a town council elected; they have appointed him coroner, and under that authority he has acted. What is the answer? The plaintiff says, all this may be true, but this charter was not granted upon the petition of the

inhabitants of Manchester; and there is not the smallest foundation for either allegation. I presume Mr. Cresswell proposes to enter into a scrutiny of the signers of the various petitions. If time permitted, I should not object, but I should have strange disclosures to make. Those who were employed by the opposite party to procure signatures were paid by the piece, and names, by the hundred, purely fictitious, were inserted, and women, and people dead in their graves, as persons who were afraid of a charter being granted to Manchester. With great submission, this question cannot be so entered into. As soon as I show that there was a petition duly signed and presented I shall be entitled to a verdict. How is such a scrutiny to be executed? There are no means of taking a poll. There must be a reasonable construction put upon the act, and the construction I put upon it is, that there being a petition which satisfied the privy council, it is impossible now to inquire which way the majority is. If all the acts under the charter are thus to be called in question, nothing is secure. What sort of an inquiry would it be? A majority of whom? All householders? Then are ladies, or minors, to vote? Are paupers to vote? All these may be inhabitant householders. To what district is this to be extended? Was the Crown ever to enter into this scrutiny, how could it ascertain the absolute majority? Now the Crown is to define the district for which the charter is to be granted, and must first determine whether the charter shall be granted before it defines the district. The advisers of the Crown ought to ascertain in the best manner they could the wants and wishes of the people, but suppose they did not do that, then let them be impeached and punished, but the charter is good. If it is to come to a majority, a majority of one is as well as a majority of 500. Are all acts then to be granted at the will of one person, and how long is this to go on, for 20 or 30 years, and then all to be made void? The consequences are most alarming. The Coroner has the power to commit for felony. Is an action to be brought against him for that? Still more serious. He holds an inquest: a person is found by the jury, a murderer, upon which he may be tried. May the prisoner plead that the coroner was not duly appointed, and is the charge of murder to be thrown from him to those who sent him for trial? I point this out to show the frightful consequences of my learned friend's doctrine. Again, is the validity of the borough rate to be questioned, one way or the other? There are in Manchester thousands of persons liable to this rate: are they all to have actions against the officers who levy it? Again, the magistrates have right to grant licenses to public-houses: are they all to be void, of which there are hundreds?

Are they all liable to have informations against them because the magistrates had not proper authority? Again, as to the police: if certain acts are gone through, all the local police acts are determined. Is this to be tried thus, or any of those questions, where one jury may find one way and one another, and perhaps on different evidence? It might be that the defendant could give evidence which would be sufficient to establish these things, and the charter would then depend upon the evidence which he has been prevented from giving. Again, it is said, the petition emanated from nine townships, and the charter is granted for only six; but as there were petitioners for all these six townships, the Crown had the discretion to fix the boundaries of the borough. So much for the objection that there was not a proper petition. The second ground appears still less tenable—namely, that the charter was not accepted: that is, that it was rejected. The charter was granted to an indefinite body, and in that case there need not be an express acceptance; and if there is an acceptance by a part, it is considered an acceptance in the whole. I merely refer to Mr. Justice Buller's doctrine laid down in the King v. Amory, 1 Term Rep. 588. So by Lord Tenterden in the King v. Hughes, 7 Barn. and Cress. 717, the great objection was, that there was no public meeting to accept the charter; and it was said that if there had it would have been sufficient, though there was no acting under it—acting under it being the evidence of acceptance of the charter. The result is, that if there be a public meeting, or an acting under it that is all that is required. Here every thing was done that was required. Councillors, aldermen, and mayor, appointed. The Crown grants a commission of the peace, a recorder is appointed, a coroner chosen, a police is established, rates are made; there is no one act authorized by the statute that has not been done. During all this acting on the one side there was acquiescence on the other. Term after term went by, no *quo warranto* was moved for. Things might go on in this way year after year, and then we might be told that there was no acceptance of the charter.

Daniel Price.—I was constable for 1838. Mr. Ferguson was the other constable, and Mr. John Brown was the boroughreeve. A requisition for a public meeting was presented to us about the 2d of February, 1838. We entered the signatures, and finding it numerously and respectfully signed, we called a meeting, which was held in the large room pursuant to advertisement. We took great pains to prevent other than rate-payers entering. The room was full. Probably four or five times the number in this court: there were upwards of 1000 people. It was the usual place of public meetings. I never saw

a more numerous meeting. A resolution for a petition was proposed. Mr. Rowe moved an amendment that a charter should not be applied for. There was speaking on both sides, and every one was heard who wished to speak. The debate lasted from about nine till half-past one or two o'clock in the afternoon. We came to a show of hands: the majority was for the charter. It was nearly the whole room: not above sixty or seventy hands were held up on the other side. We stated the majority to be in favour of the charter. The boroughreeve and the two constables all concurred. There was then a resolution for a committee to prepare the petition, and a committee was appointed. Our names were put on, but withdrawn, as it was necessary for us to hold ourselves independent.

Cross-examined.—We took pains to let every body in. Nearly the whole were in favour of the charter. I believe a great many others were in favour of a charter, if it were obtained by their own political party. I cannot form a judgment of the number of inhabitant householders in Manchester. I should think there are more than 10,000. I have no opinion whether there are 20,000 or not. I did not make out the burges lists.

George Wilson.—I attended at the public meeting, and was appointed one of the committee. I was the honorary secretary. It was appointed the 10th February. The petition was prepared, and it was ordered that copies should be distributed to canvassers, which was done. On the 16th we met again. The canvassers were members of the committee, who were instructed to obtain signatures. Instructions were handed to them with the papers for signature: they were to report from day to day to the committee. There were about 100 canvassers: they acted gratuitously. On the 16th February the committee met again: about forty were present, and a sub-committee was appointed, called the executive committee, to superintend the canvassers. On the 2nd March the committee met at the Town-hall, and resolutions were passed, and an order that as they had not received female signatures to that time, it was inexpedient to do so. On the 9th of March we met to receive the signatures to the petition. I reported the numbers, and it was ordered that the petition should be closed the day following, and an advertisement was inserted in the papers to that effect. Gentlemen were appointed to carry the petition to London.

Cross-examined.—I have been twenty years in Manchester. I have no notion of the number of inhabitants. There are 34,000 rate-payers in Manchester alone, without the other townships. I cannot say if ladies vote on church-rates there.

Richard Coffin examined on the *voir dire*.—I am a burgess, a councillor, and an alderman of the corporation. The corporation defend the action.

The Attorney-General submitted that the witness had no interest in the suit, and was competent.

Mr. Cresswell argued that if the corporation defended the action they must pay, and if the charter was not established, they could not raise any funds as a corporation, and therefore would be personally liable. The witness, therefore, comes to relieve himself from a personal liability.

Mr. Coffin.—I am not aware that any indemnity fund has been subscribed. I know of no other means of paying the town-clerk except by a rate on the burgesses. I can't say how he is to be paid.—[Mr. Cresswell referred to the case of Doe v. Tooth, 4 Adolph. and Ellis.—The Attorney-General said that that case was decided under the old system, when corporations could make ducks and drakes of their funds if they pleased.]—I attended this meeting: I never saw so numerous a meeting in-doors before. I moved the first resolution in favour of a petition for a charter. Mr. Rowe addressed the meeting on the other side, I think for three quarters of an hour, or more. I heard the majority announced by the boroughreeve and constables, after conferring together. I was a member of the committee subsequently appointed. About 100 canvassers were appointed: they were in the same class as myself. They acted gratuitously, with a few exceptions: towards the close a few were paid, chiefly from Chorlton or Medlock. I took a part in pressing the petition. I was in the executive committee. The return was closed in the beginning of March. I was one appointed to carry the petition to London. I lodged it at the Council-office, and saw it there repeatedly afterwards. I cannot recollect the day.—(The petition was produced.)

Cross-examined.—It is not in the same state now as when I carried it. It is torn now. In getting signatures I confined myself to inhabitant rate-payers residing within the municipal borough. The petition lay in my office, and many signed it there. I can speak to the handwriting of many. I can't tell how many I obtained from persons whom I knew personally; probably from fifty to a hundred. There is a class of poor householders whose landlords pay their rates. There is a considerable proportion of them.

Philip Young.—I was head clerk to the executive committee. I had a number of clerks under me. The sheets were brought to the office by the canvassers or by the chairman. I received above 120 sheets, 104 names to a sheet. Some sheets were not filled. There were in all eleven thousand six or seven hundred names.

Cross-examined.—There are no signatures that I can speak to myself. I don't know if they are the signatures of the persons they purport to be.

MAULE, B.—Mr. Cresswell, what are the points you wished to raise.

The Attorney-General admitted that an absolute majority of the inhabitant householders rate-payers, did not petition, and that there were in all more than double the number of the petitioners, but that there were more inhabitant householders rate-payers in the counter-petition than in that for the charter he could not admit.

MAULR, B.—Let us have all the points in order.

Mr. Cresswell.—One point is, whether a charter can be granted for a smaller district than the district which petitioned. I propose, first to inquire whether the petition contained a majority of inhabitant rate-payers, within the Parliamentary borough of Manchester, which included the nine townships; second, that more should sign in favour of than against the charter; and third, that there should be a majority of those who would be burgesses under the charter when granted, that is, that a majority of £10. householders should sign the petition for the charter.

The Attorney-General was willing, if necessary, that the number of signatures should be privately inquired into, but he wished first to obtain the opinion of the Court whether it was necessary that there should be shown to be a majority in the petition for the charter, or at least, he wished the opinion of his Lordship on the question.

MAULE, B. said, the fact of there being a counter-petition made it a question for the jury whether a majority of the inhabitant rate-payers petitioned for a charter, but that the charter was not, as contended by the plaintiffs, absolutely void. He thought, that if the counter-petition did contain more petitioners inhabitant rate-payers, or more of those who would be qualified to be burgesses, than the petition for the charter; the petition for the charter would be such an one as the Privy Council might grant a charter upon; and it was then taken that the petition for the charter was signed by some thousands of such persons as were authorized to petition under the act, and that the number in neither petition amounted to a majority of the whole. It was stated there were upwards of 48,000 persons entitled to vote. To investigate these, at a quarter of an hour a-piece, would take 12,000 hours, which, at eleven hours a-day, would take somewhere about three years and a half.

It was finally agreed that the Judge should put on his notes the whole number of persons entitled to vote; that the petition for the charter

contained 3,000 or 4,000 genuine petitioners; and that the counter-petition contained a greater number. On that the Judge ruled that the Privy Council could grant a charter on such a petition, on the understanding that a verdict should pass for the defendant, and that Mr. Cresswell would tender a bill of exceptions.

The jury then returned a verdict for the defendant, subject to the opinion of the Court above on the points raised.

NEW POSTAGE ACT (a).

This new Statute is merely an *addenda* to the following—

I Vict. Cap. XXXVI.

An Act for consolidating the Laws relative to Offences against the Post Office of the United Kingdom, and for regulating the judicial Administration of the Post Office Laws, and for explaining certain Terms and Expressions employed in those Laws.—[12th July, 1837.]

Whereas an Act was passed in the present Session of Parliament, intituled “An Act to repeal the several laws relating to the Post Office;” be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that on the day on which the recited Act shall come into operation this Act shall come into operation for making provision respecting offences against the Post Office, and the judicial administration of the Post Office laws.

II. And for preventing any breach of the privilege conferred by the Post-office Acts on the Postmaster-general for the benefit of the public revenue, be it enacted, that every person who shall convey otherwise than by the post a letter not exempted from the exclusive privilege of the Postmaster-general shall forfeit five pounds, and every person who shall be in the practice of so conveying letters not so exempted shall for every week during which the practice shall be continued forfeit one hundred pounds; and every person who shall perform otherwise than by the post any services incidental to conveying letters from place to place, whether by receiving or by taking up by collecting, or by ordering or by despatching, or by carrying or by re-carrying or by delivering a letter not exempted from the exclusive privilege of the Postmaster-general, shall forfeit for every letter five pounds, and every person who shall be

in the practice of so performing any such incidental services shall for every week during which the practice shall be continued forfeit one hundred pounds; and every person who shall send a letter not exempted from the exclusive privilege of the Postmaster-general otherwise than by the post, or shall cause a letter not so exempted to be sent or conveyed otherwise than by post, or shall either tender or deliver a letter not so exempt in order to be sent otherwise than by post, shall forfeit for every letter five pounds, and every person who shall be in the practice of committing any of the Acts last mentioned shall for every week during which the practice shall be continued forfeit one hundred pounds; and every person who shall make a collection of exempted letters for the purpose of conveying or sending them otherwise than by the post, or by the post, shall forfeit for every letter five pounds; and every person who shall be in the practice of making a collection of exempted letters for either of those purposes shall forfeit for every week during which the practice shall be continued one hundred pounds: and be it declared, that the term post shall herein include all post communications by land or by water (except by outward-bound vessels not being employed by or under the Post-office or the Admiralty to carry post letters); and the above penalties shall be incurred whether the letter shall be sent singly or with any thing else, or such incidental service shall be performed in respect to a letter either sent or to be sent, singly or together with some other letter or thing; and in any prosecution or action or otherwise for the recovery of any such penalty the onus shall lie upon the party prosecuted to prove that the Act in respect of which the penalty is alleged to have been incurred was done in conformity to the Post-office laws.

III. And be it enacted, that every person being either the master of a vessel inward-bound, or one of the officers, or one of the crew, or a passenger thereof, who shall knowingly have any letter in his possession not exempted from the privilege of the Postmaster-general, after the master shall have sent any part of his ship’s letters to the Post-office, shall forfeit for every letter five pounds; and whether the letter be in the baggage or on the person of the offender, or otherwise in his custody, it shall be held to be in his possession; and every such person who shall detain any such letter after demand made, either by the officer of the customs or by a person authorized by the Postmaster-general to demand ship’s letters, shall forfeit for every letter ten pounds.

IV. And for preventing the abuse of any privilege by the Post-office Acts conferred of sending letters or papers free of postage, or at a reduced rate of postage, whereby the Post-office

(a) Ante, p. 270.

revenue may be defrauded, be it enacted, that every person who shall send or cause to be sent a banker's parcel, wherein or upon the cover whereof there shall be a writing or communication, or any thing other than negotiable notes, contrary to the Post-office laws or the regulations of the Post-master-general, shall forfeit two hundred pounds; and every franking officer or other person authorized by virtue of their office to frank official letters who shall unlawfully superscribe a letter as belonging to his office or department which does not concern the business thereof, shall for the first offence forfeit one hundred pounds, and for the second offence shall forfeit the like sum, and be dismissed from his office; and every person having the command of a ship or vessel, or regiment or corps or detachment, who is authorized to write his name, and the name of the ship, or of the vessel, or of the regiment or corps detachment, commanded by him, upon a single letter from a seaman or soldier privileged to send his letter at a reduced rate of postage, who shall wilfully write his name upon a letter that is not from and on the private concerns only of such seamen or soldier so privileged, shall for every such offence forfeit five pounds; and every person not having at the time the command of the ship or vessel, or regiment or corps or detachment to which a seaman or soldier so privileged belongs, who shall write his name upon a letter in order that the same may be sent at a lower rate of postage than by law established, shall for every such offence forfeit five pounds; and every person who shall procure a seaman or soldier to obtain the signature of his commanding officer to a letter to be sent by the post which shall not be on the private concerns of such seaman or soldier, and every such seaman or soldier who shall obtain the signature of his commanding officer upon a letter which shall not be from such seaman or soldier, and upon his own private concerns only, in order to avoid the payment of the rates of postage by law established, shall for every such offence forfeit five pounds; and every person who shall wilfully address a letter to such seaman or soldier having the privilege of receiving his letters at a reduced rate, which shall be intended for another person, or which shall be concerning the affairs of another person, with intent to evade the payment of the rate of postage by law established, shall for every such offence forfeit five pounds; and every person who shall, with intent to evade any duty of postage, falsely superscribe a letter as being the owner or the charterer or the consignee of a vessel conveying the same, or as the owner or the shipper or the consignee of goods shipped in such vessel, shall for every such offence forfeit ten pounds.

V. And for the prevention of the abuse of the

privilege of sending newspapers free by the post, or at a reduced rate, be it enacted, that every person who shall inclose or cause or procure to be inclosed in a newspaper to be sent by the post, or under the cover thereof, any letter or paper or thing, and every person who shall print or cause to be printed any words or communication, either upon any such newspaper after the same shall have been published, or upon the cover thereof, or who shall put or cause to be put any writing or marks either upon the newspaper or upon the cover thereof, other than the name and address of the person to whom it shall be sent, and every person who shall knowingly either send or cause to be sent by the post, or who shall either deliver or tender in order to be sent by the post, a newspaper in respect of which any one of the offences herein-before mentioned shall have been committed, shall for every such offence forfeit treble the duty of postage, computed by weight and by distance, as if the paper in respect of which the offence was committed were a letter, such postage to be recoverable as postages not exceeding in amount twenty pounds are recoverable; or he shall, except in those cases in which the said newspaper or cover shall only have marks thereon, and not in writing, at the option of the Postmaster-general, be prosecuted as for a misdemeanour, and shall suffer punishment accordingly.

VI. And for compelling the observance of the provisions of the Post-office laws relating to the conveyance of ships letters, be it enacted, that every master of a vessel outward-bound to Ceylon, the Mauritius, the East Indies, or the Cape of Good Hope, who shall refuse to take a post letter bag delivered or tendered to him by an officer of the Post-office for conveyance, shall forfeit two hundred pounds; and every master of a vessel who shall open a sealed letter bag with which he shall have been intrusted for conveyance a letter or any other thing shall forfeit two hundred pounds; and every master of a vessel who shall not duly deliver a letter bag with the contents at the Post-office on his arrival in port, without wilful or unavoidable delay after his arrival shall forfeit two hundred pounds; and every person to whom letters may have been intrusted by the master of a vessel to bring on shore who shall break the seal, or in any manner wilfully open the same, shall forfeit twenty pounds; and every master of a vessel who shall refuse or wilfully neglect to make the declaration of having delivered his ship's letters to the Post-office, as required by an Act of the present Session, intituled an Act for the Regulation of the Duties of Postage, shall forfeit fifty pounds; and every collector, comptroller, or officer of the customs who by the said Act is required to prohibit any vessel reporting until the requisites of such Act

shall have been complied with, who shall permit such vessel to report before the requisites of such Act shall have been complied with, shall forfeit fifty pounds; and every master of a vessel (not having been able to send his letters ashore previous to his arrival at the port where the vessel is to report) who shall break bulk or make entry before all letters on board shall be sent to the Post-office shall forfeit twenty pounds; and every master of a vessel, or any other person on board any ship liable to the performance of quarantine, who shall neglect or refuse to deliver to the person or persons appointed to superintend the quarantine all letters in his possession, shall forfeit twenty pounds.

VII. And whereas post letter bags and post letters are sometimes lost or delayed by the carelessness or other misconduct of the persons having charge of the same; be it therefore enacted, that every person employed to convey or deliver a post letter bag or a post letter who shall whilst so employed, or whilst the same shall be in his custody, care, or possession, leave a post letter bag or a post letter, or suffer any person, not being the guard or person employed for that purpose, to ride in the place appointed for the guard in or upon any carriage used for the conveyance of a post letter bag or post letter, or to ride in or upon a carriage so used and not licensed to carry passengers, or upon a horse used for the conveyance on horseback of a post letter bag or a post letter, or if any such person shall be guilty of any act of drunkenness, or of carelessness, negligence, or other misconduct, whereby the safety of a post letter bag or a post letter shall be endangered, or who shall collect or receive, or convey or deliver, a letter otherwise than in the ordinary course of the post, or who shall give any false information of an assault or attempt at robbery upon him, or who shall loiter on the road or passage, or wilfully mis-spend his time so as to retard or delay the progress or arrival of a post letter bag or a post letter, or who shall not use due and proper care and diligence safely to convey a post letter bag or a post letter at the rate of speed appointed by and according to the regulations of the Post-office for the time being, being thereof convicted, shall forfeit twenty pounds.

VIII. And to prevent obstructions opposite the General Post-offices in London and Dublin, be it enacted, that no hackney carriage shall stand or ply for hire opposite the General Post-office in Saint Martin's-le-Grand, London, or the General Post-office in Sackville-street, Dublin, or any part thereof respectively; and that every driver, or any person having the management of any hackney carriage, who shall permit the same to stand or ply for hire opposite either of the said Post-offices, shall forfeit for every such

offence five pounds; and for the purposes of this provision every carriage with two or more wheels, whatever may be the form or construction of such carriage, or the number of persons which the same shall be calculated to convey, or the number of horses by which the same shall be drawn, shall be a hackney carriage within the meaning of this Act, and in all proceedings at law or otherwise, and upon all occasions whatsoever it shall be sufficient to describe it by the term hackney carriage; and every hawker, news-vender, or idle or disorderly person, who shall stop or loiter on the flagway or pavement opposite the General Post-office in Saint Martin's-le-Grand, London, or in Sackville-street, Dublin, or any part thereof respectively, shall forfeit for every such offence five pounds.

IX. And be it enacted, that every toll collector or receiver, or other person employed to receive the tolls or rates at a turnpike gate or bar erected upon a highway, bridge, or post-road, and every person who shall have the care of a gate of a walled town, or the custody of the keys of such gate, who shall demand toll for any person or horse or carriage going for or conveying or employed to go for or carry a mail, or who shall not permit the mail to pass without delay, or who shall wilfully delay or obstruct the mail at or in passing a turnpike gate or bar, or a gate of a walled town, shall for every such offence forfeit five pounds; and every ferryman or other person employed to receive the tolls or rates at a ferry who shall demand any such toll for any such person, horse, or carriage, or who shall not within the space of fifteen minutes after demand made, convey the mail (if it be possible or safe to do so) across such ferry to the usual landing-place, shall for every such offence forfeit five pounds.

X. And be it enacted, that no deputy, officer, or agent of the Postmaster-general travelling with a mail shall pay for passing or repassing a ferry within any of her Majesty's colonies or dominions in North America, but the ferryman at every such ferry shall forthwith on demand cover over every such deputy, officer, or agent without any payment for the same, on pain of forfeiting for every offence five pounds, to be recovered in any court of record within any of the provinces or colonies in North America by bill, plaint, or information, wherein no essoign, protection, or wager of law shall be allowed, one moiety thereof to her Majesty, towards the support of the government of the said provinces and the contingent charges thereof, and the other moiety to the Postmaster general who shall sue and prosecute for the same, together with full costs of suit.

XI. And be it enacted, that every person who shall aid, abet, or counsel or procure the com-

mission of an offence which is by the Post-office Acts punishable on summary conviction shall, on conviction before a justice of the peace, sheriff, sheriff-substitute, steward, or steward-substitute in Scotland, be liable to the same forfeiture and punishment to which a principal offender is by the Post-office Acts made liable.

XII. And be it enacted, that all pecuniary penalties imposed by the Post-office Acts may be sued for and recovered, with full costs of suit, by any person who shall inform and sue for the same, in any of her Majesty's courts of record at Westminster for any offence committed in England, Wales, or Berwick-upon-Tweed, and in her Majesty's court of session in Scotland for any offence committed in Scotland, and in any of her Majesty's courts of record in Dublin for any offence committed in Ireland; and the proceeding may be either by action of debt, or by bill or plaint or information, wherein no esseign, protection, or privilege, nor more than one imparlance, shall be allowed; and where the offence shall be committed in the British Isles, or in any other parts of her Majesty's dominions, such penalties may be recovered in any of the royal or superior courts of such isles, or other parts of her Majesty's dominions, by all the proceedings, ways, and means by which penalties are there recoverable.

XIII. And be it enacted, that any justice of the peace having jurisdiction where the offence shall be committed may hear and determine any offence against the Post-office Acts which may subject the offender to a pecuniary penalty not exceeding twenty pounds; and any such justice shall, upon information given or complaint made before him, summon the party accused, and also he witnesses on either side, to be and appear before him, or before any other justice of the peace, at a time and place to be appointed for that purpose: and either on the appearance of the party accused, or in default thereof, the justice present at the time and place appointed for such appearance may proceed to examine into the matter of fact, and upon due proof made hereof by voluntary confession of the party, or by oath of one witness or more, may give judgment for the plaintiff or complainant, or for the defendant, and if for the plaintiff or complainant such justice may award and issue out his warrant for the levying of the penalty adjudged, together with the costs and expenses of such proceeding, and also the costs and expenses of such warrant, and of levying the same on the goods of the offender, and may cause sale to be made of such goods in case they shall not be redeemed within five days, rendering to the party the overplus (if any); and where goods of such offender cannot be found sufficient to answer the penalty, and all such costs and expenses, the justice shall

commit the offender to the common gaol or house of correction, there to remain for any time not less than three calendar months and not exceeding six calendar months, if the full penalty imposed by the Post-office Acts for the offence of which such offender shall have been convicted shall amount to the sum of twenty pounds, unless such penalty and all such costs and expenses shall be sooner paid; and if the person convicted shall find himself aggrieved by the judgment of any such justice, he may appeal against the same to the justices of the peace at the general or quarter sessions of the peace for the county or place within which the offence shall be committed which shall be held next after the expiration of ten days from the day on which such conviction shall have been made, of which appeal notice in writing shall be given to the prosecutor or informer seven clear days previous to the first day of such sessions, and such justices at such sessions may examine witnesses upon oath, and finally hear and determine such appeal; and in case the judgment of the justice shall be affirmed, the justices at such sessions may award and order the person appealing to pay such costs occasioned by such appeal as to them shall seem meet: Provided always, that no person convicted before a justice shall be permitted to appeal against such conviction, unless within five days next after such conviction made he shall enter into a recognizance, with two sufficient sureties, before such justice, to enter and prosecute such appeal, and to pay the amount of the penalty and costs in which he shall have been convicted, and also to pay such further costs as shall be awarded in case such conviction shall be affirmed on the hearing of such appeal: Provided also, that no such proceedings so to be had or taken shall be quashed or vacated for want of form, or for any error or mistake which, in the judgment of the Court, has not a tendency to mislead the defendant, or shall be removed by certiorari, suspension, advocation, or reduction, or by any other writ or process, into any superior or other court or jurisdiction, any law or usage to the contrary notwithstanding.

XIV. And be it enacted, that the justice of the peace before whom a person shall be convicted of an offence against the Post-office Acts may mitigate the penalty imposed in cases where such justice shall see cause so to do; provided that all reasonable costs and charges incurred in prosecuting for such offence shall be always allowed over and above the sum to which the penalty shall be mitigated.

XV. And be it enacted, that all pecuniary penalties incurred under the Post-office Acts, which shall be sued or prosecuted for or recovered by or in the name of a person other than her Majesty's Attorney-General in England, her Ma-

jesty's Attorney-General in Ireland, or her Majesty's Advocate for Scotland, or the Solicitor to the Post-office, or any other officer of the Post-office in England, Ireland, or Scotland respectively, shall respectively be distributed and divided in manner following: (that is to say,) one moiety thereof to her Majesty, and the other moiety thereof, with full costs of suit, to the person who shall inform and sue or prosecute for the same; and all such pecuniary penalties as aforesaid which shall be sued and prosecuted for and recovered by or in the name of the above-named officers shall be applied to the use of her Majesty: Provided always, that the Postmaster-general, at his discretion, may give all or any part of such penalties or shares of penalties belonging to her Majesty as rewards to any person who shall have detected such offences, or given information which may have led to the discovery thereof or to the conviction of the offenders.

(To be continued.)

REVIEW OF NEW BOOKS.

The HAND BOOK, being a Guide to the CHANCERY JUDGES' OPINIONS—of the peculiarities and faults of the various decisions and reports in CHANCERY, BANKRUPTCY, and PARLIAMENT, both English and Irish, with subjects and Index. By GEORGE FARREN, Jun. Esq. Chancery Barrister, of Lincoln's Inn. London: John Richards and Co., Law Booksellers, 194, Fleet-street. 1839.

A correct book or index of this nature has been much wanted by barristers to lead them at once to over-ruled cases and unsound decisions. The author says in his preface:—

It often happens, in the rapidity of argument in Court, or in the hurry of business, that cases are cited and carry the judgment; of which cases it cannot be supposed that the opposing counsel, or the judge, is at the moment aware how far they have been over-ruled or shaken; and this little treatise is intended as a Hand Book, which being in the advocate's bag, or at hand, enables him at once, when a case is cited, (by reference merely to the name, as in a pocket dictionary,) to see how to deal with such cases when shot off against him; so also at consultation; so also in more deliberate business at chambers.

It is very evident that the author has gone through much labour in collecting the

materials for this work, and he deserves great credit for the manner in which he has put them together. We do not hesitate in saying that it is an acquisition to the profession; every practical man will find the "Hand Book" a valuable assistant.

INSOLVENT DEBTORS' COURT.

Sittings.

This Court will sit on Wednesday next, the 4th September, to take Bail Cases. When the Court will sit again has not been determined upon.

NOTICE TO CORRESPONDENTS.

A CONSTANT READER.—We must be consistent; and therefore cannot comply with your wishes.

NOTICE TO SUBSCRIBERS.

The POSTAGE ACT will be concluded next week, and will be followed in the subsequent numbers by the METROPOLITAN POLICE ACT. We stand pledged not to issue any Number at a greater price than sixpence; or, having so much matter on hand, we should publish a Supplement, and we cannot afford to do so GRATIS.

This day is published, price 4s. to be continued Monthly, Vol. III. Part II.

PRECEDENTS IN CONVEYANCING,

adapted to the Present State of the Law. Illustrated with Notes, Practical and Critical, by THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple; Author of "The Commentaries on the Constitution and Laws of England" dedicated by command to her Majesty the Queen, &c. in continuation of the PRECEDENTS by S. VALLIS BONE, Esq.

London: JOHN RICHARDS and Co., Law Booksellers, 194, Fleet Street.

This work will be completed in 4 vols.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 31st Augt 1839.

The Legal Guide.

VOL. II.]

SATURDAY, SEPTEMBER 7, 1839.

[No. 19.

LEX LOCI DOMICILII.

PART II.

IN CASES OF ILLEGITIMACY.

WHAT is the nature of the CLAIMS of the Crown in this country. The true foundation of that claim; and how far it affects or alters the case.

By what law is the question to be tried? whether any one else can make a title to the personality or not?—By the law of the *Lex loci rei sitæ*, or by the law of *Lex loci domicilii* of the owner?

THE CROWN takes then, not as a forfeiture, or in that case the creditors would have no legal claim, but as *ultimus hæres*, subject to the claims of creditors.

The Crown must pay all these claims, hereby recognizing, that the property is liable to the same burthens as other personal property, and that it only takes when no other title can be made.

Mr. ERSKINE in his Institutes, L. 3, 10, S. 5, well describes this right, as it belongs to the Crown in Scotland.

He says, "If a bastard die without lawful issue, therefore, the King takes up his succession by the necessity of law, in the character of last heir. Hence, it appears, that bastardy is a proper species of *ultimus hæres*, the Crown succeeding, because the bastard has no *aguates* to claim his succession."

VOL. II.

"The Crown's right too is precisely the same in Bastardy as in the other; it comprehends the *universitas bonorum* of the deceased. It cannot be hurt by a deed of death-bed. Skene *voce bastardus*: Cr. lib. 2 Dieg. 18, s. 14.; St. B. T. 12, s. 7. The same methods must be pursued by the King to make good his interest in the succession. On the other hand the estate which accrues to the Crown, is in both cases subjected to the same diligence of creditors, and to the same burdens: the widow *ex. gr.* is entitled to her legal provisions of *terce* and *jus relictae* in both—for the *donataire* has no better than a right of succession, since he is assignee by the King, whom the law looks upon as successor: and the legal provisions of widows cannot be hurt by any right of succession whether legal or testamentary."

This is well worthy of observation, for if the owner, though a Scotchman and a bastard, had been domiciled out of Scotland, in England for instance, his deed made on his death-bed would convey the property; which shews that the right of the Crown is founded on the *lex domicilii* of the owner and not on his birth-place.

The King then takes only because all other titles fail; he takes the residue to which no title can be made; and here, it may be observed, that he takes not the reality in the first instance, for that, would go to the immediate lord, and only to the Crown in

failure of such lord; and this also shews, that the Crown, does not take, by reason of the owner, being British born, but, by reason of all other titles under the *lex loci domicilli* of the owner failing.

But when it is said that the King shall take as *ultimus haeres*, because no one else can make a title to the property, by what law is the question to be tried whether any one else can make a title to the personality or not? By the law of the *lex loci rei sitae* or the law of the *lex loci domicili* of the owner.

If we have not misunderstood the purport of all the authorities we have referred to, this inquiry must be settled by the *lex loci domicili* of the owner.

The disposition of the personality of an intestate bastard is just as much the creation of the *lex loci domicili* as the distribution of the personality of a person dying legitimate with relations.

The mode of disposition alters not the principle: We therefore think that the *Lex loci domicili* of the owner, giving the personality of the intestate to the widow, to the relations, to the Government, or to charity, or in whatever way it may operate, is equally to be the rule; and, that in the case supposed the King does not take as *ultimus haeres*, because the law which governs the subject matter, is the *lex loci domicili* of the owner, and that law has created another title.

Lord MANSFIELD, in *Megit v. Johnson*, Doug. 547., held the same opinion as contra-distinguished from that of *Manning v. Napp*. His Lordship, in that case said, "Suppose *Lowe* had been a *bastard*, or being legitimate, had died without any next of kin, the King in such case, would have taken, as *ultimus haeres*, but subject to the debts of the intestate. See also *Price v. Parker*, 1 Lev. 157.; *Offley v. Best*, Id. 186.; *Ravenscroft v. Ravenscroft*, Id. 305."

(To be continued.)

PROBLEM XIX.

VOL. 2.

TRUSTS.

What is a SIMPLE TRUST?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWERS TO PROBLEMS 12 AND 18.

VOL. II.

What is the general nature of a guaranteee?

I. A Guarantee may be defined an agreement (a) in writing to be responsible for the debt or engagements of another person (b) in the event of his default.

II. The basis upon which the superstructure of the law of guarantees in its present state has been raised is the fourth section of the Statute of Frauds, 29 Car. 2, c. 3. Omitting such portions as come not within the present subject, the section in question runs as follows.

III. No action shall be brought . . . whereby to charge the defendant upon any special promise to answer the debt, default, or miscarriage of another person . . . unless the agreement, or some memorandum, or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

IV. The earliest and very obvious distinction laid down by the Courts was between the continuing and non-continuing liability of the person originally chargeable. The words of the statute are, "to answer the debt of another person." Now, unless the

(a) It is usually defined "a promise," &c., but the word *agreement* is more correct. See the observations (*post*) on the case of *Wain v. Warlters*.

(b) It also seems unnecessary to encumber the definition with the words "for which (debt) that other remains liable," as the word *debt* connotes continuing liability, as explained (*post*) in the case of *Birkmyr v. Darnell*.

liability of the party originally chargeable continues, it would not be his debt, but becomes the debt of the party answering, and as such does not come within the meaning of the statute, and of course need not be in writing.

V. The case in which this distinction is first to be found is that of *Birkmyr v. Daniell*.^(c) The words of the judgment *per totam curiam* are:— “ If two come to a shop and one buys, and the other to gain him credit promises the seller, ‘ if he does not pay you I will,’ this is a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, ‘ let him have the goods, I will be your paymaster,’ or ‘ I will see you paid,’ this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.”

VI. It may not unfrequently happen that where there has been merely a verbal promise, an attempt may be made to charge the supposed surety as a principal under an averment that he undertook to pay *as for himself*. This it must be obvious will generally be a question of fact which must be left to a jury whose duty it will be to take into consideration all the circumstances of the case.^(d)

VII. This continuing liability of the party liable in the first instance, the Courts have ever since held to be an essential feature of a guarantee; ^(e) and where that liability has ceased, or has become extinguished by the new promise, the statute has been held not to

apply. In *Goodman v. Chase*,^(f) for example, the defendant promised to pay the debt of another in consideration that the plaintiff would discharge his debtor out of custody, he having been arrested under a writ of *Capias ad satisfaciendum*. It was held that this promise did not come within the statute, because the debtor's liability ceased, by his discharge, at the moment the defendant's commenced, hence he did not “ promise to answer the debt of another,” but in point of fact contracted a debt of his own.^(g) Where a defendant agreed verbally to purchase the debt of another for 10s. in the £1. and so extinguished the debtor's liability, it was held that it need not be in writing.^(h)

VIII. The next point which the Courts were called upon to decide, arose in the well known case of *Wain v. Warlters*,⁽ⁱ⁾ where the meaning of the word *agreement* as used in the statute came to be fully discussed. An agreement it was held was not a mere naked promise by one person. An agreement clearly requires the concurrence of two persons, and therefore must comprehend a *consideration* as well as a *promise*. A mere promise is in fact only half an agreement, and therefore, although reduced to writing, does not satisfy the statute. In *Wain v. Warlters*, the words of the instrument were as follows:—

Mess. Wain & Co.—I will engage to pay you by half-past four, this day, fifty-six pounds and expenses on bill to that amount on J. Call.

JOHN WARLTHERS.

(c) 1 Salk, 27.

(d) *Keate v. Temple*, 1 B. & P. 158. “ If it appear by the books of the plaintiff that he did not originally give credit to the defendant, it will be strong but not conclusive evidence that he was treated as a surety only.” *Ib.*

(e) *Forth v. Stanton*, 1 Wms. Saund. 211, and the notes thereto, in which numerous subsequent cases are given; and see *Rothery v. Curry*, B. N. P. 281, and *Kirkham v. Martyr*, 2 B. & A. 613.

(f) 1 B. & A. 297.

(g) For further cases of non-continuing or extinguished liability of the original party; see *Castling v. Aubert*, 2 East. 325.; *Thomas v. Cook*, 8 B. & C. 728.; *Adams v. Dansey*, 6 Bing. 510.; *Bird v. Gammon*, 3 Bing. N. C. 883.

(h) *Anstey v. Marden*, 1 N. R. 124. For further cases within the statute see *Winkworth v. Mills*, 2 Esp. 484.; *Thompson v. Bond*, 1 Camp. 4.; *Fish v. Hutchinson*, 2 Wils. 94.

(i) 5 East. 10.

IX. In the judgment delivered by Mr. Justice Grose, the import of the word agreement is fully discussed, but as the substance of that judgment is compressed in what is stated above, nothing more need be said than to refer the reader to the report at full.

X. An instrument similar to the above came before the Court of King's Bench in the case of *Saunders v. Wakefield*,⁽ⁱ⁾ wherein the judgment in *Wain v. Warlters* was confirmed. In *Hawes v. Armstrong* the words were, "I forward to you the Bills, &c. which I doubt not will meet due honour, but in default thereof I will see the same paid." Here, there is clearly nothing beyond a mere naked promise, no consideration appears on the instrument, yet in the case of *Boehm v. Campbell*,^(j) a similar guarantee was held to be good, on the ground that here was an implied consideration; but *Boehm v. Campbell* is now an *overruled* case.^(k)

(To be continued.)

(i) 4 B. & A. 590. The instrument was as follows: "Mr. Wakefield will engage to pay the bill drawn by Pitman in favour of Stephen Saunders."

(j) 8 Taunt. 679.

(k) For further confirmation of the above doctrine see the following cases:—*Jenkins v. Reynolds*, 3 B. & B. 14.; *Morley v. Boothby*, 3 Bing. 107.; *Whitcomb v. Lees*, 5 Bing. 34.; *Cole v. Dyer*, 1 C. & J. 461.; *Bushell v. Bevan*, 1 Bing. N.C. 103.; *Ellis v. Levy*, ib. 767. *in note*; *James v. Williams*, 5 B. & Ad. 1109.; in *Pace v. March*, 1 Bing. 916. a consideration was implied as in *Boehm v. Campbell*, but like that case *Pace v. March* is now *overruled*.

Law Reports.

VICE-CHANCELLOR'S COURT.—Aug. 7.

RENSHAW v. BRANDE.

PIRACY.—Injunction.—Whether the Court will interfere by injunction to restrain the sale of a new work, parts of which had been piratically taken from another work that had become unsaleable.

Mr. K. Bruce, for the plaintiff (a bookseller), for an injunction to restrain Mr. Brande, the chemist, and his bookseller, from continuing to publish a work called the "Dictionary of Materia Medica and Practical Pharmacy," which was

alleged to be a piracy from a work written many years before by him called the "Manual of Pharmacy," and originally sold to Mr. Underwood, the bookseller, for £500. The copyright had since become by assignment the property of the plaintiff, who had published a third edition of the work, but becoming in 1835 very much prejudiced by the appearance of a new edition of the "London Pharmacopoeia," an application was made by the plaintiff to Mr. Brande to write a supplement for the "Manual," who declined it, on the ground that he was engaged in a new and comprehensive work on the same subject. This work had since been published under the title of "A Dictionary of Pharmacy," but it was alleged by the plaintiff to be pirated from the "Manual," which the defendant had sold to him, to the extent of above one-third of the whole matter, and to be, in fact, nothing more than a fourth edition of the original work. Mr. Brande, on the other hand, contended that the "Manual of Pharmacy" having become entirely useless by the publication of a new edition of the "London Pharmacopoeia," his new work could not prejudice the sale of the copies on hand, which were quite unsaleable, whether his dictionary were published or not. He also contended that the matter alleged to have been pirated was extracted from several well-known medical, chymical, and botanical authors, whose works were common property.

The VICE-CHANCELLOR said the case appeared unlike any he ever remembered; because, though he was satisfied in his own mind a good deal of the matter introduced into the defendant's book had been substantially (in the sense of piratically) taken from the "Manual of Pharmacy," yet it was attended with this extraordinary circumstance, that the "Manual," by the publication of the "London Pharmacopoeia," had become an unsaleable work. Then the Court was asked, on behalf of the unsaleable work, to interfere by injunction to prevent the sale of a new work, the only objection to which was, that parts of it were the same as the one which had become unsaleable. Upon the question of the quantity of matter pirated, his Honour referred to a passage of Lord Eldon's judgment in *Mawman v. Tegg*,^(a) in which his Lordship said, "The cases which have occurred within my experience have all been either cases in which, by altering or destroying the title-page, the publication could go on, or where the parts that were pirated bore such a vast proportion to the whole of the work, that there was no difficulty in ascertaining whether the work was or was not upon the whole a piracy, or a piracy to such an extent that you could feel

(a) 2 Russell, 385.

no uneasiness in granting an injunction; because if you confined the injunction to the pirated part of the work, that part was so very considerable, and so mixed up with the smaller part of the work, that when it was taken away there was nothing left to publish, and granting the injunction against the larger part was, in effect, destroying the whole work immediately." According to Lord Eldon's view of that case, he did think it material to consider what quantity of matter had been pirated; but his Honour was not satisfied that any investigation he could make of the pirated parts would tend very much to make it clear to him how much was so pirated as that the Court ought to grant an injunction. He could not but suspect that a good deal of what was put into the third edition of the "Manual of Pharmacy" was what might be called common matter, and might have been used by any one, and he did not know but that a great deal of matter in the third edition of the "Manual of Pharmacy" was what might be called common matter, and might have been used by any one, and he did not know but that a great deal of matter in the third edition might not have been put into any other work. Now, when he considered that the plaintiff's work had become not saleable, and that the effect of granting the injunction would be to make unsaleable and unproductive the only work that would be saleable and productive, and to stop the only source of profit the plaintiff would have, he thought, by granting the injunction, he should be pursuing a course that would be advantageous to neither. At the same, his Honour was of opinion there ought to be an inquiry at law as to the quantity of matter taken.

After some discussion, it was arranged that no order should be made on the motion, but that it should stand over with liberty to the plaintiff to bring such action as he should be advised. (1)

(1) In all these cases the Court has many difficulties to contend with. Much is left to conjecture as to what is or what is not pirated as well as the quantity. This remark applies more particularly to Encyclopedias, Dictionaries, and Law Reports of Cases. The Court, when it has granted an injunction, against the *whole* of a work, has seldom, if ever, done so, without having first ascertained, either by its own inspection or otherwise, what was the quantity of matter pirated. Nothing is more difficult than for the Court to grant an injunction against *part* of a work, although an action may be brought for pi-

rating a part. It seems to have been *Lord Hardwicke's* opinion (4 Burr. 2326) that an injunction might be granted against the *whole*, although only part was pirated; and in the instance of *Milton's Paradise Lost*, with *Newton's* notes, although there was nothing new in that book, except the notes, his Lordship granted an injunction against the *whole* book. *Lord Kenyon*, in an action at law, (see *Cary v. Longman*, 1 East, 360, and *Trusler v. Murray*, id. 363.) says, the question, whether an injunction can be granted against the *whole* of a book on account of the piratical quality of a *part*, came before *Lord Bathurst*; who seemed to have held, that it could not be so granted unless the part pirated was such, that granting an injunction against that *part* necessarily destroyed the *whole*. *Lord Kenyon* states himself to have been perfectly satisfied with the opinion of *Lord Bathurst*, as bearing upon the judgment of *Lord Hardwicke* and the other cases. In the case before *Lord Kenyon*, the declaration at law contained a count for publishing the *whole* work, and another for publishing a *part*; and his Lordship's direction to the jury seems to have been to find damages for publishing the *part* only. *Lord Eldon* said in *Mawman v. Tegg*, that in the cases which had come before him, his language had been, that there must be an injunction against such *part* as had been pirated; but in those cases the *part* of the work, which was affected with the character of piracy, was so very considerable, that if it were taken away, there would have been nothing left to publish except a few broken sentences; and upon the piracy of *Dictionaries*, his Lordship did not entertain any doubt that a man may pirate a *Dictionary*, but yet, when he considered what the language was, which *Lords Mansfield* and *Ellenborough* had used in summing up to juries in respect to pirating *Dictionaries*, *Charts*, &c. his Lordship said it would be going a great way to say that the

language of their directions did not suppose, that in cases of this kind, something ought to be left to the jury as a matter of fact. In the case, for instance, of a *Dictionary*, Lord Mansfield expressly says, that you are not merely to look at what is published in the one work being part of the other work, but that you are to consider, whether the matter alleged to have been copied, has, upon the whole, been used in such a manner, as to show (according to the language of *Lord Ellenborough* in another case) that the party meant to give to the public what might fairly be called a new work, or whether, on the other hand, in robbing the former author of so much of his work, he acted, as *Lord Ellenborough* expresses it, *animo furandi*.

EDITOR.

COURT OF BANKRUPTCY.—Sept. 3.

ANON.

Act for abolishing Imprisonment for Debt,
sec. 8.—BAIL PRACTICE.

A Solicitor appeared before the Court on behalf of a defendant, in an action against whom an affidavit of debt had been made, in pursuance of sec. 8. and stated to the Court that his client resided at Liverpool, and by some unforeseen occurrence the bond would not arrive till three o'clock by the train this afternoon. He therefore asked the Commissioner to postpone the hearing of the case till to-morrow.

On the part of the plaintiff, it was contended that the Commissioner had not the power to adjourn the appearance. To-morrow the defendant would have committed an act of bankruptcy, the 21 days as stipulated by the act expiring to day. Besides, there were objections to the bail proposed.

Mr. Commissioner HOLROYD.—Will it not be better for you to come before me to-morrow. There is nothing to hear now.

The Solicitor for the Plaintiff.—But your Honour has not the power to extend the hearing. The 21 days will have expired at the rising of the Court to-day. The notice was served on the 13th, and the affidavit filed.

This was not denied by the Solicitor for the defendant.

Mr. Commissioner HOLROYD.—Then, if that is the case, you can act upon the clause if you think it desirable. But why not come again to-morrow?

The Solicitor for the plaintiff thought it was not legal.

The Solicitor for the defendant said, as the Solicitor for the plaintiff thought that it would not be acting strictly legal to wait till to-morrow, he would ask the Court to take the case after its rising. He would call upon the Solicitor in opposition, and let him know immediately the bond arrived.

This course was ultimately agreed to.

Sept. 5.

BAIL PRACTICE.

As to filing Affidavits.

An affidavit in support of the sufficiency of the bail had not been filed, and the Solicitor wished any objections to the bail to be heard, and their sufficiency to be decided upon, before filing the affidavits, alleging that he had proceeded in this way on two occasions before Commissioners Williams and Fane.

On the other side it was contended, that the affidavits ought to be filed before being made use of.

Mr. Commissioner HOLROYD said, in all cases under the above Act of Parliament, any affidavits which the parties intended to avail themselves of must be filed before the hearing. His Honour thought it desirable to follow the practice adopted in other Courts as to reading affidavits.

As to Bail Bonds having an ad valorem Stamp.

An objection was made in a case to the amount of the stamp on the bond which was tendered, contending that it ought to bear an *ad valorem* stamp.

Mr. Commissioner HOLROYD.—My duty under the Act of Parliament is to approve of the sum for which the bail is entered into, and of the sufficiency of the sureties. I do not think it within my province to decide upon the sufficiency of the stamp. The debtor gave the bond on such a stamp as he thought fit and at his peril. If the stamp proves insufficient, the bond is good for nothing. But I will not prejudge that question. Questions on the Stamp Act are sometimes questions of great nicety, and admit of much argument, and the consequence of my deciding against the validity of the stamp might be to make the debtor commit an act of bankruptcy. As I am not imperatively called upon by the Act of Parliament to decide upon the validity of the stamp, I think I ought not to give any opinion upon the point.

INSOLVENT DEBTORS' COURT.

Sept. 4.

THOMAS ROUTLEDGE'S CASE.

Power of the Court, where an Assignee who can neither read nor write, is required to be appointed, to appoint his Attorney in his stead.

Fee of one shilling for bringing Schedule into Court abolished.

Mr. Cooke applied for the appointment of a person named Brown as assignee.

The insolvent was discharged under the act in 1823, and was entitled to an expectancy which would pay all he owed. Brown was the only creditor, and the difficulty was to get an assignee. Brown could neither read nor write; he was, however, possessed of about £500 worth of property.

Mr. Commissioner Bowen was not disposed to appoint a marksman assignee; he would have to sign some documents, and he might afterwards plead his ignorance of the contents.

The Court named his attorney assignee, as authorized under the new act.

Mr. Cooke begged, in reference to this case, to call the attention of the learned Commissioner to a recent practice in the office, of which the profession complained. The sum of one shilling had been demanded on giving notice for schedules to be brought into court on motion, which was without rule or sanction. The schedules were required for the information of the Commissioners, and it was rather hard to make the petitioners pay for the information.

Mr. Commissioner Bowen referred to the list of fees, and was of opinion that it could not be charged; it was, therefore, ordered to be discontinued.

Mr. Commissioner Bowen sat to-day to take bail-cases. There were twenty-five town cases and one country. The number of applications made since the rising of the Court for the vacation have amounted to "eighty-one," and, with the exception of a few instances, the parties have been discharged on sureties. The Commissioners will sit on further days in the vacation.

Summer Assizes.

NORTHERN CIRCUIT.—*August 23.*

Liverpool.

(Before Mr. BARON MAULE.)

GIBSON, M.P. v. HART.

SHERIFF LAW.

This action was brought to recover the value of a promissory note for £22. 11s. 9d. payable at two months.

Mr. Alexander stated the case for the defendant. His client, Mr. Hart, did not deny that he gave the promissory note, but says that he is relieved from liability by the following circumstances:—In October, 1837, the plaintiff, Mr. T. Gisborne, had brought an action against a person named Harrison, an attorney, obtained judgment, and the execution was put into the hands of Newton, the sheriff's officer at Manchester. Harrison was taken into custody, and was detained at the sheriff's office. It being important that Mr. Harrison should be at liberty, Mr. Hart applied for his liberation; and on having been given to understand that there was no other detainer against Harrison, Mr. Hart gave the promissory note for the sum mentioned—the amount of debt and costs. Before handing the note to Brown, clerk to Mr. Chew, the attorney in the case, Mr. Hart demanded that his friend should be set at liberty. "No," said the clerk to the sheriff's officer, "I must first have the security, and then he shall be set at liberty." Mr. Hart replied, "Well, I think I may trust to your honour," and he immediately handed over the note to Brown. The assistant of Newton, whose name was Hockenhall, then said, "He cannot go: I have another writ against him." Mr. Hart insisted that if Mr. Harrison was not set at liberty, his promissory-note should be returned, seeing that he had made himself responsible for the sole purpose of securing the liberation of Harrison. Brown refused to give up the note, on which a struggle ensued between him and Hart. The only witnesses that he (the learned counsel) could bring forward to prove these facts were the persons who had been engaged in the transaction; but he hoped that he should be enabled to establish from their lips the statement he had made—namely, that the promissory-note had been given on the express assertion that Harrison should be set at liberty the moment that it was signed, instead of which he was detained, because they had heard that there was another writ against him on the road from Preston.

Mr. Newton, the sheriff's officer at Manchester, stated that he was employed, in October, 1837, by Mr. Chew, to take Mr. Harrison into custody, at the suit of Mr. Thomas Gisborne. He arrested Harrison on the 7th of October, 1837.

Henry Hockenhall, clerk to Mr. Newton, stated that when asked by Hart, previous to the giving of the promissory-note, whether there was any other detainer against Harrison, he did not reply, because he did not think that it was his duty to do so. At that time he did not know whether or not there was any other detainer. When Mr. Hart desired that Harrison should be allowed to go outside of the door before the note

was given, Brown refused, saying that the note must first be given up. Hart then gave up the note; Brown gave him the discharge; and Hart and Harrison were preparing to walk out. Witness then told the latter that he must not go. He told him that, in consequence of directions he had received from Mr. Newton. Mr. Newton said that before Harrison was discharged, he would have the court searched. Witness had Harrison in custody. Hart then said, "I must have back my note." Brown refused, and a struggle took place, which continued for more than an hour, and ended in Brown keeping possession of the note. Harrison was kept in till the next day, when there came another writ from Preston. Chew was the attorney in the second writ as well as in the first. I believe that at the time Mr. Hart gave the note, he would not have given it if he had thought that there was another detainer against Harrison.

Mr. Alexander having intimated that he would rest his case upon this evidence,

Mr. Cresswell wished to know from his Lordship whether he was of opinion that there was any thing to go to the jury?

His LORDSHIP decided that there was.

Mr. Cresswell, on behalf of his client, then went on to contend that there was nothing to show that the note had been obtained by Chew or his agent on a false or fraudulent representation that there was no other detainer against Harrison. If there had been any fraud, it was most certainly not on the part of the plaintiff, Mr. Gisborne, who was a member of Parliament for Carlow, and must therefore be a respectable man. Mr. Cresswell went on to show that by law a sheriff's officer was bound to detain a person in custody when there were other detainees against him. If the sheriff enlarged the person when such was the case, he himself became responsible for the debts of the liberated person.

Verdict for the defendant.

NEW POSTAGE ACT (a).

This new Statute is merely an *addenda* to the following—

1 Vict. Cap. XXXVI.

An Act for consolidating the Laws relative to Offences against the Post Office of the United Kingdom, and for regulating the judicial Administration of the Post Office Laws, and for explaining certain Terms and Expressions employed in those Laws.—[12th July, 1837.]

(Continued from p. 288.)

XVI. And be it enacted, that every justice of the peace before whom a person shall be con-

victed of an offence against the Post-office Acts shall take the penalty or share of the penalty belonging to her Majesty levied or paid under such conviction, and shall pay or cause to be paid all such sums of money which he shall so take at the next general or quarter session of the peace after he shall have so taken the same into the hands of the clerk of the peace, town-clerk, or other such officer of the county or place within which such conviction shall have been made, who shall, within fourteen days after his receipt thereof, and without fee or reward, pay or remit the same, for the use of her Majesty, to the solicitor of the Post-office at the Post-office in London, Edinburgh, or Dublin, as the conviction shall happen to be in England, Scotland, or Ireland respectively; and every such justice shall, within one week after every such payment made by him to a clerk of the peace, town-clerk, or other such officer, transmit to such solicitor a schedule containing the name of the person so convicted, the nature of the offence, and the amount of the penalty in which he shall have been convicted, the date of such conviction, and the sum of money which shall have been paid by virtue thereof, together with the name of the clerk of the peace, town-clerk, or other such officer to whom he shall have paid the same; and every justice who shall omit to pay or cause to be paid to such clerk of the peace or other officer as aforesaid, at the time and in the manner hereinbefore directed, any such penalty or share of penalty received by him, or upon payment thereof shall omit to transmit to the proper solicitor of the Post-office such schedule, and every clerk of the peace, town-clerk, or other officer who shall omit to pay or remit the penalty or share of penalty to such solicitor of the Post-office, within the time and in the manner hereinbefore directed in that behalf, shall forfeit fifty pounds.

XVII. And be it enacted, that when any person shall be summoned before a justice of the peace to answer an information or complaint exhibited or made against him by a person other than officer of the Post-office, touching an offence committed or alleged to have been committed by such person against the Post-office Acts, and such information or complaint shall afterwards be withdrawn, or quashed or dismissed, or if the defendant shall be acquitted of the offence charged against him, the justice may order and award that the informer or person exhibiting the information or making the complaint shall pay to the defendant such costs of making or preparing for his defence, and also such compensation for his loss of time, and for the time of his witnesses (if any), in attending such justice touching such information or complaint, as to such justice shall seem reasonable; and in default of the immediate

payment of the sum so awarded, the justice may cause the same to be levied by distress and sale of the goods and chattels of the person ordered to pay the same, together with the costs of such distress and sale; and if goods and chattels of such person sufficient to answer the sum so awarded, and such costs as aforesaid, cannot be found, the justice may commit such person to the common gaol or house of correction for any time not exceeding one calendar month, unless the sum so awarded, together with all costs and expenses, shall be sooner paid.

XVIII. And be it enacted, that a summons issued by a justice of the peace, requiring a defendant or a witness or other person to appear before him or any other justice, with reference to an information, complaint, or other proceeding for the recovery of any postage, postage debt, or penalty under the Post Office Acts, shall be deemed to be sufficiently served in case either the summons or a copy thereof be served personally upon the person as aforesaid, or be left at his usual or last known place of residence, or, if such person be a proprietor, driver, conductor, or guard of any stage carriage, if such summons or copy be left with the book-keeper or person for the time being acting as book-keeper for such stage carriage in any town or place from, into, or through which such carriage shall go or be driven nearest to the place where any such offence shall be committed.

XIX. And be it enacted, that every constable or other peace officer who shall refuse or neglect to serve a summons or execute a warrant or order granted, issued, or made by a justice of the peace, pursuant to the Post Office Acts, shall forfeit ten pounds.

XX. And be it enacted, that every person who shall be summoned as a witness to give evidence before a justice of the peace, or before justices at sessions, touching the matters alleged or relating to an information, complaint, appeal, or other proceeding depending before such justice or justices for the recovery of a postage, postage debt, or penalty under the Post Office Acts, who shall neglect or refuse to appear before such justice or justices at the time and place to be for that purpose appointed, without a reasonable excuse for such neglect or refusal, to be allowed by such justice or justices touching the matters aforesaid, shall forfeit ten pounds.

XXI. And be it enacted, that upon the trial or hearing of an information exhibited or complaint made under the Post Office Acts any officer of the Post Office shall be a competent witness, notwithstanding that such officer may be an informant or complainant, or may be entitled to or expect a part of any pecuniary penalty, any remuneration or reward on the con-

viction of an offender upon such information or complaint.

XXII. And be it enacted, that in all cases where goods or chattels distrained or otherwise seized or taken under the Post Office Acts are directed to be sold the same shall be sold by public auction; and notice of the time and place of such sale shall be given to the owner of such goods or chattels, or left at his last known place of abode, three days at least prior to such sale: provided always, that if the owner of any such goods or chattels shall give his consent in writing to the sale thereof at an earlier period than is by this Act or shall be by any such notice appointed for such sale, or in any other manner than is by this Act directed, it shall be lawful to sell such goods or chattels according to such consent: provided also, that if the owner of such goods or chattels shall at any time before the sale thereof pay or tender to the person who by any warrant or other process shall be directed or authorized to cause such goods or chattels to be sold the sum which he shall by such warrant or process be directed to levy or raise by the sale of such goods or chattels, together with all reasonable costs and expenses incurred, no sale of such goods or chattels shall be made.

XXIII. And be it enacted, that the Postmaster-General may compromise and compound any action, suit, bill, plaint, or information which shall at any time hereafter be commenced by his authority or under his control against any person for recovering penalties incurred under the Post Office Acts, on such terms and conditions as the Postmaster-General shall in his absolute discretion think proper, with full power for him, or any of his officers or agents by him thereunto authorized, to accept the penalties so incurred or alleged to be incurred, or any part thereof, without action, suit, or information brought or commenced for recovery thereof.

XXIV. And be it enacted, that all penalties incurred by any person for offences against the Post Office Acts shall be sued for within the space of one year next after the penalty shall be incurred.

XXV. And be it enacted, that every person employed by or under the Post Office who shall contrary to his duty open or procure or suffer to be opened a post letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the Court shall seem meet: provided always, that nothing herein contained shall extend to the opening or detaining or delaying of a post letter returned for want

of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof; nor to the opening or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand (in Great Britain) of one of the principal Secretaries of State, and in Ireland under the hand and seal of the Lord Lieutenant of Ireland.

XVI. And be it enacted, that every person employed under the Post-office who shall steal, or shall for any purpose whatsoever embezzle, secrete, or destroy, a post letter, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years; and if any such post letter so stolen or embezzled, secreted or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life.

XVII. And be it enacted, that every person who shall steal from or out of a post letter any chattel or money or valuable security shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life.

XVIII. And be it enacted, that every person who shall steal a post letter bag, or a post letter from a post letter bag, or shall steal a post letter from a post office, or from an officer of the Post-office or from a mail, or shall stop a mail with intent to rob or search the same, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life.

XXIX. And be it enacted, that every person who shall steal or unlawfully take away a post letter bag sent by a Post-office packet, or who shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for any term not exceeding fourteen years.

XXX. And with regard to receivers of property sent by the post and stolen therefrom, be it enacted, that every person who shall receive any post letter or post letter bag, or any chattel or money or valuable security, the stealing or taking or embezzling or secreting whereof shall amount to a felony under the Post-office Acts, knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post, shall in England and Ireland

be guilty of felony, and in Scotland of a high crime and offence, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable to be transported beyond the seas for life.

XXXI. And whereas post letters are sometimes by mistake delivered to the wrong person, and post letter and post letter bags are lost in the course of conveyance or delivery thereof, and are detained by the finders in expectation of gain or reward; be it therefore enacted, that every person who shall fraudulently retain, or shall wilfully secrete or keep or detain, or, being required to deliver up by an officer of the Post-office, shall neglect or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post letter bag or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting or refusing to deliver up the same, or by any other person, shall in England and Ireland be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable to be punished by fine and imprisonment.

XXXII. And for the protection of printed votes and proceedings in Parliament and printed newspapers sent by the post, be it enacted, that every person employed in the Post-office who shall steal, or shall for any purpose embezzle, secrete, or destroy, or shall wilfully detain or delay in course of conveyance or delivery thereof by the post, any printed votes or proceedings in Parliament, or any printed newspaper, or any other printed paper whatsoever sent by the post without covers, or in covers open at the sides, shall in England and Ireland be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet.

XXXIII. And be it enacted, that every person who shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, the name or handwriting of the Receiver-general for the time being of the General Post-office in England or Ireland, or of any person employed by or under him, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining of any money in the hands or custody of the Governor and Company of the Bank of England or Ireland on account of the Receiver-general of the Post-office, or shall forge or alter, or shall utter, dis-

pose of, or put off, knowing the same to be forged or altered, any draft, warrant, or order of such Receiver-general, or of any person employed by or under him, for money or for payment of money, with intent to defraud any person whomsoever, shall be guilty of felony, and being convicted thereof shall be transported beyond the seas for life.

XXXIV. And in order to prevent the imitation and forgery of lawful franks, be it further enacted, that every person who shall forge or counterfeit the handwriting of another person in the superscription of a post letter, or who shall alter or change upon a post letter the superscription thereof, or who shall write or send by the post or cause to be written or sent by the post a letter the superscription whereof in whole or in part shall be forged or counterfeited or altered, knowing the same to be forged, counterfeited, or altered, with intent in either of those cases to avoid the payment of the duty of postage, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be transported beyond the seas for the term of seven years.

XXXV. And be it enacted, that in the case of every felony punishable under the Post-office Acts, every principal in the second degree, and accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by the Post-office Acts punishable; and every accessory after the fact to any felony punishable under the Post-office Acts (except only a receiver of any property or thing stolen, taken, embezzled, or secreted,) shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanour punishable under the Post-office Acts shall be liable to indictment and punished as a principal offender.

XXXVI. And be it enacted, that every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanour punishable by the Post-office Acts shall in England and Ireland be guilty of a misdemeanour, and in Scotland of a crime and offence, and being thereof convicted shall be liable, at the discretion of the court, to be imprisonment for any term not exceeding two years.

XXXVII. And for the more effectual prosecution of offences committed against the Post-office Acts, be it enacted, that the offence of every offender against the Post-office Acts may be dealt with, and indicted and tried, and punished, and laid and charged to have been committed in England and Ireland, either in the county or place where the offence shall be committed, or in any county or place in which he shall be apprehended or be in custody, as if his

offence had been actually committed in that county or place, and if committed in Scotland, either in the High Court of Justiciary at Edinburgh, or in the Circuit Court of Justiciary to be holden by the Lords Commissioners of Justiciary within the district where such offence shall be committed, or in any county or place with which such offender shall be apprehended or be in custody, as if his offence had been actually committed there; and where an offence shall be committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter bag or post letter, or in respect of a post letter bag or post letter, or a chattel or money or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part wherof the mail, or the person, or the post letter bag or the post letter, or the chattel, or the money, or the valuable security sent by the post in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had been actually committed in such county or place; and in all cases where the side or the centre or other part of a highway, or the side, the bank, the centre, or other part of a river, or canal or navigation, shall constitute the boundary of two counties, shall offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed in either of the said counties through which or adjoining to which or by the boundary of any part of which the mail or person shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had actually been committed in such county or place; and every accessory before or after the fact to any such offence, if the same be a felony or a high crime, and every person aiding or abetting or counselling or procuring the commission of any such offence, if the same be a misdemeanour, may be dealt with, indicted, tried, and punished as if he were a principal, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried.

XXXVIII. And be it enacted, that where an offence shall have been committed in Scotland, no person committed in Scotland on a charge of a high crime or offence under this Act shall be entitled to insist on bail; nevertheless in the following cases the party may be admitted to bail; (that is to say,) first, if the public prosecutor shall consent thereto, in which case the bail shall be such as he shall agree to; second, if the judges of the Court of Justiciary, or the Sheriff

or Sheriff's substitute, or Stewart or Stewart's substitute of the county or stewartry within which the person shall be committed, shall deem it consistent with the ends of justice, and in this case the bail shall be of such amount as such judge, under the circumstances of the case, may think necessary for ensuring the appearance for trial of the person accused

XXXIX. And be it enacted, that where an offence punishable under the Post-office Acts shall be committed within the jurisdiction of the Admiralty, the same shall be dealt with and inquired of and tried and determined in the same manner as any other offence committed within that jurisdiction.

XL. And be it enacted, that in every case where an offence shall be committed in respect of a post letter bag or a post letter, or a chattel, money, or a valuable security, sent by the post, it shall be lawful to lay in the indictment or criminal letters to be preferred against the offender the property of the post letter bag or of the post letter, or chattel or money or the valuable security sent by the post, in the Postmaster-general; and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise that the post letter bag or any such post letter or valuable security was of any value; and in any indictment or in any criminal letters to be preferred against any person employed under the Post-office for any offence committed against the Post-office Acts, it shall be lawful to state and allege that such offender was employed under the Post-office of the United Kingdom at the time of the committing of such offence, without stating further the nature or particulars of his employment.

XLI. And be it enacted, that every person convicted of any offence for which the punishment of transportation for life is herein awarded shall be liable to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and every person convicted of any offence punishable according to the Post office Acts by transportation for fourteen years shall be liable to be transported for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years.

XLI. And be it enacted, that where a person shall be convicted of an offence punishable under the Post-office Acts, for which imprisonment may be awarded the court may sentence, the offender to be imprisoned, with or without hard labour, in the common gaol or House of Correction, and may also direct that he shall be kept in solitary confinement for the whole or any portion of such imprisonment, as to the court shall seem meet.

XLIII. And be it enacted, that so often as any sum or sums of money not exceeding twenty pounds shall be due for postage from any person within the United Kingdom or other her Majesty's dominions, or which shall be due for postage from any deputy, agent, or letter carrier, or any other person employed in receiving or collecting the postage of letters or of any of the Post-office revenue, or from the sureties of any such last-mentioned person, a complaint may be made to one or more of her Majesty's justices acting for the place (whether county, riding, division, city, town, or other place,) and thereupon he shall summon the party complained of and the witnesses on either side, and shall examine into the matter of fact; and on due proof being made of the money due from the person complained of, either by his voluntary confession, or by the oath of one witness or more, the justice shall grant a warrant to a peace officer (whether constable, tithing man, or other peace officer,) of the same place to distrain the party complained of by his goods and chattels to the amount of the debt and of all the expences (whether costs, charges, or otherwise, of obtaining such warrant, and of the proceedings relating thereto, and to the making of the distress and sale thereof); and the constable having taken the distress may keep it for five days at the charge of the party complained of, and if the amount of the debt and all the expence shall not be paid within that time, then the goods and chattels distrained shall be sold by the peace officer, and the surplus (if any) of the money arising by the sale thereof, after deducting the amount of the debt and all the expences, shall be rendered by the peace officer to the person distrained upon; and for the purpose of taking such distress the peace officer, when either a refusal or a resistance shall be made, may break open in the daytime any place (whether house, building, or otherwise,) where any goods or chattels of such person shall be; and if no sufficient distress can be had whereon to levy the debt and expenses, or in case an insufficient distress only can be found, or if an insufficient distress has been sold, then a justice of the peace may commit such person to the place, there to remain until the debt and all expenses, or so much thereof as shall remain after deducting therefrom the proceeds of the sale, shall be satisfied; and in addition to the above proceedings, if the postage due from any officer of the Post-office, surety, or any other person in Ireland shall not exceed fifty pounds, the same may be recovered with full costs in a summary way by process or civil bill in the court of the district where the person sued shall reside which has jurisdiction to try matters on civil bill; but no decree shall be made thereon unless process or civil bill shall have been served on the person.

sued eight clear days at least before the first day of the quarter sessions at which it is to be tried; and if the person sued shall appeal from the decree made thereon against him, and on the hearing of the appeal the decree shall be affirmed, he shall pay to her Majesty double the costs of the original decree, and the affirmance thereof shall be conclusive on all the parties therein.

XLIV. And be it enacted, that all duties of postage granted by any of the Post-office Acts, and charged by virtue thereof, may be sued for and recovered by suit, action, or information in any of her Majesty's Courts of Record, and by all such ways and means and in such manner and form as any other duties granted to her Majesty by any Act or Acts relating to her Majesty's revenue are recoverable by law, as well as by the particular ways and means provided by this Act; and in all actions, bills, plaints, informations, and proceedings to be commenced, prosecuted, entered, or filed in the name or on behalf of her Majesty for the recovery of any such duties, her Majesty may have and recover such duties, with full costs of suit.

XLV. And be it enacted, that every complaint, information, summons, conviction, warrant of distress, or commitment or other such proceeding which shall be had or taken for the recovery of any postage debt or penalty under the provisions of the Post-office Acts, may be drawn or made out according to the several forms contained in the Schedule hereunto annexed, or to the effect thereof, with such changes therein as the case shall require; and every such complaint, information, summons, conviction, warrant, or other such proceeding which shall be so drawn or made out shall be good and effectual to all intents and purposes whatsoever, without stating the case or the facts or evidence in any more particular manner than is required in and by such forms respectively.

XLVI. And for the protection of persons acting in the execution of the Post-office Acts, be it enacted, that all legal proceedings, whether by action or by prosecution, which shall be commenced against any person for any thing done in pursuance of or under the Post-office Acts, shall be commenced and prosecuted within three calendar months next after the commission of the Act, and not afterwards; and such proceedings shall be laid and tried in the county or place where the cause of action shall arise, and not elsewhere; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in the following cases the defendant shall recover his full costs of suit as between attorney and client, that is to say, if a verdict shall pass for the defendant, or if the plaintiff shall become nonsuit, or if the plaintiff shall discontinue the action, or if on de-

murrer or otherwise judgment shall be given against the plaintiff; and the defendant shall have the like remedy for his cost as any defendant may have for costs of suits in other cases at law; and although a verdict shall be given for the plaintiff in any such action the plaintiff shall not have costs against the defendant, unless the Judge before whom the trial shall be had shall at the time of such trial certify in writing his approbation of the action, and of the verdict obtained thereupon.

(*To be continued.*)

NEW CONVEYANCING WORKS.

LETTER TO THE EDITOR.

SIR,—I hailed with considerable satisfaction the appearance of an ORIGINAL WORK upon MODERN CONVEYANCING, at something like a moderate price, and in a clear, concise, and intelligible form, suitable to a man of business. I allude to Mr. WESTERN'S PRECEDENTS, which, to use a modern phrase, may be termed the ATTORNEY'S HAND BOOK.

I was admitted an Attorney last Term, and am now purchasing a small library, and the object of my addressing you, (as the Guide to all such as me) is to express my surprise that your vigilance has not yet discovered,—or if you have—that you have taken no notice of a tinkering folio that was placed in my hands, and which I found to contain some fifteen Precedents in about 700 octavo pages, sent into the world under the cloak of another man's name and fame, at the extravagant price of 25s., to be succeeded by NINE OTHER similar volumes (*if they ever should appear*). This made its appearance on the same day as Mr. Western's unassuming Work, and from what I saw of it, the profession should be set right about its merits. I humbly venture my opinion, that it is part of an old kettle originally well manufactured, but now quite worn out, which has been tinkered up by a new aspirant to legal fame, and palmed upon the public under the name of the original manufacturer.

We have had Mr. Hayes's Work, which goes at once to the ELEMENTS, and we have now Mr. Western's, which in a similar manner goes to the practice, and we can purchase both these works for less than five pounds. Do pray cast your argus eyes into this Bookseller's book, (for such I take it to be,) and let the men, young and old, know something of your opinion about it, and you will much oblige,

A SUBSCRIBER.

Lincoln's Inn, 3rd Sept. 1839.

We do not wage war with authors, compilers, or any such poor devils; for want of practice, and consequent want of fees, men

must do something to live, and so long as we find writers are *honest*, why we even let them write on. There are very few works appear that are worth the trouble of reviewing. We abhor the waspish selfish spirit, that, nourished by ignorance, and incompetence, too often shews itself in what is called **REVIEWS**. **SATIRE** would be a better designation: but even satire hath its laws, and ought to have, more than any other kind of writing. It is the interest of mankind that a satirist should not abandon himself to an excess of ill-humour against all, who have the misfortune to displease him. We have not seen the work our Correspondent alludes to. We will inquire about it; he may be mistaken in his opinion.—*En.*

REVIEW OF NEW BOOKS.

PRECEDENTS IN CONVEYANCING, adapted to the present State of the Law. Illustrated with Notes, Practical and Critical. By THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple; "Author of "The Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen, &c. In continuation of the *Precedents* by S. VALLIS BONE, Esq. Vol. III. Part 2. London: John Richards and Co. Law Booksellers, 194, Fleet-street.—Price Four Shillings.—*Sept. 1839.*

We find this work continued, as promised, by the appearance of PART No. 2, which is written in the same spirit, and with the same view to *utility* and *safety*, as the first part. The part before us concludes the Title "**AGREEMENTS**," and enters upon the very difficult subject of **DEBTOR** and **CREDITOR**, and the Precedents consist of **TRUST DEEDS**. The manner in which the *Notes* are given is altogether different from any other work of the kind, and, being critical, must be a great acquisition to the practical man. The author continues to animadvert in strong terms upon the **UNSETTLED STATE OF THE LAW**, which he shows in every case of doubt and difficulty, and to all the **OVER RULED CASES** he distinctly di-

rects attention. The law, as it stands relating to *liquidated damages*, reserved by agreements, and the distinction made when a certain sum is reserved as a *penalty a nomine*, is clearly given, as is also the law governing trust-deeds for the payment of creditors, and the rights, duties, and liabilities of **TRUSTEES** generally, and in a note to "**TRUSTEES' INDEMNITIES**," usually inserted in all well-drawn trust-deeds, and which is particularly directed to the notice of **SOLICITORS**, the author says—

LORD HARDWICKE laid down a rule that **trustees** should not be answerable for losses when they acted by other hands either from necessity or conformably to the common usage of mankind. His Lordship, *Ex parte Belchier* (A.M. 219), said there are two sorts of necessity: first, *legal necessity*; and secondly, *moral necessity*. As to the first, a distinction prevails. When the **executors** join in giving a discharge for money, and one of them only receives it, they are both answerable for it, because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if **trustees** join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary. *Moral necessity* is from the usage of mankind, if the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as, if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable; in the employment of stewards and agents; for none of these cases are on account of necessity, but because the persons acted in the usual method of business.

LORD KING, in *Balsh v. Hyam* (2 P. Wms. 454.), said it was a rule that a *cestui que trust* ought to save the trustee harmless, as to damages relating to the trust; so within the reason of that rule, where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which *cestui que trust* is discharged from a loss, or from a plain and great hazard of it, the trustee ought to be repaid; and where it appears to be absolutely necessary that one of the trustees should be employed in the management of the trust estate, the Court will order him a reasonable allowance for his trouble. This was decided in *Marshall v. Hollaway* (2 Swanst. 432) by LORD ELTON, who said, that it being alleged by the co-trustees that the nature and circumstances of the testator's estate required the application of a great proportion of time, and that they could not un-

dertake to continue in the trust without the aid and assistance of Croft (*an attorney*), who was better acquainted therewith than any other person, and that it would be for the benefit of the estate that Croft should continue a trustee; and it being alleged by Croft that due attention to the affairs of the testator would require so much of his time and attention as would be greatly prejudicial to his other pursuits, and therefore he would not have undertaken to act therein but under the assurance that an application would be made to the Court to authorise the allowance of a reasonable compensation for his labour and time, and that he would not continue to act herein without such reasonable allowance being made to him; it should therefore be referred to the Master to settle a reasonable allowance to be made to Croft for his time, pains, and trouble, or the time past; and if the Master should be of opinion that Croft should be continued a trustee, then to settle a reasonable allowance to be made to Croft for the time to come. In that case Croft had declined to prove the will or accept the trust; but executed no disclaimer of the estate, and his co-trustees had employed him in the capacity of agent for the trust. The co-trustees filed a bill for the administration of the trust, and prayed that in case the Court should be of opinion that Croft ought to be discharged from the trust, then that he might convey the trust estates, and be allowed a compensation for his time and trouble in the management of the testator's affairs. See also *Brockopp v. Baines*, 3 Mad. 90.; *Ellison v. Airey*, 1 Ves. 111.; *Ayliffe v. Murray*, 2 Atk. 58.; as to a trustee making a contract for an allowance with his cestui que trust: also *Gould v. Fleetwood*, cited *Robinson v. Pett*, 3 P. Wms. 251. n. A. In the latter case LORD TALBOT C. said, it was an established rule, that a trustee, executor, or administrator, should have no allowance for his care and trouble: the reason of which seemed to be, or that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value. Besides the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time might be more valuable than that of another; and there could be no hardship in this respect upon any trustee, who might choose whether he will accept the trust or not. In *Ayliffe v. Murray*, LORD HARDWICKE thought that AN ATTORNEY (trustee or executor) might make the usual professional charges for business done for the trust estate. But this was overruled by LORD LYNDHURST, who determined that if a trustee who was a SOLICITOR acted as a solicitor, he was not entitled to charge for his labour, but only for his costs out of pocket.

In *Moore v. Froud*, 3 Mylne & Cr. 45., the present LORD CHANCELLOR entered fully into

the question of a TRUSTEE SOLICITOR being entitled to costs as a remuneration for business done for the true estate. His Lordship said, "there are two parts of the trust deed applicable to this point; first, that part in which the trusts are declared, wherein it is provided that all costs, charges, and expenses of the deed, and all expenses, disbursements, and charges already or hereafter to be incurred, sustained, or borne by the trustees, or any of them, either in professional business, journeys, or otherwise, for the purpose of negotiating or performing the agreements, trusts, and purposes before mentioned, and all costs, charges, and expenses of persons to be employed by them as surveyors, and all other expenses of carrying the trust into execution, shall be paid, in the first place, out of the produce of the intended sale."

"Now the costs in question being the ordinary remunerations of a solicitor, as distinguished from the costs out of pocket, cannot be considered as charges and expenses incurred, sustained, or borne by the trustees; but such expressions in terms apply to payments made or liabilities incurred.

"The next provision is more specific; it provides that each trustee is to be at liberty to retain and reimburse himself all such reasonable costs, charges, and expenses as he may sustain, or be put unto, such costs, charges, and expenses to be reckoned, stated, and paid as between attorney and client; but this provision does no more than the rule of law would have done, a trustee's costs being taxed as between attorney and client. And what are the costs so to be taxed? Costs which the trustees may sustain or be put unto; terms wholly inapplicable to sums claimed as remuneration.

"There is nothing in either of these provisions which is peculiarly applicable to the case of the solicitor being also trustee. It cannot, therefore, be assumed that the intention was to provide for some other mode of dealing with that union of characters than what the law would have enforced; and still less that, under such provision, a solicitor dealing with his client can be permitted to claim that which, without at least a specific contract with the client, and proof that the client was fully cognisant of his legal rights, independently of such contract, and of the effect and legal consequences of the act upon such legal rights, he would not be entitled to claim.

"It remains, therefore, to be seen what is the rule of law in cases in which no specific contract regulates the rights of the parties. It is clear that if an attorney be allowed to make profit by means of professional business of his office of trustee, it will constitute an exception to a rule well known and established in all other cases. (*Robinson v. Pett*, 3 P. Wms. 247.) A factor

acting as executor is not entitled (*Scattergood v. Harrison*, Moseley, 128.); nor a commission agent (*Sheriff v. Axe*, 4 Russell, 33.). Why is the case of a *solicitor* to constitute an exception to the rule? What is the reason given for the rule? It is, I think, well stated in *Robinson v. Pett*: "The reason seems to be, for that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value." It is not because the trust estate is in any particular case charged with more than it might otherwise have to bear; but that the principle, if allowed, would lead to such consequences in general. In the case of the factor or agent, if the executors had employed other persons in those capacities, they would probably have been allowed the expenses; but if they are to perform those duties themselves, and to charge a *profit* upon such employments, what protection can the plaintiff have against extravagant charges? Do not these reasons apply to the case of *solicitors*? Does not this very case strongly exemplify the danger, and illustrate the merit of the rule which would avert it? If, therefore, it had been necessary for me to come to a conclusion upon this point, without the aid of previous decisions directly applicable, I should not have felt much difficulty in the performance of that duty; but still I am glad to be relieved from that necessity, and to find my own opinion confirmed by that of Lord LYNDHURST in the case of *New v. Jones* (not reported), in which that question was deliberately considered, and decided conformably to the opinion I have expressed. It was indeed said that a *contrary* decision had taken place in the case of *Daniel v. Goldson* (before the VICE-CHANCELLOR, March, 1833,) but I do not find that the point was there raised or decided. The Master, indeed, may have allowed such costs; but I do not find any judgment of the Court upon it."

His Lordship ordered that the Master, in taxing the accounts of the trustees, was *not* to allow them any *professional charges*, or charges for loss of time, or other emoluments; but to allow only such charges and expenses *actually paid* by them *out of pocket*, as he should find to have been properly incurred and paid by them.

We will only add that no attorney's office should be without this work, to which it is as necessary and as useful, as the ink-stand.

NOTICE TO CORRESPONDENTS.

OMFGA.—In our next.—We had not only before discovered, but noticed the fact of the *wholesale plagiarism*;—see our Note to the Answer to Problem XVIII. Vol. II. The work upon "Rights of Things" we never heard of.

ERRATUM—Vol. 2, p. 275, l. 16, from the top of 1st col. for (*Deo d. Bisk r. Koeling*, 1 Man. & Selw. 85.) read (*Deo d. Bish r. Keeling*, 1 Mau. & Selw. 85.)

Stove on principles Entirely New, and unequalled for Comfort and Economy.

BY HER MAJESTY'S ROYAL LETTERS
Patent. The CHUNK PATENT STOVE, invented by Mr. R. Prosser, Civil Engineer, is distinguished from all others by its entire freedom from dust or smoke, its great economy of fuel, and its perfect safety from fire. It has been a source of great comfort in the nursery and bedroom of the invalid, affording an uniform temperature through the day and night, with only one supply, while the most delicate test cannot detect any thing arising from its use which is injurious to health—it merely warms the air without decomposing it; and, as there is no door, none of the gases generated by combustibles, can pass into the apartment. Wherever warmth is required, this Stove is applicable. It is as desirable for the drawing-room as the laundry; for warming greenhouses it possesses extraordinary claims, the very great expense of building flues, and afterwards the immense consumption of fuel, being avoided. For workshops and ships' cabins it is invaluable; it requires attention only once in twenty-four hours, during which time the cost will not exceed twopence.—Price, plain, £3.; fluted, £3. 10s. Manufactured by the sole Proprietors, RIPPON and BURTON, Wells-street, Oxford-street. Of whom may be had detailed Catalogues of the prices of fenders, fire-irons, warranted table cutlery, superior nickel silver, &c., 20 per cent. under any other old-established house, which can be forwarded for a single postage. Established 1820.

On Sept. 2 was published, price 4s. to be continued Monthly, Vol. III. Part II.

PRECEDENTS IN CONVEYANCING, adapted to the Present State of the Law. Illustrated with Notes, Practical and Critical, by THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple; Author of "The Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen, &c. in continuation of the PRECEDENTS by S. VALLIS BONE, Esq.

Part 3, Vol. 3, will be published October 1. London: JOHN RICHARDS and Co., Law Book-sellers, 194, Fleet Street.

This work will be completed in 4 vols.

Printed by GEORGE NORMAN, at his Printing Office, 29, Mulden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 7th Sep-
tember, 1830.

The Legal Guide.

VOL. II.]

SATURDAY, SEPTEMBER 14, 1839.

[No. 20.

LEX LOCI DOMICILII.

PART II.

As to the manner in which instruments, executed in *England* by a domiciled *Englishman*, are to be construed and dealt with in respect of evidence by a Scotch Court, in so far as these instruments relate to the distribution of personal property, situated within the territory of *Scotland*.

LAW OF EVIDENCE in these cases.

WE will now illustrate the doctrine we have asserted, by showing what is the practice in this country in cases of this kind; and we cannot do better for the purpose, than quote the Speech of LORD BROUHAM, made in the House of Lords, on their Lordships giving judgment in the Appeal Case, *Yates v. Thomson and others.* (a) (June 5, 1835.) His Lordship observed, that the question which he considered it right to give reasons upon in that case related to the manner in which instruments executed in *England*, by a domiciled *Englishman*, are to be construed and dealt with, in respect of evidence by a Scotch Court, in so far as these instruments relate to the distribution of personal property, situated within the territory of *Scotland*.

His Lordship said, It was on all hands

admitted, that the whole distribution of Mr. Yates's personal estate, must be governed by the law of *England*, where he had his domicile, through life, and at the time of his decease, and at the dates of all the instruments executed by him. Had he died intestate, the *English* statute of distributions, and not the *Scotch* law of succession in moveables, would have regulated the whole course of the administration. His written declarations must, therefore, be taken with respect to the *English* law. His Lordship thought it followed from hence, that those declarations of intention must be construed as we should construe them *here*, by our principles of legal interpretation. Great embarrassment may, no doubt, arise from calling upon a *Scotch* Court to apply the principles of *English* law to such questions, many of those principles being among the most nice and difficult known in our jurisprudence. The *Court of Session* may, for example, be required to decide whether an executory devise is void as being too remote, and to apply, for the purpose of ascertaining that question, the criterion of the gift passing, or not passing, what would be an estate in realty, although, in the language of the *Scotch* law, there is no such expression as executory devise, and, within the knowledge of *Scotch* lawyers, no such thing as an executory estate tail. Nevertheless, this is a difficulty which must of necessity be grappled with, because in no other way can the *English* law

(a) See *S. Clarke and Finlly, 581.*

be applied to personal property, situated locally within the jurisdiction of the Scottish forum, and the rule which requires the law of the domicile, to govern succession to such property, could in no other way be applied, and followed out. Nor has any distinction in this respect ever been taken between testamentary succession, and succession *ab intestato*, or has it been held either here, or in *Scotland*, that the Court's right to regard the foreign law, was excluded, wherever a foreign instrument had been executed. It was, therefore, his Lordship's opinion, that in this as in other cases, of the like description, the *Scottish* Court must inquire of the foreign law as a matter of fact, and examine such evidence as will shew how in *England* such instruments would be dealt with as to construction. His Lordship said he gave this as his opinion upon principle, for he was not aware of the question ever having received judicial determination in either country : but here his Lordship thought the importing of the foreign code (sometimes incorrectly called the *omnis*) must stop: what evidence the Courts of another country would receive, and what reject, was a question which he could not at all see the necessity of the Courts of any one country entering. Those principles which regulate the admission of evidence, are the rules by which the Courts of every country guide themselves in all their inquiries. The truth with respect to men's actions, which, from the subject matter of their inquiry, is to be ascertained according to a certain definite course of proceeding, and certain rules have established, that in pursuing this investigation, some things shall be heard from witnesses, others not listened to; some instruments shall be inspected by the judge, others kept from his eye. This must evidently be the same course, and governed by the same rules, whatever be the subject matter of investigation; nor can it make any difference whether the facts, con-

cerning which the discussion arises, happened at home or abroad; whether they related to a foreigner domiciled abroad, or a native living and dying at home. As well it might be contended, that another mode of trial should be adopted, as that another law of evidence should be admitted in such cases. Who would argue that in a question like the present, the *Court of Session* should try the point of fact by a jury, according to the *English* procedure, or should follow the course of our dispositions or interrogatories in Courts of Equity, because the testator was a domiciled Englishman, and because those methods of trial would be applied to his case, were the question raised here! The answer is, that the question arises in the *Court of Session*, and must be dealt with by the rules which regulate inquiry there. Now the law of evidence is among the chief of these rules; nor let it be said that there is any inconsistency in applying the *English* rules of construction, and the *Scotch* rules of evidence to the same matter, in investigating facts by one law, and intention by another. The difference is manifest between the two inquiries; for a person's meaning can only be gathered from assuming that he intended to use words in the sense affixed to them, by the law of the country he belonged to at the time of framing his instrument. Accordingly, where the question is what a person intended by an instrument relating to the conveyance of real estate, situated in a foreign country, and where the *Lex loci sitae* must govern, we decide upon his meaning by that law, and not by the law of the country where the deed was executed, because we consider him to have had that foreign law in his contemplation.

(To be continued.)

PROBLEM XX.

VOL. 2.

TRUSTS.

What is a SPECIAL TRUST?

TO THE EDITOR OF THE LEGAL GUIDE.
ANSWERS TO PROBLEMS 12 AND 18.
VOL. II.

(Continued from p. 292.)

XI. Where a consideration can be clearly implied the guarantee is valid, and here it will be found, that where the agreement is prospective, or where there is an *executory condition*, a consideration may generally be implied, as for instance, provided you will give A. credit is the condition precedent, which, when fulfilled, form the consideration necessary to the validity of the guarantee. On the other hand, in *Wain v. Warlters*, the debt was *pre-existent*, and the promise, therefore, *retrospective*; hence no consideration could be implied.

XII. There are many cases of prospective agreements reported, but that which is usually referred to is *Staph v. Lill.* (*l*) in which the words of the instrument were,—I guarantee the payment of any goods which Mr. John Staph shall deliver to Mrs. Nicholls, of Brick Lane.—John Lill. Here the delivery of the goods was very properly deemed a good consideration, and in *Newbury v. Armstrong.* (*m*) an agreement to be security for one S. Corcoran, for whatsoever you may trust him with, while in your employ, to the amount of £50., (*n*) was held good on similar grounds. (*o*)

(*l*) Reported at N. P., 1 Campbell, 242, and afterwards confirmed by the Court of K. B., and reported 9 East, 348.

(*m*) 6 Bing, 201.

(*n*) A guarantee may be limited in amount and in duration, but where a specific debt is intended, the amount need not be named, *Bateman v. Phillips*, 15 East, 279.

(*o*) See also *Russell v. Moseley*, 3 B. & B. 211.; *Morris v. Stacey*, Holt's N. P. C., 153.; *Combe v. Wolfe*, 8 Bing, 157.; *Shortrede v. Cheek*, 1 ad. & Ell. 59.; a distinction was formerly taken between a promise made before and after delivery, but this distinction is now superseded by the rule as to prospective agreements as laid down by *Tindal*, C. J. in *Newbury v. Armstrong*; (see *Jones v. Cooper*, Cowp. 228.).

XIII. There is, however, a class of cases, where retrospective agreements have been held to be valid as guarantees, in as much as they refer to some past consideration, fulfilling a previous request. In *Payne v. Wilcox*, the essential words of the instrument were:—“Mr. R. Payne having at my instance and request consented to suspend proceedings, &c. . . I do hereby in consideration thereof, personally undertake, &c.”—and it was held that the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least, till the day named in the undertaking.

XIV. It should be observed, that an agreement fulfilling all the conditions stated in the reported cases, need not be in a single writing. Parts of the said agreement may be different pieces of paper, provided they are connected one with another in sense: and parol evidence for the purpose of connecting them has always been rejected. (*p*)

XV. There is one other requisition of the statute which it is necessary to notice. The agreement must be “signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorised.”

XVI. Two points have been decided on the subject of the signature required by the statute of frauds. First, that the instrument need be signed only by the party to be charged, and not by the other contracting party; (*q*) and second, that the signature may be at the beginning, as well as at the end of the instrument. (*r*)

(*p*) *Jackson v. Low*, 1 Bing. 9.; *Saunders v. Jackson*, 2 B. & P. 398.; *Allen v. Bennett*, 3 Taunt. 169.; *Dobell v. Hutchinson*, 3 Add. & Ell. 355.

(*q*) *Knight v. Crockford*, 1 Esp. 190.; *Laythrop v. Bryant*, 3 Bing. N. C. 735. “It is not the signature of both parties that makes the agreement. The agreement is in fact made before signature.”

(*r*) *Right v. Price*, Doug. 241.; *Ogilvie v. Foljambe*, 3 Meriv. 62.

XVII. It may be necessary to add, that in some few cases guarantees require an agreement stamp, and the rule laid down is, that where the principal or original contracts requires a stamp; so also does the guarantee.(s) This excludes agreements for the sale of goods, and indeed most of those mercantile transactions which give birth to guarantees.

XVIII. Such are the principal features of a valid guarantee, but it has been decided that a mere offer to guarantee, as "I have no objection to guarantee, &c." is not sufficient; though it seems it might be rendered so by acceptance. (t)

XIX. An informal guarantee cannot be taken advantage of, after money has been paid under it, either to the party secured,(u) or into court; (v) in neither case, can money so paid be recovered back, and proof even that there is not a written instrument is of no avail.

XX. But the court will enforce a verbal guarantee against an attorney, who has undertaken to pay his client's debt and costs, by virtue of the control which they exercise over their own officers. (w)

XXI. Let us now recapitulate the various requisites of a valid guarantee:—

1. The agreement intended to operate as a guarantee, (that is where the party originally chargeable still remains liable,) must be in writing.

2. Inasmuch as an agreement comprehends a *consideration*, as well as a *promise*, a mere naked promise is not sufficient, but the consideration may be implied from the terms of the instrument, as well as expressed.

(s) *Warrington v. Furber*, 8 East, 242.
 (t) *M'Iver v. Richardson*, 1 M. & S. 557.; *Mozeley v. Tinckler*, 1 C. M. & R. 672.; *Symonds v. Waite, 2 Stark*, 371.; *Grant v. Hill*, 1 Stark, 110.
 (u) *Shaw v. Woodcock*, 7 B. & C. 73. ¶
 (v) *Middleton v. Brewer, Peake*, 15.
 (w) *Evans v. Duncan*, 1 Tyrwh.

3. The agreement need not be in one written paper, but may be collected from two or more.

4. The signature of the "party to be charged" is alone required, and it may be at the beginning, as well as at the end of the instrument.

5. Where the original contracts require an agreement stamp, so also will the guaranteee which relates thereto.

6. But if a guarantee be informal, such defect cannot be taken advantage of after money has been paid under it, either to the party secured, or into court.

King's Bench Walk.

H. S. C.

Law Reports.

COURT OF CHANCERY.—June 26.

ANGELL v. DAVIS.

Appeal from the Vice-Chancellor.
TRUSTEES, their liability to replace Trust Money lent upon insufficient security.

PRACTICE.—Whether the Court has Jurisdiction to entertain an Appeal for Costs.

The bill was filed by the plaintiffs, who are trustees of the property of an infant, and is prayed that the defendant might be compelled to account for certain monies belonging to the infant, which he had advanced on mortgage, and to replace those monies at his own cost. The defendant was a trustee in conjunction with the plaintiffs, and he had also been entrusted with the sole management of the property, which, by the terms of the deed of trust, might be lent out on mortgage on "freehold or good leasehold security." A sum of £150. was advanced to Mr. Amor on the security of land which was not worth £40., but was held by Amor under a covenant to build. The plaintiffs did not consider this covenant a sufficient security, and the Vice-Chancellor having directed a reference to the master, it was reported that the money was advanced on property of the description mentioned. Under these circumstances the court ordered the money to be replaced, but as it appeared that the mortgagor was ready to repay it, and as no loss had therefore been incurred, the defendant was not called on to pay any costs, and against this order the present appeal was brought.

Mr. Girdlestone, for the appeal, contended

that although under ordinary circumstances there could be no appeal for costs which were given or withheld in the court below at the discretion of the Judge, yet here there might be such appeal, because costs were expressly introduced as a part of the relief prayed by the bill. The improper conduct of the trustee had given occasion to the suit. He had been warned that unless the money was immediately replaced, the bill would be filed and costs prayed against him, and if costs were not given, the court would be depriving persons yet unborn (for the infant had only a life interest) of a considerable portion of their property. It was this peculiarity which they apprehended took the case out of the ordinary rule with respect to appeals for costs.

Mr. Wigram, on the other side, maintained, on the authority of *Jenour v. Jenour*, 10 Ves. J. 572. (a) and *Taylor v. Pope*, 15 Ves. J. 78. that there could be no such appeal. They also defended the conduct of Mr. Davis, and maintained that as the money was forthcoming, and no loss had been incurred, the court was right in not compelling the payment of costs. The plaintiffs themselves had been guilty of a much greater breach of trust than the defendant, for they had placed the trust money in the three-and-a-half per cents.

The LORD CHANCELLOR said, it was quite impossible for the court to sanction such a proceeding with regard to the execution of a trust, as that made out by the bill. It was true no loss had been incurred, but the defendant, holding a trust with an express injunction to advance the money on good leasehold security, had thought proper to advance it on the security of a covenant in a lease which in truth was no security at all. Such conduct on the part of a trustee the court could not overlook, but the difficulty was, whether the court had jurisdiction to compel him to pay costs on an appeal. His Lordship expressed his opinion that the defendant must be made to pay the expenses of a bill filed purely in consequence of his misconduct, if, on an examination of the cases, it should be found that the court had the power to make a decree to that effect.

July 3.

This case came on again for hearing on the appeal for costs.

The LORD CHANCELLOR said, that having adjudicated he was clearly of opinion that the defendant had done wrong in lending the money on the security of a covenant which was, in point of fact, no security at all; and as the Court was bound to set its face against such proceedings, he also expressed a strong desire to make the defendant pay the costs, if the practice

of the Court permitted him to make such an order, but as the appeal was purely for costs there was on that matter some doubt. His Lordship then referred to and commented upon 1 Ves., sen., 148.; 1 Eden, 17.; Beames's Appendix, 10.; and Burkett *v. Spray*, 1 Russ. and Myl. 115. (b), in which successive Chancellors, had recognized the rules of the Courts to be, that they would hear appeals relating to the costs of trustees and mortgagees. There were three reasons which, in addition to these authorities, induced him to think this appeal could be entertained. In the first place the bill prayed for costs as matter for relief; the costs, secondly, were not personal; and thirdly, the error appeared on the face of the proceedings.

His LORDSHIP said he had come to the conclusion, that the Court, under the circumstances of the case, had authority to entertain an appeal for costs, and to direct the defendant to pay the costs of the proceedings rendered necessary by his dealing with the fund. The rule with respect to an appeal for mere personal costs was a wholesome one, and he had no disposition to relax it; but it might happen, as in the present case, that costs were the sole object of contention in the cause, and as in the present case one of the principal objects prayed by the bill. His Lordship was of opinion, therefore, that having jurisdiction to make a decree with respect to costs, the defendant must pay those which the plaintiffs prayed against him.

(a) The late Sir Samuel Romilly in that case stated, he conceived the RULE to be, that where the costs are in the discretion of the Court, there can be no appeal upon the subject of costs, and referred to *Wirdman v. Kent*, Bro. C. C. 140. (stated from his own note) and *Williams v. Binning*, (in the Court of Exchequer cited from a note of Mr. Abbott, the then Speaker of the House of Commons) in answer to which LORD ELDON, C., said, "Suppose a third person was executor, and brought before the Court; here the executor happens to be before the Court by the mere accident that the trustee, happens to be executor; for, as executor, he had done with the fund; having placed it in the hands of the trustees for the persons entitled under the trust. It has been 17 years out of his hands as executor. Then this is not costs within the Com-

MONS. RULE but relief, and his Lordship himself gave the following declaration that it might not be misunderstood, " In as much as the fund, the right to which was in question in this cause, had been separated from the residue of the personal estate of the testator, and placed in the hands of the trustees thereof by the executor, before the bill filed, and as the payment of the *costs* of this suit out of the residue, is in this cause *specifically* prayed by the bill as relief, and the executor as such, is made a party to the suit in respect of that relief, so prayed; the order for the payment of the *costs* in the decree complained of is in *this particular case* to be considered as relief granted by the Court; and in this case the residue of the personal estate ought not to have been charged with the payment of the costs of this suit; but the same ought to be paid out of the trust fund, the right to which was in question in this cause, and his Lordship referred it to the Master to tax the costs of the suit which he directed to be paid from the fund in Court."

(b) In that case LORD LYNDHURST held that *an appeal would lie in respect of costs*, if any principle were involved, and they were not merely given as consequential on the decree. Most of the cases on the subject of appeals relative to costs are brought together in a note to Mr. Blunt's edition of *Ambler's Reports*, 521. To these may be added *Eyre v. Parnell*, 29th Feb. 1727; *Crosby v. Shadsworth*, 4th April, 1728; *D. P. Harc. M. SS.; Gould v. Granger*, Mos. 395.; *Huband v. Huband*, 7 Bro. P. C. 433. Toml. edit.; *Tod v. Tod*; 1 *Bligh* 638. N. S. and see 1 Dow. 261.—EDITOR.

QUEEN'S BENCH.—May 31.

Sittings in Banco.

STOCKDALE v. HANSARD.

JUDGMENT.

(Continued from page 270.)

III. I come at length to consider whether this privilege of publication exists. The plea

states the resolution of the House, that all Parliamentary reports printed for the use of the House should be sold to the public, and that these several papers were ordered to be printed, not however stating that they were printed for the use of the House. It then sets forth the resolution and adjudication before set out. We know by looking at the documents referred to at the bar that this resolution and adjudication could not justify the libel complained of, because it was not, in fact, passed till after action brought. But passing over all minor objections, I assume that the defendant has properly pleaded a claim on the part of the House to authorize the indiscriminate publication and sale of all such papers as the House may order to be printed for the use of its members.

The Attorney-general would preclude us from commencing this inquiry. He protests against our taking any other step than that of recording the judgment already given in the superior court, and registering the edict which Mr. Hansard brings to our knowledge. But having convinced myself that the mere order of the House will not justify an act otherwise illegal, and that the simple declaration that that order is made in exercise of a privilege, does not prove the privilege; it is no longer optional with me to decline or accept the office of deciding whether this privilege exist in law. If it does, the defendant's prayer must be granted, and judgment awarded in his favour; or, if it does not, the plaintiff, under whatever disadvantage he may appear before us, has a right to obtain at our hands, as an English subject, the establishment of his lawful rights, and the means of enforcing them.

In the first place I would observe, that the act of selling does not give the plaintiff any additional ground of action or right to redress at law beyond the act of publishing. The injury is precisely the same in its nature, whether the publication be for money or not, though it may be much more extensively injurious when scattered over the land for profit. But the direction to sell is highly important in this respect; that public sale necessarily imports indiscriminate publication beyond recall or control, and holds out the same authority as a protection to every subordinate vendor, who, by purchase from their printer and bookseller, is like him doing no more than giving effect to an order of the House.

How far it is strictly constitutional for either House of Parliament to raise money by sale or otherwise, and apply it to objects not specified by Act of Parliament, might require consideration on general grounds, but does not belong to the present season or place, in which we have only to deal with the manner in which the mutual rights of the parties before us in this action are affected.

It is likewise fit to remark, that the defamatory matter has no bearing on any question in Parliament, or that could arise there. Whether the book found in the possession of a prisoner in Newgate were obscene or decent could have no influence in determining how prisons can best be regulated, still less could the irrelevant issue whether it was published by the plaintiff. The most advisable course of legislation on the subject is wholly unconnected with those facts; the inquisitorial functions would be exercised with equal freedom and intelligence however they were found to be; and if the ascertainment of them by the House was a thing indifferent, still less could the publication of them to the world answer any one Parliamentary purpose.

The proof this privilege was grounded on three principles: necessity, practice, universal acquiescence. If the necessity can be made out, no more need be said; it is the foundation of every privilege of Parliament, and justifies all that it requires. But the promise to produce that proof ended in complete disappointment. It consisted altogether in first adopting the doctrine of *Lake v. King*, in 1st Saunders, that printing for the use of the Members is lawful, and their rejecting the limitation which restricts it to their use. The reasoning is, "If you permit the number of copies to be as large as the number of Members, the secret will not be confined to them." A strong appeal to justice and expediency against printing, even for the use of the Members, what may escape from their hands to the injury of others, but surely none in point of law for throwing down the only barrier that guards the rest of the world against calumny and falsehood, founded on *ex parte* statements, made for the most part by persons interested in running down the character assailed.

The case just alluded to, *Lake v. King*, drew a line in the 19th year of Charles II., which has always been thought correct in law. The defendant justified the libel he had printed, by pleading, that it was only printed for the use of the Members. Much doubt at first existed whether the justification were good in law, the right of delivering copies for the use of the members of a Committee being undisputed, but some of the judges questioning whether printing could be so justified. After an advisement of many terms, and even of some years, Lord Hale and the Court sustained the defence, because, being necessary to their functions, it was the known course in Parliament to print for the use of Members. But wherefore all this delay and doubt if the House then claimed the privilege of authorising the publication of all papers before them; or how can we believe that the defendant would not have pleaded at first that privilege, when we find that he was admitted to have acted according to

the course and proceedings of Parliament; if it was then their understood right? This case occurred within a very few years of *Benger v. Evelyn*, which must have excited the attention of the House, and made them vigilant in maintaining their privileges against improper interference from courts of law.

The supposed necessity soon dwindled, in the hands of the learned counsel, down to a very dubious kind of expediency; for is it not much better, said he, that a man defamed, and thence avoided by mankind, should know he has been the victim of a privileged publication, than remain ignorant by what means he has lost his place in society? A question over which many a man might wish to pause before he answered it. It is far from certain that he would become acquainted with the fact, he might be absent on business, or abroad in the service of his country; but the discovery, when made, would bring him small comfort, as it would show him that his enemy was too strong to grapple with, and that the door of legal redress must be barred against him for ever.

Another ground for the necessity of publishing for sale all the papers printed by order of the House was, that Members might be able to justify themselves to their constituents, when their conduct in Parliament is arraigned, appealing to documents printed by authority of the House. This is precisely the principle denied and condemned by Lord Ellenborough, and the Court, in the *King v. Creevy*, a decision, which it may now perhaps be convenient to censure as inconsistent with privilege, but which, founded on Lord Kenyon's authority, in the *King v. Lord Abingdon*, has been uniformly regarded till this time as a just exposition of the law. But, indeed, it is scarcely possible for ingenuity to fancy a case in which a Member, accused of any misconduct in his trust, should be able to vindicate myself by resorting to such documents.

(To be continued.)

PALACE COURT.—Sept. 6.

BERENSTEIN v. HODGSON.

Sugar Bakers' Workmen being yearly Servants—Their legal right to certain HOLY-DAYS during the year.

In this cause (a) a rule had been obtained by the defendants, to show cause why a nonsuit should not be entered, or a new trial granted, on the ground that the learned judge had improperly admitted evidence as to custom, and that the contract was not correctly set out in the declaration.

(a) See ante, p. 249.

The rule was argued on a former day by Mr. Gaselee, for the plaintiffs; and Mr. Helps (with Mr. Corrie) for the defendants, and judgment was now given.

The Judge was of opinion that the evidence had been properly received, and the contract correctly set forth in the declaration; he therefore could not disturb the verdict.

Rule dismissed.

COURT OF BANKRUPTCY.—Sept. 4.

PLAINT AGAINST LLEWELLYN WATKINS WILLIAMS.

A Bankrupt having kept no books, and unable to produce vouchers of any kind to support his balance sheet, not allowed to pass his last examination.

This was the sitting for the adjourned last examination of the bankrupt. He was late of the Old Bailey, afterwards of the Rotunda, Blackfriars, but now of the Colosseum Café, Albany-street, and of Flora-cottage, Augusta-road, Regent's-park, (described as) wine-merchant.

Mr. Commissioner HOLROYD asked the official assignee if he could verify the truth of the bankrupt's statement as set out in the balance sheet.

The official assignee said he had no means of doing so. The bankrupt kept no books, and he had no vouchers of any kind.

Mr. Commissioner HOLROYD then said, that upon the face of the balance-sheet the bankrupt could not be allowed to pass. It appeared that his credits amounted to above £6,000.; to meet this the assets were literally nothing: £50. of bad debts, and a small quantity of furniture subject to some rent, which would not leave enough to pay the Court fees. The bankrupt had kept no books, and he had no vouchers of any kind. Among the losses stated in the balance-sheet was a sum of £215. said to have been lost at different fairs, £20. at one, £30. at another, and so on. He (the Commissioner) had nothing to guide his judgment as to the truth or accuracy of the balance-sheet. Under these circumstances, he must adjourn this case *sine die*. If a person chose to trade without keeping any books or any vouchers as to his dealings, and was thereupon unable to comply with the provisions of the bankrupt laws, his Honour thought such person had no better reason for complaining of being debarred from the benefit of such law than a person who was not a trader at all. The law was made to protect the fair, open, and honest trader, and to such persons he thought it ought to be confined.—Adjourned accordingly.

Summer Assizes.

HOME CIRCUIT.—Aug. 9.

Before LORD CHIEF JUSTICE TINDAL.
THE EASTERN COUNTIES RAILWAY COMPANY
v. WALSH.

Construction placed by the Judge upon the terms of the Act of Parliament requiring "Notice of calls to be inserted in some newspaper published and circulated in each of the Counties of Middlesex, Essex, Suffolk, and Norfolk," whether it extends to London Newspapers circulating in all those counties.

This was an action by the directors of the Eastern Counties' Railway against the defendant, sued as Samuel Henry Walsh, of Liverpool, banker, to recover the sum of £950, being the amount of calls made upon shares in this company.

No defence was offered.

Mr. Shee stated, that the defendant was the proprietor of a great number of shares of the Eastern Counties Railway Company; upon those shares calls had been made, amounting to the sum sought to be recovered, and which had not been paid by the defendant. He should show that the Act of Parliament had been complied with in all necessary particulars.

Mr. John Blackman then deposed that he was a clerk in the company. He produced the books of the company, by which it appeared that S. H. Walsh was the proprietor of a certain number of shares. A call was made by the directors, in the month of May, 1838, of £2. 10s. per share, and which would have rendered the defendant liable for the shares he then held, to the payment of £250. The call was made on the 26th of May, and it was to be paid on the 16th of June.

The COURT here observed, that it appeared that the defendant was sued as Samuel Henry Walsh. The Act of Parliament certainly made the production of the books of the company, with the name inserted, *prima facie* evidence of the proprietorship of the shares, but in the present instance the name in the book was at variance with the plea, in one it being stated to be S. H. Walsh, and in the other Samuel Henry Walsh. His lordship thought there ought to be some proof that the initials were meant to stand for the names mentioned in full.

The witness stated in continuation that he understood the defendant's name to be Samuel Henry Walsh. He proceeded to state that a second call was made in September, 1838, and a third in December of the same year, which third call became payable on January 14, 1839.

The Lord Chief Justice TINDAL.—When was your advertisement of the call inserted.

The witness stated that it was inserted in the London papers of the 18th of December, and in the Norfolk, Suffolk, and Essex papers of the 29th of December.

The Lord Chief Justice TINDAL.—The plaintiff is out of court with respect to this call. The company is bound to give twenty-one days' notice in a newspaper circulated in all the four counties.

Mr. Shee submitted that as the London papers circulated in all the four counties, it was quite sufficient to insert the advertisement in them.

Lord Chief Justice TINDAL considered that was not sufficient. The act required that the notice of the call should be inserted in some newspaper published and circulated in each of the counties of Middlesex, Essex, Suffolk, and Norfolk. There was very great neglect on the part of the company in not getting up the case better.

Mr. Shee said he should submit that if he could show that the London papers circulated in all these counties, it would be sufficient.

Lord Chief Justice TINDAL.—We must have some evidence, at all events, to show that you have complied with your Act of Parliament. The act is very explicit, and gives the company great powers.

The witness, in continuation, stated that other calls have been made, which rendered the defendant liable to the payment of £950 upon the shares he held, and £30 interest.

Evidence was then adduced to show that the London papers circulated throughout the counties alluded to, and

The Lord Chief Justice then directed the jury to find for the plaintiff for £980, the full amount claimed.

NORTHERN CIRCUIT.—August 27.

(Before Mr. BARON MAULE.)

Special Jury.

TAYLOR v. LLOYD, AND OTHERS.

PARTNERS—*Liability of a Firm for the Acts of one Partner.*

It appeared from the evidence adduced, that the defendants are bankers in Birmingham. The firm consists of five partners, four of whom pleaded to the action (which was *in assumpsit*) that they were never liable; the fifth (Mr. F. Lloyd) pleaded, in addition, a plea of payment of the sum claimed. The plaintiff was an old lady, aged about 75 years. She formerly resided in Liverpool, and is possessed of an income of somewhat more than £1,700. a-year. At the time of the transactions which gave rise to the

present inquiry, she had gone to reside at a place called Wild-green, near Sutton Coldfield, Warwickshire, where she kept a carriage, a coachman, a servant maid, and a dog. There was little society in the neighbourhood. The dog fell ill, and she applied to the wife of a Mr. Jones, whose husband was there a spade and shovel manufacturer, in rather a humble way, to recommend her to a farrier, who could see to her horses and cure the dog. Mrs. Taylor afterwards called repeatedly on Mrs. Jones, who became a friendly visitor at the house. In the year 1836, one of the defendants, Mr. Francis Lloyd, came to reside at the manor-house at Sutton Coldfield. Soon after this the plaintiff's house was robbed, and Mr. Francis Lloyd being a magistrate, application was made to him to investigate the case. This led to a friendly intercourse between the plaintiff and Lloyd, who appeared greatly to interest himself in her affairs. In 1837 Mr. Jones removed to Birmingham, where Mrs. Taylor assisted them to set up in business in the edge-tool trade, and lent money from time to time to Mr. Jones, in various sums, to the amount of near £2000., for which she had his personal security, and a mortgage upon some premises which he had bought whereon to establish his manufactory. In 1838, a young and handsome woman came to reside at Sutton Coldfield, in a house called the Swiss-cottage. Mr. Lloyd mentioned her to Mrs. Taylor as a young widow lady of the name of Harding, and introduced them to each other. Whenever Mr. Lloyd came in the neighbourhood he generally called at Mrs. Taylor's, on his way both to and from Birmingham, and when at a distance he did not fail to write to her, expressing his devotion to, and wish to serve her, in terms which could only be accounted for, considering the great disparity of age between them, on the supposition that he had some purpose to serve. He sent her game, fruit, and flowers, became her banker, sent her a pass-book and a check-book, and received her money. He wrote also that he had a project by the accomplishment of which he hoped to add to her domestic happiness. This was an intention to marry the pretty Mrs. Harding, and to offer Mrs. Taylor a place at his fireside, being assured that the lady of his choice would find great advantage in having her assistance in the conduct of his household. He for the first time thought seriously of matrimony, though it had often been recommended to him by his friends, combined with the allurements of youth, beauty, and fortune. On one of the occasions when Mrs. Taylor advanced money to Mr. Jones, she requested him to cut two checks out of her check book, and also showed him her pass-book, in which at this time stood a balance in her favour at the defendants' bank of £1,981*l.* 10*s.*

In the same year Mr. F. Lloyd took the opportunity to see Mr. Jones, and said that he thought they were at cross purposes as to Mrs. Taylor. Jones said he was at no purpose at all, and did not understand what he meant. Early in 1839 the old lady resolved to return to Liverpool, and made preparations for the purpose. Mrs. Jones, and the pretty Mrs. Harding, who had become a frequent visitor, came to assist in packing, and were occupied near a fortnight. Mrs. Taylor told Mr. Lloyd, that before she left she should want 1,000*l.* and requested him to bring it her. On looking for the pass-book it was missing and could no where be found; and one morning, towards the close of the scene, Mr. Lloyd brought a paper parcel, which he delivered to Mr. Jones, saying, "Here is Mrs. Taylor's money." On opening it the parcel was found to contain 250*l.* Mrs. Taylor said, "What does Mr. Lloyd mean by this? I wanted 1,000*l.*, and he has sent me 250*l.*" Shortly after this Mrs. Harding discovered a pass-book under a heap of loose waste paper in the water-closet, and produced it as the lost book. On examining it several sums were put to the credit and debit of Mrs. Taylor, so as to render the balance due to her only 250*l.*; and some items of interest were put on the debit instead of on the credit side. The book, though a regular pass-book of the bank, with a printed notice to customers pasted inside the cover, professed to be an account between the plaintiff and Mr. Francis Lloyd only. The whole of this appearing very strange, Mrs. Taylor consulted Mr. Weaver, one of her agents who collected part of her rents in Liverpool, who had an interview with Mr. F. Lloyd. At first Mr. Lloyd denied the account being more than the 250*l.*, which he had delivered to Mrs. Taylor, but Weaver said that he had himself paid in a sum of 700*l.*, and that he could have the notes of 400*l.* of it, and that Jones knew the pass-book contained a balance of 1,981*l.* 10*s.* in favour of Mrs. Taylor. Lloyd said, "If so, I must stand by it." This led to further inquiry, when it turned out that the pretty widow Harding was a mistress of Lloyd's, and had had two children by him. The paper manufacturer who made the paper of which the pretended pass-book was made, swore that he made the paper, and that the frame in which it was made was not in his possession till the 24th of August, 1837. The book contained entries of an earlier date, all of which looked as if written with the same pen and ink, and at the same time. The frame-maker, now retired, but formerly paper frame-maker to the Bank of England, deposed that he made the frame in which the paper of which the pretended pass-book was made, and that he sent it from his manufactory to the paper maker on the 24th of August, 1837, and not before.

MASULE, B. observed, that when a young man who had withstood the allurements of youth, beauty, and fortune, wrote to an old woman in the way Lloyd had done to the plaintiff, it must be obvious to any body but himself that his object was to ingratiate himself into her favour, for the sake of her money. It could only be with a view to deception that he asked her advice and sanction with regard to his marriage with the pretended widow, who had long been kept by him as his mistress. That there was a banker's account appeared certain. Even the pretended book was put off as a pass-book, though headed as between Mrs. Taylor and him only, and she had all along had a check-book of the bank. The other partners pleaded that they were not liable; but if one partner took the plaintiff's money, and pretended to place it in the bank for her, they were all liable. On looking at the evidence, it did seem that about 700*l.*, paid in by Mr. Weaver, had been drawn out again; and whether that constituted a part of the 1,981*l.* 10*s.* which Jones saw in the pass-book, was a point for their consideration.

Verdict for the plaintiff—Damages 1,281*l.* 10*s.*

NEW POSTAGE ACT.

This new Statute is merely an addenda to the following—

1 Vict. Cap. XXXVI.

An Act for consolidating the Laws relative to Offences against the Post Office of the United Kingdom, and for regulating the judicial Administration of the Post Office Laws, and for explaining certain Terms and Expressions employed in those Laws.—[12th July, 1837.]

(Continued from p. 301.)

XLVII. And for the interpretation of the Post-office laws, be it enacted, that the following terms and expressions shall have the several interpretations herein-after respectively set forth, unless such interpretations are repugnant to the subject or inconsistent with the context of the provisions in which they may be found; (that is to say,) the term "British letter" shall mean a letter transmitted within the United Kingdom; and the term "British newspapers" shall mean newspapers printed and published in the United Kingdom liable to the stamp duty and duly stamped; and the term "British postage" shall mean the duty chargeable on letters transmitted by post from place to place within the United Kingdom, or if transmitted to or from the United Kingdom, chargeable for the distance which they shall be transmitted within the United King-

dom, and including also the packet postage, if any; and the term " Colonial letter" shall mean a letter transmitted between any of her Majesty's colonies and the United Kingdom; and the term " Colonial newspapers" shall mean newspapers printed and published in any of her Majesty's dominions out of the United Kingdom; and the term " Convention posts" shall mean posts established by the Postmaster General under agreements with the inhabitants of any places; and the term " Double postage" shall mean twice the amount of single postage; and the term " East Indies" shall mean every port and place within the territorial acquisitions now vested in the East India Company in trust for her Majesty, and every other port or place within the limits of the Charter of the said Company (China excepted), and shall also include the Cape of Good Hope; and the term " Express" shall mean every kind of conveyance employed to carry letters on behalf of the Post-office other than the usual mail; and the term " Foreign country" shall mean any country, state, or kingdom not included in the dominions of her Majesty; and the term " Foreign letter" shall mean a letter transmitted to or from a foreign country; and the term " Foreign newspapers" shall mean Newspapers printed and published in a foreign country in the language of that country; and the term " Foreign postage" shall mean the duty charged for the conveyance of letters within such foreign country; and the term " Franking Officer" shall mean the person appointed to frank the official correspondence of offices to which the privilege of franking is granted; and the term " Her Majesty" shall mean " Her Majesty, her heirs and successors;" and the term " Her Majesty's colonies" shall include every port and place within the territorial acquisitions now vested in the East India Company in trust for her Majesty, the Cape of Good Hope, the Islands of Saint Helena, Guernsey, Jersey, and Isle of Man, (unless any such places be expressly excepted,) as well as her Majesty's other colonies and possessions beyond seas; and the term " Inland postage" shall mean the duty charged for the transmission of post letters within the limits of the United Kingdom or within the limits of any colony; and the term " Letter" shall include packet, and the term " Packet" shall include letter; and the expression " Lord Lieutenant of Ireland" shall mean the chief Governor or Governors of Ireland for the time being; and the expression " Lords of the Treasury" shall mean the Lord High Treasurer of the United Kingdom of Great Britain and Ireland, or the Lords Commissioners of her Majesty's treasury of the United Kingdom of Great Britain and Ireland, or any three or more of them; and the term " Mail" shall include every conveyance by which post letters are carried,

whether it be a coach or cart or horse, or any other conveyance, and also a person employed in conveying or delivering post letters, and also every vessel which is included in the term packet boat; and the term " Mail bag" shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post letters are conveyed, whether it does or does not contain post letters; and the term " Master of a vessel" shall include any person in charge of a vessel, whether commander, mate, or other, and whether the vessel be a ship of war or other vessel; and the expression " Officer of the Post-office" shall include the Postmaster-General, and every deputy postmaster, agent, officer, clerk, letter-carrier, guard, post-boy, rider, or any other person employed in any business of the Post-office, whether employed by the Postmaster-General, or by any person under him or on behalf of the Post-office; and the term " Packet postage" shall mean the postage chargeable for the transmission of letters by packet-boats between Great Britain and Ireland, or between the United Kingdom and any of her Majesty's colonies, or between the United Kingdom and foreign countries; and the term " Packet letter" shall mean a letter transmitted by a packet-boat; and the term " Penalty" shall include every pecuniary penalty or forfeiture; and the expression " Persons employed by or under the Post-office" shall include every person employed in any business of the Post-office according to the interpretation given to officer of the Post-office; and the terms " Packet-boats" and " Post-office packets" shall include vessels employed by or under the Post-office or the Admiralty for the transmission of post-letters, and also ships or vessels (though not regularly employed as packet-boats) for the conveyance of post-letters under contract and also a ship of war or other vessel in the service of her Majesty, in respect of letters conveyed by it; and the term " Postage" shall mean the duty chargeable for the transmission of post-letters; and the term " Post-town" shall mean a town where a post-office is established (not being a penny or two-penny or convention post-office); and the term " Post letter bag" shall include a mail-bag or box, or packet or parcel, or other envelope or covering in which post-letters are conveyed, whether it does or does not contain post-letters; and the term " Post-letter" shall mean any letter or packet transmitted by the post under the authority of the postmaster-General, and a letter shall be deemed a post-letter from the time of its being delivered to a Post-office to the time of its being delivered to the person to whom it is addressed; and the delivery to a letter-carrier or other person authorized to receive letters for the post shall be a delivery to the Post-office; and a delivery at the house or office of the person to

whom the letter is addressed, or to him, or to his servant or agent or other person considered to be authorized to receive the letter according to the usual manner of delivering the person's letters, shall be a delivery to the person addressed; and the term "Post-office" shall mean any house, building, room, or place where post-letters are received or delivered, or in which they are sorted, made up, or despatched; and the term "Postmaster-General" shall mean any person or body of persons executing the office of Postmaster-General for the time being, having been duly appointed to the office by her Majesty; and the terms "Post-office Acts" and "Post-office Laws" shall mean all Acts relating to the management of the post, or to the establishment of the Post-office, or to the postage duties, from time to time in force; and the term "Ships" shall include vessels other than packet-boats; and the term "Single-postage" shall mean the postage chargeable for a single-letter; and the term "Single letter" shall mean a letter consisting of one sheet or piece of paper, and under the weight of an ounce; and the term "Sea postage" shall mean the duty chargeable for the conveyance of letters by sea by vessels not packet-boats; and the term "Ship letter" shall mean a letter transmitted inwards or outwards over seas by a vessel not being a packet-boat; and the term "Treble letter" shall mean a letter consisting of more than two sheets or pieces of paper, whatever the number, under the weight of an ounce; and the term "Treble postage" shall mean three times the amount of single postage; and the term "Treble the duty of postage" shall mean three times the amount of the postage to which the letter to be charged would otherwise have been liable according to the rates of postage chargeable on letters; and the term "United Kingdom" shall mean the United Kingdom of Great Britain and Ireland; and the term "Valuable security" shall include the whole or any part of any tally, order, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings bank, or the whole or any part of any debenture, deed, bond, bill, note, warrant, or order or other security whatsoever for money or for payment of money, whether of this kingdom or of any foreign state, or of any warrant or order for the delivery or transfer of any goods or valuable thing; and the term "Vessel" shall include any ship or other vessel not a Post-office packet; and whenever the term "between" is used in reference to the transmission of letters, newspapers, Parliamentary proceedings, or other

things between one place and another, it shall apply equally to the transmission from either place to the other; and every officer mentioned shall mean the person for the time being executing the functions of that officer: and whenever in this Act or the Schedules thereto, with reference to any person or matter or thing, or to any persons, matters, or things, the singular or plural number or the masculine gender only is expressed, such expression shall be understood to include several persons or matters or things as well as one person or matter or thing, and one person, matter, or thing as well as several persons or matters or things, females as well as males, bodies politic or corporate as well as individuals, unless it be otherwise specially provided, or the subject or context be repugnant to such construction.

XLVIII. And be it enacted, That this Act shall extend to and be in force in the Islands of Man, Jersey, Guernsey, Sark, and Alderney, and in all her Majesty's colonies and dominions where any post or post communication is established by or under the Postmaster-General of the United Kingdom of Great Britain and Ireland.

XLIX. And be it enacted, That this Act may be altered or repealed during the present Session of Parliament.

SCHEDULE

TO WHICH THE FOREGOING ACT REFERS.

No. 1.

Form of an Information for the Recovery of a Penalty under this Act.

County [or as the case may be] Be it remembered, that on the day of to wit. of our Lord at in the of A. B. of, &c. [or A. B. an officer of the Post-office, as the case may be,] cometh before me, C. D. Esquire, one of her Majesty's justices of the peace for the said and informeth me the said justice that E. F. of heretofore, to wit, on the day of in the year of our Lord at in the said did [here state the offence], contrary to the form of the statute in such case made and provided, whereby the said E. F. hath forfeited for his said offence the sum of

Taken and received by me, the day and year first above written.

No. 2.

Form of a Summons on the foregoing Information.

To E. F. of, &c.

County [or as the case may be] Whereas an information hath been exhibited before me, C. D. Esquire, one of her Majesty's justices of the peace for the

charging that you the above-named E. F. on the day of at did [here state the substance of the charge], whereby you have forfeited the sum of These are therefore to require you personally to be and appear before me the said justice, or before such other of her Majesty's justices of the peace for the said as shall be then present, at on the day of at the hour of in the noon or the same day, then and there to answer the same information, and to make your defence thereto; and if you fail to appear accordingly such proceedings will be taken as if you had personally appeared and not made any defence to the said charge.

Given under my hand and seal this day of

No. 3.

Form of a Conviction on the foregoing Information.

County [or as the case may be] Be it remembered, that on the day of at E. F. of, &c. was duly convicted before me one of her Majesty's justices of the peace for in pursuance of an Act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act," &c. [title of this Act] for that the said E. F. on the day of did [here state the offence as the case may happen to be], contrary to the form of the statute in that case made and provided; for which offence I do adjudge that the said E. F. hath forfeited the sum of and [if the justice mitigate the penalty] which sum of I do hereby mitigate to the sum of over and above the sum of for the costs and charges of G. H. the informer, in prosecuting his conviction.

Given under my hand and seal the day of

No. 4.

Form of a Warrant of Distress, founded on the foregoing Conviction.

County [or as the case may be] Whereas E. F. of has been duly convicted of a certain offence, for [here state the offence as in conviction] whereby he hath forfeited the sum of [and in case of mitigation, which hath been mitigated to the sum of] over and above the reasonable costs and charges of the informer, allowed and assessed the sum of : Therefore I command you to levy the said sum of and also the said sum of for the costs and charges foreshaid; making together the sum of by distraining the goods and chattels of the said E. F.; and if within the space of five days next after such distress taken the said sum of together with the reasonable costs and charges of

taking and keeping such distress, shall not be paid, then I order and direct that you shall sell and dispose of the said goods and chattels which shall be so distrained, seized, and taken as aforesaid, and shall levy and raise thereout the said sum of and all reasonable costs and charges of taking and keeping and selling such distress, rendering the overplus, if any, to the owner of the said goods and chattels; and you are to certify to me what you shall have done by virtue of this my warrant. Given under my hand and seal the day of

(Signed)

One of her Majesty's justices of the peace for the said of

No. 5.

Form of a Warrant of Commitment for want of a sufficient Distress, founded on the foregoing Conviction.

To the constable of and to the keeper of the common gaol [or house of correction] at in the said County [or as the case may be] Whereas E. F. of has been duly convicted of a certain offence, for that [here state the offence as in the conviction], whereby he hath forfeited the sum of [and in case of mitigation, which hath been mitigated to the sum of] over and above the reasonable costs and charges of the informer, allowed and assessed at the sum of making together the sum of : and whereas it has been duly made to appear to me, that no sufficient distress can be found whereon to levy the said sum of : therefore I command you the constable of to apprehend and take the said E. F. and safely to carry him to the common gaol [or house of correction] at in the of and there to deliver him to the keeper thereof, together with this warrant; and I do hereby command you the said keeper to receive into your custody in the said gaol [or house of correction] him the said E. F. and him therein safely to keep for the space of unless the said sum of shall be sooner paid. Given under my hand and seal the day of

(Signed)

One of her Majesty's justices of the peace for the said of

No. 6.

Form of a Complaint whereon to found a Warrant of Distress for Recovery of Postage.

County [or as the case may be] Be it remembered, that on this day of to wit. in the year of our Lord at

in the of A. B., an officer of the Post-office complaineth to me, C. D. Esquire, one of her Majesty's justices of the peace for the said that the sum of is due and owing from E. F. of to her Majesty [or to the said A. B. if the case be so,] for the duty of postage, which he hath refused or neglected to pay; and thereupon the said A. B. prayeth of me the said justice that the said E. F. may be summoned to appear and show cause, if any he have, why, due proof being made of the sum due and owing from him for postage as aforesaid, a warrant of distress should not be granted for recovery thereof, pursuant to the direction of the statute in that behalf made.

Taken and received by me the day and year first above written.

No. 7.

Form of Summons on the foregoing Complaint.

To E. F. of County [or as the case may be] Whereas complaint has been made unto me, C. D. Esquire, of to wit. one of her Majesty's justices of the peace for the of that the sum of is due and owing from you to her Majesty [or to A. B. an officer of the Post-office, if the case be so,] for the duty of postage, which you have refused or neglected to pay: these are therefore to summon you to be and appear at in the said on the day of at the hour of in the noon of the same day, before me the said justice, or before such other of her Majesty's justices of the peace for the said as shall be then present, in order that you may show cause, if any you have, why, on due proof being made of the sum of money due and owing from you for such duty of postage as aforesaid, a warrant of distress should not be granted for the recovery thereof, pursuant to the directions of the statute in that behalf made; and if you fail to appear accordingly, such proceedings will be taken as if you had appeared, and had not shown any sufficient cause why such warrant should not be granted. Given under my hand and seal this day of

No. 8.

Form of a Warrant of Distress founded on the foregoing Complaint.

To the constable of [or to C. D. of as the case may be.] County [or as the case may be] Whereas complaint hath been made that E. F. of is of to wit. indebted to her Majesty [or to A. B., an officer of the Post-office, if the case be so,] in the sum of for the duty of

postage, which he hath refused or neglected to pay; and whereas the said E. F. hath been duly summoned, and due proof hath been made on oath before me that the sum of is due and owing from the said E. F. for such duty of postage as aforesaid, and that he hath neglected to pay the same: therefore I command you to distrain the said E. F. by his goods and chattels, and to levy thereon the said last-mentioned sum, being the amount of such duty of postage as aforesaid, and also the further sum of for the costs, charges, and expenses of proceeding for and obtaining this warrant, and of the proceedings incident and relating thereto, making together the sum of and if within the space of five days next after the taking of such distress the sum of together with the reasonable costs and charges of taking and keeping such distress, shall not be paid, then I do hereby order and direct that you shall sell and dispose of the said goods and chattels which shall be so distrained, and that you shall levy and raise thereout the said sum of and all reasonable costs and charges of taking, keeping, and selling such distress, rendering the overplus (if any) to the owner of the said goods and chattels; and you are to certify to me what you have done by virtue of this my warrant. Given under my hand and seal this day of

(Signed)

One of her Majesty's justices of the peace for the said of

No. 9.

Form of a Warrant of Commitment for want of sufficient Distress, founded on the foregoing Complaint.

To the constable of in the of and also the keeper of the common gaol [or house of correction] in the said County [or as the case may be] Whereas complaint was made of to wit. that E. F. of was indebted to her Majesty [or to A. B., an officer of the Post-office, if the case be so,] in the sum of for the duty of postage, which he had refused or neglected to pay: and whereas the said E. F. was duly summoned, and due proof was made on oath that the sum of was due and owing from the said E. F. for such duty of postage as aforesaid, and that he had neglected to pay the same; and whereas a warrant has been issued directed to C. D. of commanding him, by distress and sale of the goods and chattels of the said E. F., to levy the said last-mentioned sum, being the amount of such duty of postage as aforesaid, due and owing from the said E. F. and also the further sum of for the costs, charges, and

expenses of proceeding for and obtaining the said warrant, and of the proceedings incident and relating thereto, making together the sum of ; and it now appearing to me by the oath of the said C. D. that no sufficient distress can be found whereon to levy the said duty, costs, and charges [or in case an insufficient distress shall have been taken,—and whereas the said C. D. hath certified to me that he hath under the said warrant levied and raised the sum of only ; and it now appearing to me by the oath of the said C. D. that no sufficient distress can be found whereon to levy the residue of the said duty, costs, and charges] : therefore I command you the said constable of to apprehend and take the said E. F. and safely to convey him to the common gaol [or house of correction] of the said at in the said and there to deliver him to the keeper thereof, together with this warrant; and I do hereby command you the said keeper to receive into your custody in the said gaol [or house of correction] him the said E. F. and him therein safely to keep until the said sum of or until the sum of the residue of the said duty, costs, and charges remaining after deducting the said sum of so levied and raised as aforesaid, shall be fully paid and satisfied. Given under my hand and seal this day of

(Signed)

One of her Majesty's justices of the peace for the said

MINUTE OF THE BOARD OF TREASURY RELATIVE TO CARRYING INTO EFFECT THE ACT FOR ESTABLISHING A REDUCED AND UNIFORM RATE OF POSTAGE.

My Lords read the act for the further regulation of the duties of postage, which received the royal assent on Saturday, the 17th inst.

By this act my Lords are invested with a power of carrying into effect the reduced and uniform rate of postage contemplated by Parliament, either according to the present mode of collecting the postage, or by prepayment, collected by means of stamps, compulsory or optional.

My Lords feel the importance of the discretion with which Parliament has invested them, affecting as it must the convenience of the public, the collection of the revenue, as well as the security and facility of the transmission of the correspondence of the country.

In comparing the advantages which may arise from the plan of prepayment, by means of stamps, if such plan should be adopted, much must depend upon the stamp which may be employed. For the convenience of the public it is of the

greatest importance that the mode selected should afford every facility for obtaining and using the stamp. It is also clear that the charge which will fall upon the public, in the shape of extra payment, on account of the stamp itself, in addition to the penny rate, must vary according to the nature of the stamp adopted.

In the course of the inquiries and discussions on the subject several plans were suggested—viz. stamped covers, stamped paper, and stamps to be used separately, and to be applied to any letter, of whatever description, and written on any paper.

Before my Lords can decide upon the adoption of any course, either by stamp or otherwise, they feel that it will be useful that artists, men of science, and the public in general, may have an opportunity of offering any suggestions or proposals as to the manner in which the stamp may best be brought into use. With this view, my Lords will be prepared to receive and consider any proposal which may be sent in to them on or before the 15th of October, 1839.

All persons desirous of communicating with my Lords on the subject, are requested to direct to the Lords of the Treasury, Whitehall, marked "Post-office Stamp."

My Lords will be prepared to award a premium of £200 to such proposal as they may consider the most deserving of attention, and £100 to the next best proposal.

My Lords will feel at liberty to adopt, for the public service, any of the suggestions which may be contained in any communications made to them, except, of course, where parties have any right secured by patent.

The points which this Board consider of the greatest importance are—

1. The convenience as regards the public use.
2. The security from forgery.
3. The facility of being checked and distinguished in the examination at the Post-office, which must of necessity be rapid.
4. The expense of the production and circulation of the stamps.

My Lords will be prepared to receive and consider proposals from foreign countries; and they desire that a copy of this minute be transmitted to Lord Palmerston, and that his Lordship should be requested to take such measures as he may deem most advisable, through her Majesty's Ministers abroad, for the purpose of making known the intentions of this Board.

They desire also that Lord Palmerston be requested to procure for my Lords, through her Majesty's Ambassador at Paris, information respecting the system of stamps adopted in France, and specimens of the stamp impressions used in that country.

Transmit a copy of this minute to the Postmaster-General, for his information and guidance.

Whitehall, Treasury Chambers, Aug. 23.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—To your declaration, in the first volume of your valuable work, that "this mutual criticism amongst our youthful correspondents, is just as it ought to be," I heartily subscribe. Yet it was not without much hesitation, that I took up the pen of the critic; finding however certain hallucinations in W. T. K.'s answer to PROBLEM 5, in No. 12, Vol. 2, the detection of which, by no means, implies any extraordinary perspicacity, and having looked, in vain, for some correction of those errors, in such subsequent numbers, as have yet come to my hand, I deem it due to the credit of your excellent periodical, to suggest to you, the propriety of W. T. K. correcting some parts of his answer. In the first place, I think he should oblige your readers by citing his authorities correctly. The author to whom he is so largely, nay, we may say wholly indebted, he ought at least to have given correctly * * * * *. When an answer to any of your Problems is transcribed wholesale from any author, I think you will agree with me, (a) that not only ought the title of his book to be correctly stated, but his pages (if it were only from gratitude) correctly copied. But W. T. K. quoting an illustration of a preceding definition says, "As if a man seized in fee simple granteth lands to A. for twenty years, and after the determination of the said term then to B. and his heirs for ever, here A. is tenant for life, remainder to B. in fee." So by an estate being granted to A. for twenty years, he becomes tenant for life. An absurdity, the equal of which could hardly be found even in a modern Act of Parliament. He immediately proceeds thus:—"In the first place, an estate for life is created or carried (b) out of the fee, &c." In the original it is "for years," and "carved out of the fee, &c." However, had this been, what may have been intended, a faithful transcription, it is submitted that the illustration (though Blackstone's) (c) is not a very happy one, he is as yet,

(a) If our Correspondent will turn his attention to our last number, p. 274, he will find that we not only agree with him, but that we have shewn the source from which the entire Answer is copied.—ED.

(b) See Erratum.—ED.

(c) Blackstone says, "An estate in remainder may be defined to be, an estate limited to take effect, and be enjoyed after another estate is determined. As if a man seized in fee simple granteth lands to A. for twenty years, and after the determination of the said

speaking of remainders generally; but an estate for years is only capable of supporting a vested remainder. There are several other passages mangled (d) * * * *. For sound information on the doctrine of remainders, I would refer your Correspondent, to Mr. Fearne's very elaborate treatise on that subject.

I am, Sir, very respectfully yours,

OMEGA.

term then to B. and his heirs for ever. Here A. is tenant for years, remainder to B. in fee. In the first place, an estate for years is created or carved out of the fee and given to A., and the residue or remainder of it given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee, 2 Com. 15 Ed. 184.; Co. Litt. 143. ED.

(d) See the illustration by a Feoffment to J. S. and his heirs, &c. which is correctly copied from his favourite book.

We leave W. T. K. to answer for himself. We have omitted the severe, though probably just, strictures of our Correspondent upon the work he alludes to, as we know nothing about it.—ED.

NOTICE TO CORRESPONDENTS.

W. T. K.—Observe the *Letter* from OMEGA.

ERRATUM.—Vol. 2, p. 180, col. 1, line 4 from the top, for "an estate for life is created or carried out of the fee,"—read "an estate for years is created or carved out of the fee."

On Oct. 1 will be published, price 4s. to be continued Monthly, Vol. III. Part III.

PRECEDENTS IN CONVEYANCING, adapted to the Present State of the Law. Illustrated with Notes, Practical and Critical, by THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple; Author of "The Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen, &c. in continuation of the PRECEDENTS by S. VALLIS BONE, Esq.

London: JOHN RICHARDS and Co., Law Book-sellers, 194, Fleet Street.

This work will be completed in 4 vols.

Printed by GEORGE NORMAN, at his Printing Office, 28, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 14th Sept. 1839.

The Legal Guide.

VOL. II.]

SATURDAY, SEPTEMBER 21, 1839.

[No. 21.

LEX LOCI DOMICILII.

PART II.

As to the manner in which instruments, executed in *England* by a domiciled *Englishman*, are to be construed and dealt with in respect of evidence by a Scotch Court, in so far as these instruments relate to the distribution of personal property, situated within the territory of *Scotland*.

LAW OF EVIDENCE in these cases.

(Continued from p. 308.)

THE facts of the case cited in our last (*a*) were these, Mr. James Yates, born in *Scotland* but domiciled in *England*, purchased from Colonel Macdonald the *Island* of *Shuna*, one of the *Hebrides* in *Scotland*, for £10,500.—he paid down £5,000, and for the residue of the purchase money, he granted a personal bond, payable at Candlemas, 1819, which was declared also to be a *lien* on the estate. The bond declared, that all incumbrances affecting the estate were to be fully discharged before it was to be paid. Colonel Macdonald assigned the bond and *real lien* to a Mr. Campbell, of London, who also assigned it to the Leith Banking Company. When the bond became due, Mr. Yates ascertained that the incumbrances on the estate

were not paid, and he deposited the whole principal money and interest due on the bond, in the *Bank of Scotland*, in the name of Samuel Rose, Esq., Commissioner of Excise in Edinburgh, and he wrote to the Leith Banking Company that he had made such deposit, which should be paid to them on producing discharges of the incumbrances upon the estate. The Leith Banking Company did produce some discharges, and received a proportion of the money deposited, amounting to £4,000. Mr. Rose afterwards relinquished the trust, and Mr. Yates took in his own name, two receipts for the balance of the purchase money and interest, and that money continued vested with the *Bank of Scotland* on those receipts up to the time of his death.

Mr. Yates before his death executed in *England* several instruments in writing. By the first of these, dated the 15th April, 1828, he devised his *Island* of *Shuna*, and he declared his will to be, that the said receipts of deposit should become the property of, and be indorsed or transferred by his executors, in another will respecting his property in *England* to his trustees the *Magistracy* of *Glasgow*, but that the money should remain where it then was, until the defects in the title to the *Island* were cured, or till those trustees were satisfied with respect to the same, and then to become the property of Colonel Macdonald.

By another instrument in writing, dated

Yates v. Thomson.

VOL. II.

the 1st May, 1828, he disposed of his English property and appointed executors. This he subsequently cancelled.

As a Scotch deed intended to dispose of the *Island of Shuna*, Mr. Yates had ascertained that the first mentioned will was ineffectual, as it did not contain those dispositive words which by the law of *Scotland* are necessary in conveying real property. He then executed a Trust Conveyance in proper form on the 1st April, 1829, by which he gave and disposed of the *Island of Shuna* to trustees, and declared that if the incumbrances should not be cleared before his death, he had in a separate will which related to his property in *England*, directed his trustees or executors in that will to assign or indorse the aforesaid deposit notes or receipts to his trustees, the *Mayor* and *Bailies*, to be kept by them in the same depositary (the *Bank of Scotland*) until the defects were cured.

By another instrument in writing, dated the 17th of April, 1829, Mr. Yates, after referring to the aforesaid Trust Conveyance, disposed of his *English* property, and thereby gave his goods and chattels, wherever situated, to his nephew, Jacob Yates, his heirs and assigns, and appointed him sole executor, and residuary legatee. Mr. Yates died, and probate of this will was granted to his nephew by the *Prerogative Court of Canterbury*, which was confirmed in *Scotland*, and by virtue whereof he claimed the deposit in the *Bank of Scotland*. The Trustees of the *Island of Shuna* also claimed the deposit under the trust disposition, and as appropriated for discharging the incumbrances on the island.

The *Leith Banking Company* also claimed the deposit, and had taken proceedings by arrestment.

The *Bank of Scotland* raised an action of multiple poinding. The *Lord Ordinary*, by an interlocutor, dated 17th of January, 1832, decreed in favour of the trustees of *Shuna*. Against this the appellant (Jacob

Yates) reclaimed to the Lords of the Second Division, who, on the 24th of May, 1832, pronounced this interlocutor. They adhere to the *Lord Ordinary's* interlocutor: find the trustees entitled to the fund *in medio* and interest, and decern that the trustees apply the fund *in medio* and interest, in payment of the heritable debt over the *Island of Shuna*, held by the *Leith Banking Company*, upon their clearing the incumbrances on the property, and remit to the *Lord Ordinary* to hear parties thereon, and also as to the question of expenses claimed by Jacob Yates, as executor, being paid out of the fund *in medio*. (a)

Dr. Lushington, who appeared for the appellant, raised two points, upon which he considered the question turned. 1st. What would be the rights of the parties under the general terms and effect of the deeds and wills, independent of any special bequest or direction regarding the money deposited in bank? 2ndly. Whether any such special bequest or direction subsisted at the testator's death, or formed part of the settlement of his succession, as to supersede the general rule of law on the subject?

Lord Brougham continued (b).—The will of April, 1828, has not been admitted to probate here; it has not even been offered for proof, so that there is no sentence of any court of competent jurisdiction upon either way. But in *England* it would never be received in evidence, nor be seen by any court; neither would it have been seen if it had been proved ever so formally. Our law holds the probate as the only evidence of a will of personalty, or of the appointment of Executors; in short, of a disposition which a testator may make unless it regards his real estate. Can it

(a) See 10 Shaw, D. & B. 565.

(b) *Yates v. Thomson*, 3 Clarke & Finelly, &c. ante p. 306.

said that the *Scotch Court* is bound by this rule of evidence, which, though founded upon views of convenience, and for any thing I know, well devised, is yet one which must be allowed to be exceedingly technical, and which would exclude from the view of the Court a subsequent will, clearly revoking the one admitted to probate? The English Courts would never look at this will, although proof might be tendered that it had come to the knowledge of the party on the eve of the trial. A delay might be granted, to enable him to obtain a revocation of the probate of the former will. It is absurd to contend that the Court of Session shall admit all this technicality of procedure into its course of judicature, as often as a question arises upon the succession of a person *domiciled in England*.

(To be continued.)

PROBLEM XXI.

VOL. 2.

MORTGAGES.

In what manner, and to what extent may Interest due on a Mortgage debt, by agreement *inter partes*, be converted into Principal, and carry Interest?

ANSWER TO PROBLEM XVI.

VOL. II.

CONTRACTS.—What contracts are void at Common Law, as affecting Public Policy?

TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—Should you deem the following answer worthy of insertion in your Journal, it will be necessary to premise to the reader, that he will not find an example of *every* contract which might possibly be void at Common Law, as affecting Public Policy. To have given such examples would almost have filled a volume. Yet it is hoped that the principles of this branch of law are ex-

plained, and the cases likely to occur in practice classified, in such a manner, as to enable the reader to determine with certainty, what contracts are, and what are not, within the meaning of my text.

ALFONSO.

All contracts, which have for their object any thing contrary to the principles of sound policy, are void by the Common Law. (Cwop. 39. and Story on Bailments, p. 254.) Yet a doubtful matter of public policy, is not sufficient to invalidate a contract; for unless it expressly and unquestionably contravene public policy, it will not be void. (J. Chitty, jun. on Contracts.) So that the object of our present enquiry is simply this, —What are the species of contracts which our Courts of Judicature have adjudged to be repugnant to public policy?

I. In general every contract, which has for its object the performance of something forbidden by the law of God, as to commit murder, perjury, or other crime; and whatever is clearly unjust, or *contra bonos mores*, (Girardy v. Richardson, 1 Esp. Rep. 13.) is void by the Common Law.

II. Hence contracts entered into with a view to future cohabitation and prostitution, are illegal. Thus an agreement for the use and occupation of lodgings, which are let expressly for purposes of prostitution, are void. (Comyn on Contracts, p. 54.)

III. A general restraint of marriage is void at Common Law—it being prejudicial to morality, and therefore repugnant to the principle of public policy. And for this purpose, every agreement which can be construed into such a restraint, will be void. Thus in the case of *Love v. Peers*, (4 Burr. 2225.), where the defendant promised the plaintiff, that he would not marry any one except the plaintiff; and if he did, he would pay her £1000. YATES, J. said—"This agreement is a restraint of marriage. It is not a covenant to marry the plaintiff, but not to marry any one else. And yet she was under

no obligation to marry him. So that it restrained him from marrying *at all*, in case she had not chosen to permit him to marry her."

IV. So a marriage brocage contract, that is, an undertaking to procure marriage between two parties, for a reward, is void, because of the pernicious effects of such contracts in occasioning unhappy alliances. (Wood Vin. Lec. p. 274, and Chitt. on Contr. 219.)

V. An agreement for the purpose of totally restraining any one from trade is void, for it is contrary to the principles of *national* policy. (1 P. W. 181.) But if a man, for a good consideration, restrains himself from the exercise of his trade in a particular place, this is lawful; for the location in which a man exercises his calling does not concern the policy of the nation. (Mitchel v. Reynolds, 1 P. W. 181.)

VI. All contracts for supplying the subjects of an enemy's country with goods are illegal. (Story on Bailments, 254.)

VII. It has been determined, that if two persons enter into a contract under the semblance of a sale of goods, not intending really to buy or sell the commodity, but merely as a gambling speculation, and to pay the difference of the market price on a particular day, like a time bargain in the stocks, such a contract is illegal and void at common law, and no action will lie to enforce it. (Com. on Contr. 58.)

VIII. Wagers on the event of a war, or of an election, or in restraint of marriage, are respectively illegal, as contrary to sound policy. (J. Chitt. Jun. Contr. 156, and Chitty on Bills.) In short all wagers which lead to inquiries, the investigation of which might affect the public interest, are held void. (Chitt. Contr. p. 222.)

IX. Agreements to procure public offices, where not expressly prohibited by statute, are frequently void by common law, inasmuch as they tend to introduce unworthy

persons into public employments. (3 Wood Vin. Lec. p. 274.)

X. Any contract, which may impede the due course of public justice, or the natural effect of which is to induce a public officer to neglect his duty, is invalid. Thus an agreement in consideration of suppressing evidence, or stifling, or compounding a prosecution for felony, or a misdemeanour of a public nature, is void. So likewise an engagement to indemnify a sheriff in the execution of an unlawful act, is illegal. (Chitt. Contr. p. 221.)

XI. An agreement to fight is void, as tending to or creating a breach of the peace. (4 T. R. 78.)

XII. Lastly, contracts which are infected with fraud are void both at law and in equity; for the basis of all dealings ought to be good faith. (Comyn Contr. p. 58.) Therefore if A. agree to purchase goods of B. at a certain sum, for the benefit of C., any secret agreement between B. and C., that the latter shall pay a further sum for them, is void, as a fraud on A.; and C. is not liable to pay that sum. (Jackson v. Duchaire, 3 T. R. 551.) Again, the employment of puffers at an auction, not for the defensive purpose of protection against a sale at an under value, but to extort a high price, by taking advantage of the eagerness of bidders, will sometimes invalidate the sale on the ground of fraud. (Sugd. V. and P. 23, 2nd ed. Chitt. Contr. 227.)

ALFONSO.

Imperial Parliament.

HOUSE OF LORDS.—*August 23.*

We give the following extract from LORD LYNDHURST'S Review of the last Session of Parliament.

"When the last second Jamaica Bill was over, the 9th of July had arrived. Up to that day not one bill of any consequence had passed the two houses. The whole was a blank. We had passed, it is true, the Mutiny Bill, and the Ar-

nual Indemnity Bill; we had passed nine or ten money bills, of the ordinary course and character; we had also passed twelve or fourteen other bills, some for the amendment, some for the continuance of former bills, and others for trifling and unimportant matters, to which no opposition was made in either House of Parliament. There were many bills lying on the table of the House of Commons, and several of them of an important nature. It became, therefore, necessary to inquire what the Government intended to do with them. The session was far advanced, and members were naturally anxious on the subject. And accordingly, we find, upon this intimation, that measure after measure was abandoned. I hold a list in my hand of these bills. There was a bill for the Registration of Voters in England; it was abandoned. A similar bill was introduced for the Registration of Voters in Scotland; it was in like manner abandoned. The Fictitious Votes Bill (Scotland)—a bill of importance to that country, was abandoned. The Preparation of Writs (Scotland), abandoned; the Registration of Leases (Scotland), abandoned; the Heritable Securities (Scotland), abandoned; the District Sessions Bill, abandoned; the Town Councils' Bill, abandoned: so also the Ecclesiastical Duties and Revenues Bill, it was abandoned. The Factories' Regulation Bill—a bill which had been much discussed, and of vast importance to the interests of humanity, was abandoned. The Collection of Rates Bill, the County Courts Bill, the Embankments (Ireland) Bill, and many other bills of different descriptions, all, all were abandoned, because Ministers, from not possessing the necessary energy, vigour, and capacity, and above all, from not enjoying the confidence of the House of Commons, found it impossible to carry these measures through Parliament.

“ But there is another measure on which, at the close of the session, some reliance may possibly be placed, and upon which, therefore, I must say a few words. I allude to the Postage Bill. That measure was at first ridiculed and assailed by the retainers, and also by some of the members of the Government. It was abused as absolutely impracticable; with a deficient revenue to give up another million, upon such an experiment, was the very extreme of impolicy and absurdity. All this was urged and circulated with great activity by the members and retainers of Government. But the measure was pressed from without, and her Majesty's Ministers did not possess sufficient vigour or character, nor enough of the confidence of Parliament to resist it; and, in opposition to their better judgment, they prepared to bring in the bill. Not having the courage or the ability to look the measure directly in the face, they hit, as they fancied, upon a con-

trivance to get rid of it by a side-wind; and her Majesty's Chancellor of the Exchequer, with that singular ingenuity which distinguishes his character, thought that if he could introduce into the bill a clause distasteful to the House of Commons, he should be enabled to defeat the measure. Accordingly a pledge was introduced, that Parliament would make good any deficiency which might be occasioned in the public revenue by the adoption of the new project. This pledge proved as he had anticipated, distasteful to the House, and it was strenuously opposed. It was said, and said justly, by its opponents, that such a pledge was unnecessary; for that if the revenue proved deficient, it would become the duty of the House of Commons, without any such pledge, to make that deficiency good. At length, however, in spite of all these manœuvres, the Postage measure passed through all its stages in the House of Commons. Then the Government looked for assistance to your Lordships; the cry was, “ the Lords will never pass the bill—they will not suffer the revenue to be thus reduced; it is sure to be defeated in the House of Lords.” Well, the bill came on for discussion here upon the motion for the second reading; and I never observed, upon the consideration of any important Ministerial measure, a thinner attendance upon the opposite benches. The noble Viscount moved the second reading; he urged with great force, with all the talent, and with all the knowledge of the world which distinguish him, every reason that could be urged against the measure; and, after he had expatiated upon and exhausted all these topics, he concluded by saying, ‘ However, as the bill seems to be wished for, I now move its second reading.’ Your Lordships considered it principally as a measure connected with the finances of the country, and on this account more particularly within the province of the other House of Parliament, and for which the Ministers were responsible. No effective opposition was therefore directed against it. It was passed, I cannot say with the satisfaction of the noble Viscount, and has now become the law of the land.

* * * * *

“ My Lords, I have now brought you down to an advanced period of the session. The 9th of August had arrived, and then a great flight of bills, the *oi πολλοι*, of legislation, were introduced, some of them mischievous—some of them unconstitutional—some of them of a jobbing character, but the great mass of them unimportant and inoffensive, and which met with no opposition. It appears as if her Majesty's Ministers were determined to make up by number what they wanted in the weight and quality of their legislative measures. Am I expressing myself, my Lords, too strongly? I will select one or two

instances in proof of what I have stated. One of these measures was the Metropolitan Police-Courts Bill. By this bill, a patronage, to the extent of 54,000*l.* a-year, was given to the Secretary of State for the Home Department. There was another provision of the bill, by which the trial by jury, in a particular class of felonies was abolished. This was the first attempt of such a nature ever made in this country, except perhaps during the disorders of the seventeenth century, from which the present Government seems very much inclined to draw its precedents. Trial by jury had always been respected even in the most arbitrary times, but, instead of a jury, a magistrate appointed by the Crown, paid by the Crown, and removable at the pleasure of the Crown, was substituted. Stealing, and receiving stolen goods to any amount, came within his jurisdiction, and it was left to his arbitrary will to decide whether the accused should or should not have the benefit of trial by jury—to the arbitrary will of a judge, removable at the pleasure of the Crown. Such was the bill as it passed through the Reformed House of Commons. It was sent up here at the close of the session, and your Lordships, acting wisely and constitutionally, struck out this extraordinary provision. Another objectionable measure was the Admiralty Bill, the salary of the Judge presiding in that Court was to be increased to 4000*l.* a year, and he was to be allowed to sit in the House of Commons. I wish to speak with every respect of the learned gentleman who at present fills that office, but it is notorious that he is a keen political partizan, and most devoted and inflexible in his adherence to the present Government. Other alterations of an extensive character were proposed to be effected by the bill, and at a period of the session when it was impossible for your Lordships to give them due consideration; your Lordships therefore rejected the bill. Another measure was brought up to your Lordships' house, which I do not characterise too strongly when I state it to have been one of the most scandalous jobs ever attempted to be carried through Parliament. When I recall that measure to your Lordships' recollections, I am sure you will not think the terms I have used too strong for the occasion: I allude to the Sale of Spirits (Ireland) Bill. Another bill had been introduced into the other House of Parliament for electioneering purposes, having for its object to alter a law of great importance passed for the protection of public morals. This bill was so distasteful to the other house, and of such a character, that there was no chance of its ever passing; what then was the course pursued? The Chancellor of the Exchequer's bill for the Sale of Spirits, had passed through its various stages up to the third reading. Then it was, when no-

body expected such a proceeding, that he allowed the person who introduced the bill I have just referred to, to ingraft that bill, at the third reading, on the Government measure, and thus it passed the House of Commons by a contrivance as scandalous as had ever occurred in the history of legislation. It is unnecessary for me to say, that this addition to the Government bill was thrown out by your Lordships, without any attempt being made to defend it; for the whole proceeding was one which would not bear consideration or argument for a moment. Why was this bill embodied in the Government measure? It was felt convenient to conciliate the patron of that bill, and therefore it was that this extraordinary consent was given. But this kind of proceeding always fails of its object, and it failed signally in the present instance; for when the bill relating to the Charter of the Bank of Ireland came on shortly after for discussion, the individual whom it was wished to conciliate, opposed that Bill with the utmost activity and vigour; and, in consequence of that opposition, that measure so important to the credit and character of the Government, and the loss of which proved them to be utterly incapable of managing the affairs of the country, was, after a long and ineffectual struggle, finally abandoned. With respect to the rest of these bills, the mere sweepings of the offices, they were dealt out like cards at the table by the noble Viscount the Lord Privy Seal, to whom the whole Government business seems, at this important period of the session, to have been entrusted. They were submitted with little explanation to your Lordships, and met with no opposition.

But there is another class of bills—three in number—which calls for a few observations. These were among the last bills of the Session. One of them has been discussed to-night, the others having been considered on former evenings. They relate to the establishment of a police force at Manchester, Bolton, and Birmingham. They are mere temporary measures; but what has led to their introduction? Because, in granting charters to those particular towns, Ministers have been so careless and negligent in their proceedings, that serious doubts have been entertained as to the validity of the charters, and they are now under consideration in the courts of law. These bills, therefore, were rendered necessary in consequence of the bungling of Ministers themselves; and they, surely, therefore, are not entitled to take praise for their introduction. There were, however, other considerations which unfortunately called for the passing of these bills. They were felt to be requisite on account of the tumults and disturbances which have taken place in the northern parts of this island, and for which the Govern-

are deeply responsible. It was they who first roused the people—they first excited and stimulated them to acts of tumult and disorder,—they first sent forth the watchword, "Agitate, agitate, agitate!" and they are, therefore, responsible for the consequences which have followed. Agitation was convenient to raise them to power, and they were willing to keep up as much of it as was necessary to maintain them in their position. They wished that thus far the flood might proceed, and no further—that at this point the proud waves might be stayed. But it is far easier to let loose the tempest, than afterwards to enchain or to direct it. In all ages the same course has been pursued, and the same result has followed. Ambitious men make use of the multitude, and awaken their passions, for their own ambitious purposes—for the attainment of their own personal objects of aggrandisement and favour. They ride into authority on the shoulders of the people, and then they find the tumult and violence to which they owed their elevation inconvenient and dangerous. It then becomes necessary to coerce and restrain those whom they had before excited and encouraged; and their astonished and deluded followers at length discover, that they have become the dupes and victims of those whom they had formerly eulogised and extolled.

Law Reports.

COURT OF CHANCERY.—Aug. 8.

ALTREE v. HORDERN.

Appeal from the Vice-Chancellor.

PRACTICE.—13th NEW ORDER—LACHES—

Whether Order to amend shall be granted after Answer put in for two years and no further proceedings.—Object of the New Orders to keep SOLICITORS to their duty, and prevent delay.

Mr. Monro moved to discharge an order of the Vice-Chancellor, that the plaintiff might amend his bill, which was filed in 1836, and the answers were put in by two out of three of the defendants so long back as January 1837, and no further proceedings were taken by the plaintiff till March last. *Walmsley v. Froud, Russ and Myle*, 334, was cited in support of the motion.

Mr. Wigram for the plaintiff said, the Vice-Chancellor thought it better that the existing suit should go on, than that the plaintiff (who was very poor) should be driven to file a new bill. That as the defendant had not taken any steps to dismiss the bill for want of prosecution,

there were laches on both sides; and he contended that it was necessary to leave a large discretion in the Judge upon cases of this nature, and said that the present case had been carefully considered by his Honour. That the case of *Walmsley v. Froud* did not here apply, as no replication had been filed.

The LORD CHANCELLOR said that no attempt had been made to explain the delay that had taken place. The orders of the Court must not be dispensed with but upon good reasons. It is the *duty of Solicitors* to be diligent in the prosecution of their cases, and the object of the new orders was mainly to keep them to their duty, and prevent delay. The 13th New Order is peremptory, and cannot be dispensed with by the *Master*. If the amendment applied for was allowed, the order might as well be struck out, and it might be objected in every case as an excuse for such delays, that the defendants had not moved to dismiss the bill—this is no excuse: it may be a circumstance to affect the costs. The answer of the third defendant may have been kept back for the express purpose of making this application. If I were to grant this application, I should be destroying the Orders.—Order to amend set aside.

ROLLS' COURT.—July 2.

DE GAGA v. THE DUKE OF LEINSTER.

FRENCH LAW OF DOWRY.—TRUSTEES—*Their duties in regard to the disposal of the Wife's Fortune, where an ENGLISHWOMAN MARRIES a FRENCHMAN, and it was declared that the marriage took place under the Law of Dowry as established by the French code.*

Mr. G. Richards said this was the petition of Monsieur and Madame de Gaga, under the following circumstances:—By the settlement made upon the marriage of Lord Robert Stephen Fitzgerald and Miss Sophia Fielding in 1792, certain sums charged on lands in the County of Kildare, Ireland, were vested in the trustees of the settlement upon trust for the issue of the marriage after the death of the husband and wife in such manner as they or the survivor should appoint. One of the children, Miss Matilda Fitzgerald, in 1817, married in Paris the Chevalier de Gaga, and by the marriage contract it was declared that the marriage took place under the law of dowry established by the French code. In 1820 Lord Robert and Lady Fitzgerald made an apportionment of one-fourth part of the sums comprised in the settlement in favour of their daughter, then Madame de Gaga, according to the terms of her French

marriage contract. Lord and Lady Fitzgerald had since died, and the present suit was instituted to ascertain who were the parties that were entitled to receive this fourth share according to the marriage contract of Monsieur and Madame de Gaga. The Master had in several reports found that according to the French law the Chevalier de Gaga could not touch the capital of his wife's fortune, excepting under the obligation of converting it into immoveable property, over which neither of them would have any power of alienation, and that by the civil law a duty was imposed upon the trustees of the money not to part with it unless for the acquisition of such property. In conformity with these reports, a contract was entered into for the purchase of a house in the Rue d'Anjou, Paris. The Master found from the certificate of the valuer appointed by the President of the Civil Tribunal at Paris, that this house was of the requisite value; and he also found from the certificate of the Conservator of Mortgages in Paris the number and nature of the incumbrances upon it, and that the purchase money was to be paid by the trustees into the hands of the vendors and incumbrances at a notary's office in Paris. The petition was for the completion of the purchase.

Mr. De Gex, for the Duke of Leinster, the defendant, said, his Grace was surviving trustee of the settlement of Lord and Lady Fitzgerald, and would act as the Court should direct him.

Lord LANGDALE.—The amount of the purchase money must be paid out of the fund in Court to the Duke of Leinster, to be applied by him in completing the purchase, according to the Master's report.

July 15.

HILL v. GOMME.

Voluntary Settlement—Without valuable consideration, whether subsequent acts of the donor shall vacate it, and let in other objects of his bounty under a will made afterwards.

This suit was instituted, *in forma pauperis*, by William Thomas Hill, of George-street, Pentonville, grocer, one of the children of John Hill, deceased, against James Chettle Gomme, the surviving executor of James Deane, deceased, and others, and the circumstances were of a remarkable nature. The facts of the case were these. The deceased James Deane, formerly a victualler and brickmaker, being a married man, without any family of his own, became attached to the plaintiff when a little boy, and wished to adopt him as his own child. He proposed the matter to the plaintiff's father, and they came to an arrangement, in consequence of which a deed, dated the 14th February, 1818,

was executed, made between James Deane and John Hill, which recited that Deane had no children, and had agreed with Hill, in consideration of £100. forthwith to take, maintain, clothe, educate, apprentice, and bring up William Thomas Hill, the infant son of John Hill, then of the age of five years (the plaintiff), and also that his (Deane's) heirs, executors, and administrators, should, after his death, stand possessed of all his property upon the trusts thereafter declared. In pursuance of which agreement and in consideration of £100., Deane did for himself his heirs, executors, and administrators, covenant with Hill to board, maintain, &c., the plaintiff, as if he were his (Deane's) own son, to apprentice him, to pay the apprentice fee, and all expenses during his minority; and also, in case he (Deane) should have no children, to convey and transfer all his property, so that the same should be for his wife for life, and, after her decease, for the plaintiff; but if Deane should have children, then the plaintiff, upon the death of the wife, was to take equally with those children. The deed contained a power of revocation, but was never revoked. Hill, the plaintiff's father, died intestate in 1826, leaving a widow and two sons, the plaintiff then 13, and Richard two years younger. The widow administered, died, and administration, during the minority of the children was granted to Manley. Richard attained 21 in 1835, whereupon Manley's administration ceased, and, by an arrangement between the plaintiff and Richard, administration was granted to Richard. Deane made his will in June, 1821, but in it took no notice of the plaintiff. He bequeathed one moiety of his property to his wife, and the other moiety to his executors in trust for his wife, as long as she remained his widow, and on her death or second marriage in trust for his mother, his two brothers, and two sisters. Deane died in November, 1827, worth about £1,200. without any child. His mother died shortly afterwards, and his widow married Vaile, by which she forfeited one of the moieties of Deane's property to the two brothers and sisters. They entered into a deed with Vaile and his wife, by which, in consideration of £498. 19s. 8d., they released her from all claims in respect of that moiety. The plaintiff attained his full age in August, 1833. The allegation in his bill was, that he was not aware of the deed executed on his behalf by Deane until letters of administration were granted to his brother Richard, and that then they opened a box and discovered the deed, after which the suit was instituted as speedily as could be. The object of the plaintiff was to obtain a declaration of the Court that he, under the deed of the 14th of February, 1818, was beneficially entitled to Deane's property, subject to the administration of

Mrs. Vaile, and that his brother, Richard Hill, as the personal representative of their father, John Hill, deceased, was a creditor upon Deane's estate to the amount of all Deane's property, in trust for him, the plaintiff, subject to the aforesaid life-interest of Mrs. Vaile. The bill also prayed for an account of Deane's estate, and that Gomme, and the estate of the deceased executor, might be declared liable to make good the whole of Deane's estate, which they had received.

Mr. Pemberton, for the plaintiff, stated, that after the deed of 1818, the plaintiff was for some years brought up and maintained by Deane as his son, but before he came of age he was removed from Deane's house at Shepherd's-bush. Upon Deane's death without children, in Nov. 1827, the deed took effect. The plaintiff attained 21 in August, 1833, and Manley, the limited administrator of Hill's father, handed the father's papers over to him, and amongst them, in a box, was found this deed of 1818, with which the plaintiff then first became acquainted. The bill was filed on the 5th of September, 1836. The executors of Deane stated in their answer that they had parted with the testator's money before they had notice of the deed. The deed was perfectly legal, the plaintiff was a purchaser under it, and entitled to the decree he asked for.

Mr. Tinney, for the defendant, Mrs. Vaile, said, that no valuable consideration was ever paid by the plaintiff, who was a pauper, or by his father, or by any one on his behalf. It was not pretended that the £100. was a consideration for Deane's covenant, it was nothing in comparison to it, nor was it paid. The consideration originally stated in the deed was nature, love, and affection. It was prepared by Mr. Brill, a solicitor. From the evidence of that gentleman's clerk, the counsel consulted thought that love and affection were not a good consideration where there was no relationship, and so the £100. was inserted; but although the receipt on the deed for the £100. was signed and attested, there was no proof that the money was paid. It was a mere voluntary act, and there was no proof that anything had been done to carry it into execution.

Mr. Kindersley appeared for Gomme, the surviving executor of Deane, and argued that the deed of 1818 was void, and that Gomme had no notice of it before he parted with Deane's assets.

Mr. Weld appeared for other parties claiming under Deane's will.

Mr. Pemberton replied.—There could be no controversy excepting with respect to the facts. The questions were, whether the deed was *bond fide* executed by Deane as a contract binding on

him, and whether the contract was ever so abandoned as to deprive the plaintiff of the right of insisting upon it. It was said, that in 1816 a plan was concocted by Mr. and Mrs. Hill to get rid of their child, and to foist it upon Deane, and the whole transaction was to complete that fraud. That could not be; Deane was in a very humble station, earning his livelihood as a brick-maker, making bricks on his own account, and at that time the plaintiff was placed under the care of Deane and his wife. There was nothing improbable in Deane's taking a liking to the child; neither of the parties were wealthy, and Deane was in rather inferior circumstances. Deane, in fact, did that for £100. which he would have willingly done without—he engaged to adopt and bring up the child. The plaintiff was now, after the death of his parents, dealing with a transaction which took place when he was five years old, and was contending with Deane's wife, by whom he was nursed, a party to the whole transaction, and competent to give a full account. That the plaintiff had been placed in Deane's house, had resided there, and had been treated as Deane's adopted child, the evidence was conclusive. One of the servants, Sarah Gillington, proved that in 1816 he was treated by both Mr. and Mrs. Deane with the greatest kindness; they called him Willy, and he called them daddy and mammy. Other witnesses proved kind treatment in 1817, 1818, and 1819. Deane spoke of the boy in the strongest terms of affection, and some used to joke Deane, who called the plaintiff his boy, and the person to whom he would leave his property if he ever got any. Brill, the solicitor who prepared the deed, was dead, but his nephew, Mr. Taylor, now a solicitor, without any motive to favour this pauper, deposed that Deane and Hill, the father, came to his uncle's office, and that he explained to them counsel's opinion that love and affection would not be a good consideration, in consequence of which the £100. was substituted. The provisions of the deed were conformable to the wishes of Deane and Hill at the time, and the deed was valid, and as Deane had neglected to carry it into effect, the plaintiff was entitled to the decree he sought.

Aug. 10.

Lord LANGDALE this day delivered judgment. His Lordship recapitulated the circumstances of the case, that Deane having no children, executed the deed to John Hill, the father of the plaintiff, by which, in consideration of £100. he covenanted and agreed to take, maintain, clothe, educate, apprentice, and bring up the plaintiff, then a child, and that after his, Deane's death, his executors should stand possessed of all his

property in trust for Deane's wife for her life, and after her decease, for the plaintiff; but if Deane were to have children, then the plaintiff was to take equally with those children. The deed contained a power of revocation, but Deane never revoked it. He died in 1826, without children, leaving a will made in June, 1821, bequeathing his property to his wife, his brothers and sisters, but taking no notice of the plaintiff. The plaintiff was of age in 1833, but was not aware of the deed executed by Deane until afterwards, when it was found in a box. His Lordship said, that the presumption was that the deed had been abandoned, for the agreement had not been performed, the plaintiff had not been kept until he grew up at Deane's house, nor was he apprenticed by Deane, nor was it clear that the £100., the consideration stated in the deed, and substituted by the advice of counsel for natural love and affection, had been really and *bond fide* paid. Although the deed when discovered was found not to be cancelled, he (Lord Langdale) thought, under all the circumstances, that the agreement had been abandoned. The evidence of the plaintiff having been during his childhood very frequently at the house of Deane was not sufficiently strong. He was of opinion that the deed had been vacated, and that he could not order it now to be carried into execution. It had been contended that the case was like that of the purchase of an estate for the advancement of a son, but it was very different, for there was no relationship between Deane and the plaintiff, no consideration of blood or natural affection. The circumstances were very singular. Bill dismissed.

QUEEN'S BENCH.—*May 31.*

Sittings in Banco.

STOCKDALE *v.* HANSARD.

JUDGMENT.

(Concluded from p. 311.)

Then, on general grounds, the necessity of making the parliamentary conduct of the members known to their constituents is urged, and the duty of the House of Commons to convey instruction to the people. The latter argument may be answered by asserting, that the duty of general instruction resides in the legislature, and not in single branch of it. The former argument proves too much; for the conduct of the representative is best disclosed by the share taken by him in the debates, which from all time, up to the present moment, have been not only neither sold nor published by the House, but cannot be published by the most accurate reporter without justification to legal consequences. It

can hardly be necessary to guard myself against being supposed to discuss the expediency of keeping the law in its present state, or introducing any and what alterations. It is, no doubt, susceptible of improvement, but the improvement must be a legislative act. If we held that any improvement, however desirable, could be effected under the name of privilege, we should be confounding truth, and departing from our duty. And if, on such considerations, either House should claim, as matter of privilege, what was neither necessary for the discharge of their proper functions, nor ever had been treated as a privilege before, this would be an enactment, not a declaration; or, if the latter name were more appropriate, it would be the declaration of a general law, to be disregarded by the courts, though never, I hope, treated with contempt. It would also be the declaration of a new law; and the word "adjudge" can make no difference in the nature of the thing.

The practice, or usage, is the second ground on which the Attorney-general seeks to rest this privilege; and he has a warrant for his claim, which, if well-founded, is even stronger than any opinion of necessity. He refers to an Act of Parliament. The Postage Act, it seems, conveys all parliamentary proceedings to all parts of the empire free of expense, and forasmuch as when that Act passed, it was notorious that the votes and other proceedings contained matter criminalizing individuals; therefore, it is argued, the legislature must have intended to circulate such criminalatory matter. But the same Act requires newspapers to be circulated free of postage: it was equally notorious that newspapers often contained libels, yet it was never contended that the Postage Act intended to give impunity to their circulation. In both cases it is clear that the Act merely gave untaxed circulation to such proceedings and such papers as it was before lawful to circulate, leaving all questions of what is lawful exactly in their former plight. But "the practice has prevailed from all time." If so, it is strange that no vestiges of it are tracked to an earlier period than 1640, when the House of Commons, acting neither in a legislative nor an inquisitorial capacity, began to set up an authority independent of the Crown and hostile to it, which led to its gradually absorbing all the powers of the State. For near 20 years the House was taking this executive part, which they could not carry on but by publishing their votes and proceedings. At the restoration they made some amends to the exiled King, by evincing their loyalty in the same manner, and their oaths of allegiance and submission were also sold and published, as their manifesto and basis of men and money against his father had been before. Thus does the practice appear to have originated

in the long Parliament, and to have been continued at the Restoration. The origin disproves the antiquity of the privilege, or its necessity for the functions of one of the three estates; no such necessity was thought of till one began to struggle against the other two for ascendancy, which reduced them to nothing. True it is, the practice of so printing and publishing has proceeded with little interruption till this hour. But the question is not on the lawfulness or expediency of printing and publishing in general, it is whether any proof can be found of a practice to authorise the printing and publication of papers injurious to the character of a fellow-subject; such a privilege has never been either actually or virtually claimed by either House of Parliament; the notice of neither has been called to the fact of their giving publicity in writings of that character; what course they might have taken we cannot know, if a party thus injured had laid his grievance before them. Had their answer been, we claim the right to promulgate our judgment on cases within our jurisdiction, on which we have made inquisition, heard evidence and defence, and formed our judgment, they would have referred to a state of things wholly different from that which is now before us. If they had said, we claim the privilege of ordering the printing of what we please, and of publishing all we print, however partial the statement, and however ruinous to individuals, the question of their right to justify the publisher would have been much the same as that which we have now under discussion.

The practice of a ruling power in the state, is but a feeble proof of its legality. I know not how long the practice of raising ship-money had prevailed before the right was denied by Hampden. General warrants had been issued and enforced for centuries, before they were questioned in actions by Wilkes and his associates, who, by bringing them to the test of law, procured their condemnation and abandonment. I apprehend that acquiescence on this subject proves, in the first place, too much; for the admitted and grossest abuses of privilege have never been questioned by suits in Westminster Hall. The most obvious reason is, that none could have commenced a suit of any kind for the purpose, without incurring the displeasure of the offended House, instantly enforced, if it happened to be sitting, and visiting all who had been concerned. During the Session, it must be remembered, that privilege is more formidable than prerogative, which must avenge itself by indictment or information, involving the tedious process of law; while privilege, with one voice, accuses, condemns, and executes, and the order to "Take him," addressed to the Serjeant-at-arms, may condemn the offenders to persecution and ruin.

Who can wonder that early acquiescence was deemed the lesser evil, or gravely argue that it evinced a general persuasion that the privilege existed in point of law?

Besides, the acquiescence could only be that of individuals in particular hardships brought upon themselves by the proceedings published: we have a right to suppose that a considerate discretion was fairly applied to the particular circumstances of each case; that few things of a disparaging nature were printed at all; that where criminalizing votes were allowed to meet the public eye, they were justified as an exercise of jurisdiction upon matters properly brought before Parliament, after patient hearing and candid inquiry; that the imputations were generally true, and actions for libel would only have made them more public; and that even where exparte proceedings were printed, to the annoyance of private persons, that minute suffering would be lost sight of in the general sense of an overwhelming necessity.

All kinds of prudential considerations, therefore, conspired to deter from legal proceedings, and will fully account for the acquiescence; and the difference between the extent of publication formerly practised and the uncontrolled sale of all that the House may choose to print, in order to raise a fund for paying its officers, cannot fail to strike every unbiased understanding.

I must add, that the evidence on this subject set forth in the Report convinces me that publication has never been by way of exercising any of its privileges, nor the fruit of deliberation, to what extent it ought to be carried, and within what bounds restrained. With very different objects the practice was originally introduced; it grew imperceptibly into a perquisite, and I venture to believe that it was raised into a traffic, and a means of levying money without much consideration.

The authority to which the Attorney-General last appealed is one to which particular attention is due; I mean the Report of the Committee appointed by the late House of Commons to examine the subject. He spoke of it as a document of extraordinary weight, demanding the utmost respect, as uniting the suffrages of the most distinguished statesmen and the most eminent lawyers.

I feel just and high deference to them all, towards none more than the learned person who pressed us with their authority, and whose argument at the bar so fully laid before us all that could possibly be urged in defence of their Resolutions. That learned person gave us to understand that he had sacrificed many weeks of his valuable time in studying this great subject, and that in preparing his argument he had become perfectly convinced that his side was the

side of truth. He must forgive me the remark, that this conclusion would have affected me more if it had preceded instead of following the Report of that Committee and the trial at Nisi Prius, and indeed the resolution of 1835. He also felt it right to remind us that Members of that Committee, though not now occupying judicial station, are sure to do so hereafter; that their fame may eclipse all their predecessors upon the bench, and their opinion, embodied in the Committee's Report, ought to be as much venerated as if it had appeared some ages earlier, in the reign, he added, by way of example, of Queen Anne.

I fully accede to the suggestion, but in acting upon it I could not refrain from considering the claims to confidence which the individual members might possess. My inquiry would not be confined to their learning and ability; I should ask of their habitual candour and love of truth, perhaps, too, of their political and personal connexions. I might be driven to the invidious necessity of comparison, finding that some lawyers in the House had dissented from the Committee. If I had found also in the minority such names as adorn the list of those who opposed the claim of privilege in the case of *Ashby v. White* in the reign referred to, it might be difficult, notwithstanding any disparity of numbers, to be quite certain which way the balance of authority inclined.

One thing would aid me in this estimate, whether the first impressions of those most conversant in constitutional law coincided with the resolutions in which they afterwards concurred; for in many cases the first thoughts of understanding men are the best, and the surest to bear the stamp of truth; subsequent consideration sometimes brings expediency into competition with rectitude, and expediency of all kinds, general and particular, public and personal. But on the other hand, it would not be unimportant to know whether great lawyers, whose minds had not been particularly exercised in these matters, who might have been at first induced to concur in the resolutions, had seen reason to abide by them on maturer reflection. Some may have yielded to the extensive claims of privilege admitted by Judges, and asserted by great living authority, who might afterwards renounce them as inconsistent with clear principles of law in daily operation. But I have been led too far in observing on the authority of the report, against which the plaintiff is in truth appealing to our judgments, on which nothing but the learned counsel's claim of deference to it could have tempted me to make a single remark. Let me only add, that if its authority and force of reasoning had appeared to its composers so conclusive, there might have been more propriety and more grace in leaving them to their natural influence

over our minds, than in resorting to language which would have exposed our motives to a darker suspicion than any pointed out by the Attorney-General, if our opinion had happened to coincide with that of the House of Commons.

I cannot conclude without some reference to the particular circumstances which have attended this cause in its progress, and have been observed upon by the Attorney-General at the close of his long discourse. I then mentioned the suddenness with which this great subject came upon me, when the newspapers informed me that the issues which I was about to try had been made the topic of discussion in the House of Commons the night before. I must now add that, when on the trial, it was proposed to make out a defence from the resolution so often cited, that resolution was unknown to me. The project of the honourable House to authorize the unrestricted sale of all their printed proceedings at so much a sheet, throwing off such a discount to wholesale purchasers, and appropriate the money to be raised to specific purposes, was what I never had anticipated, and (I own) could hardly believe. I thought it clear that such a course of proceeding could only be defended by asserting, for one House of Parliament, that sovereign power which is lodged in the three estates; an opinion confirmed by the report of the Committee, by the Attorney-General's argument, and by the concurrence of my learned brethren.

Some degree of censure was insinuated on my immediate declaration of an opinion not absolutely necessary for disposing of the cause, and which was said to have encouraged the plaintiff to commence this second action. I may be allowed to doubt this supposed consequence; for the second action was brought three months later, and immediately after the report of the Committee had appeared. Perhaps, by some dexterous dealing with the points that arose at Nisi Prius, it might have been possible to avoid this painful collision, but not without shrinking from my duty to those parties, who, whether necessarily or not, brought this question before me, and had a right to my opinion upon it; not without a poor compromise of the sacred principles of constitutional freedom. Besides, the delay would have implied a doubt where none was entertained, and would have been but a short postponement of the evil day; for similar questions must have sprung up in other quarters, and must have brought under examination the large rights now claimed.

I had indulged a hope that the resolution might have undergone revision, and have been found such as the House of Commons would not wish to continue on its Journals. I had even some ground for believing that distinguished members of the Committee had passed upon

the inquiry with opinions corresponding with my own; and I, for my own part, am at a loss to discover in their printed report, or in the argument I have heard, any good reason for their conversion. I cannot lament that I gave utterance, at the proper season, to sentiments of which I deeply felt the importance as well as the truth: or can I doubt that a full consideration of the whole subject will lead to beneficial results. One thing alone I regret,—a warmth of expression in asserting what law and justice appeared to me to require, which may have rendered it more difficult for the late House of Commons to recede from my claim which it had advanced.

I am of opinion, upon the whole case, that the defence pleaded is no defence in law, and that our judgment must be for the plaintiff on the demurrer.

INSOLVENT DEBTORS' COURT.

Sept. 13.

BAIL CASES.

THE BLACK BOOK.

Mr. Commissioner BOWEN said, that it had been the practice of the Court of Queen's Bench to keep what was termed a "black book," with the names of all persons rejected as notorious felons. He should order a similar book to be kept in this Court, and should direct the proper officer to enter therein the name of a person called Watts, a tailor, who had been rejected as a felon on a former day. That person had made affidavit that he had £200. stock on his premises, but on his examination declined to swear such a statement, and admitted his stock to be very small. Such a person could not be admitted as bail, and it was important that a record could be kept of that and similar cases.

CENTRAL CRIMINAL COURT.—Sept. 16.

CHARGE OF THE RECORDER OF LONDON TO THE GRAND JURY.

Cutting and wounding—Discretionary power given by the late Act of Parliament to the Grand and Petty Juries in cases of assaults by means of cutting instruments—the discharge of loaded fire arms and the use of dangerous weapons, which they did not possess before the passing that Act—Robbery by a married woman in concert with her husband.

The RECORDER addressed the GRAND JURY. He observed, that although the calendar was heavy in point of numbers, the offences were of an ordinary description, and would not require any lengthened observations from him. There were, however, some cases of cutting and wound-

ing which required a few remarks. It was much to be lamented that offences of this description appeared to be on the increase, as the calendars of each succeeding session unfortunately testified. The Act of Parliament lately framed relative to assaults by means of cutting instruments, the discharge of loaded fire-arms, and the use of dangerous weapons, gave the Petty Jury a discretionary power, which they did not formerly possess, of finding a verdict for the assault, if they should not be satisfied that the higher charge was sustained by the evidence. The same power was given to the Grand Jury of ignoring the bill for the more serious offence, and returning a bill for the assault only; but, should they entertain any doubt upon the subject, the safer course would be to send the party for trial upon the higher charge, and leave the case to be decided by the Petty Jury; and, having read over the depositions in the several cases referred to, his Lordship was of opinion that they ought to be sent before the Petty Jury in one shape or the other. There was also a charge of rape committed in a public-house upon a child under 12 years of age. In this case, perhaps, the Grand Jury would consider that the capital offence had not been committed, and, if so, it would be competent for them to return a bill for the assault, which, amounting to a misdemeanour, would subject the party charged to severe punishment. After alluding briefly to other cases in the calendar, his Lordship observed, that there was a charge of robbery against a man and a woman, presented under peculiar circumstances. It appeared that the woman, who was a reputed prostitute, although married, induced the prosecutor to accompany her home, and after a short time she proceeded to rifle his pockets, which the prosecutor resisted, and during the altercation a man, who claimed the woman as his wife, entered the room by force, when a scuffle ensued between him and the prosecutor, which enabled the woman to escape with the money which she had forcibly obtained. The Grand Jury in this case would consider whether they believed the male prisoner had acted in concert with his wife. If they believed that he was waiting near the spot in order to aid and assist in the robbery, he would be equally guilty as the female, and they would in that case return a true bill against both prisoners; but if, on the contrary, they considered that the male prisoner came to the room by accident, and had no intention to join in the robbery, the Grand Jury would in that case ignore the bill as far as the charge affected him; but in a legal point of view the case presented some difficulty, and, unless they should be satisfied that the male prisoner had no intention to aid in the robbery, it would be better to return a true bill against him as well as the woman.

CIRCUITS

OF THE

COMMISSIONERS FOR THE RELIEF OF INSOLVENT DEBTORS.

1839.	Northern Circuit.	Midland Circuit.	Home Circuit.	Southern Circuit.
Autumn Circuits.	H. B. Reynolds, Esq., Chief Commissioner.	J. G. Harris, Esq. Commissioner.	T. B. Bowen, Esq. Commissioner.	W. J. Law, Esq. Commissioner.
Wednesday, Oct. 23	Oakham . . .	. . . . .	Dover . . .	
Thursday . . 24	. . . . .	. . . . .	Canterbury . .	
Friday . . 25	Sheffield . . .	. . . . .	Maidstone . .	
Monday . . 28	Wakefield . . .	. . . . .		Reading
Tuesday . . 29	. . . . .	Chelmsford . .	Horsham . . .	Oxford
Wednesday . . 30	. . . . .	Colchester . .		
Thursday . . 31	. . . . .	Ipswich . .		Worcester & Cty.
Saturday, Nov. 2	Kingston-upon-Hull . . .	Yarmouth . .		Hereford
Monday . . 4	. . . . .	Norwich & City. . .		
Tuesday . . 5	York and City . . .	. . . . .		Presteigne
Wednesday . . 6	. . . . .	Lynn . . .		Brecon
Thursday . . 7	Richmond . . .	Bury St. Edmunds . .		Carmarthen and
Friday . . 8	Durham . . .	Cambridge . .		Borough.
Saturday . . 9	. . . . .	Huntingdon . .		Cardigan.
Monday . . 11	Newcastle-upon-Tyne and Town . . .	Peterborough . .		Haverfordwest
Tuesday . . 12	. . . . .	Lincoln & City . .		and Town.
Wednesday . . 13	Carlisle . . .	. . . . .		Swansea.
Thursday . . 14	. . . . .	Nottingh. & Town . .		
Friday . . 15	Appleby . . .	. . . . .		Cardiff.
Saturday . . 16	Kendal . . .	Derby . . .		
Monday . . 18	Lancaster . . .	Lichfield . . .		Monmouth.
Tuesday . . 19	. . . . .	Stafford . . .		
Wednesday . . 20	. . . . .		Hertford . . .	Gloucester & Cty.
Friday . . 22	. . . . .	Shrewsbury . . .		
Saturday . . 23	. . . . .	. . . . .		Bristol.
Monday . . 25	. . . . .	Oldbury . . .		
Tuesday . . 26	Preston . . .	Birmingham . . .		Bath.
Wednesday . . 27	. . . . .			Wells.
Thursday . . 28	Liverpool . . .	Warwick . . .		
Friday . . 29	. . . . .	. . . . .		Exeter and Cty.
Saturday . . 30	. . . . .	Coventry . . .		
Monday, Dec. 2	Chester and City . . .	Leicester . . .		Plymouth.
Tuesday . . 3	. . . . .	. . . . .		Bodmin.
Wednesday . . 4	Mold	Northampton . . .		
Thursday . . 5	Ruthin	Bedford . . .		Dorchester.
Friday . . 6	. . . . .	Aylesbury . . .		
Saturday . . 7	Beaumaris . . .	. . . . .		Salisbury.
Monday . . 9	Carnarvon . . .	. . . . .		Southampton.
Tuesday . . 10	. . . . .	. . . . .		Winchester.
Wednesday . . 11	Dolgelly . . .	. . . . .	
Friday . . 13	Welch Pool . . .	. . . . .	

NEW METROPOLITAN POLICE ACT.

2 & 3 Vict. CAP. XLVII.

An Act for further improving the Police in and near the Metropolis.—[17th August, 1839.]

Whereas an Act was passed in the tenth year of the reign of King George the Fourth, intituled "An Act for Improving the Police in and near the Metropolis," for the purpose of establishing a new and more efficient Police in the room of the inadequate local establishments of nightly watch and nightly police, within the limits in the said Act specified, therein called "The Metropolitan Police District;" And whereas the system of police established under the said Act hath been found very efficient, and may be yet further improved: Be it therefore further enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of an Act passed in the twenty-ninth year of the reign of King George the Second, intituled "An Act for appointing a sufficient number of constables for the service of the City and Liberty of Westminster, and to compel proper persons to take upon them the office of Jurymen, to prevent nuisances and other offences within the said City and Liberty," or of any other Act, as requires or authorizes the appointment of any constables or high constable at any Court Leet, shall be repealed from the passing of this Act.

II. And whereas by the said Act of the tenth year of the reign of King George the Fourth her Majesty is empowered, by the advice of her Privy Council, to order that any parishes, townships, precincts, and places, whether parochial or extra parochial, in the Counties of Middlesex, Surrey, Hertford, Essex, and Kent, of which any part shall be situated within twelve miles of Charing Cross in the City of Westminster, shall be added to and form part of the Metropolitan Police district: And whereas the boundary of the district so formed is very irregular; be it enacted, that it shall be lawful for her Majesty, by the advice of her Privy Council, to order that any place which is part of the Central Criminal Court district, except the City of London and liberties thereof, and such places as are or may be included in any Act already passed or to be passed in this Session of Parliament, intituled "An Act for regulating the Police in the City of London," and also that any part of any parish, township, precinct, or place, which is not more than fifteen miles distant from Charing Cross in a straight line may be added to and form part of the Metropolitan Police district, although the

whole of such parish, township, place, or precinct may not be added thereunto; and all the provisions of this Act, and of the said Act as amended by this Act, shall extend and apply to the parishes, townships, precincts, or places, or the parts thereof, so respectively added; and in case no separate rate shall be levied for the relief of the poor in any place or part so added, the Police rate shall be assessed and levied therein in like manner as in extra-parochial places within the Metropolitan Police district, in which no rate is levied for the relief of the poor.

III. And be it enacted, that in every case in which after the passing of this Act any parish, township, precinct, or place, or any part thereof, shall become part of the Metropolitan Police district, it shall be lawful for the Lord High Treasurer or three or more Commissioners of her Majesty's Treasury, by warrant under their hands and seals, to direct the issue, out of the consolidated fund of the United Kingdom of Great Britain and Ireland, of an additional yearly sum not greater in each case than the amount of two-pence in the pound upon the additional rental assessed to the Metropolitan Police by reason of such addition, free of all rates, taxes, and impositions, to be paid and applied in aid of the charge of maintaining the Police of the metropolis, upon the same conditions, with respect to the district so added to the Metropolitan Police district, as the issue of a sum not exceeding sixty thousand pounds out of the said consolidated fund is authorized, with respect to the parishes and places already within the Metropolitan Police district, by an act passed in the fourth year of the reign of his late Majesty, intituled "An Act to authorize the issue of a sum of money out of the Consolidated fund towards the support of the Metropolitan Police;" and every parish, township, precinct or place, or any part thereof, within the counties last aforesaid, which at any time shall be part of the Metropolitan Police district, shall be within all the provisions of the last recited Act as amended by this Act.

IV. And be it enacted, that an Act passed in the seventh year of the reign of his late Majesty, intituled "An Act to authorize the placing of the Horse-patrol now acting under the authority of the Chief Magistrate of the public office in Bow-street under the authority of the Justices appointed for the Metropolitan Police district, is hereby repealed;" but notwithstanding the repeal of the said Act it shall be lawful for her Majesty to appoint the Justices appointed and to be appointed under the said Act of the tenth year of the reign of King George the Fourth to be Justices of the Peace for the counties of Berkshire and Buckinghamshire, although they may not be qualified by estate; and the said

Justices shall be empowered to act as Justices in the last mentioned counties as fully as in any other part of the Metropolitan district, and not further or otherwise, and shall be styled "The Commissioners of Police of the Metropolis."

V. And be it enacted, that the constables belonging to the Metropolitan Police force shall have all the powers and privileges of a constable in the counties of Berkshire and Buckinghamshire, and upon the river Thames within or adjoining to the several counties of Middlesex, Surrey, Berkshire, Essex, and Kent, and within or adjoining to the City of London and liberties thereof, and in and on the several creeks, inlets, and waters, docks, wharfs, quays, and landing places, thereto adjacent, and shall act therein and thereupon, as fully as in any part of the Metropolitan Police district.

(*To be continued.*)

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STOCKDALE v. HANSARD.—We have now concluded the Judgment pronounced by *Lord Chief Justice Denman* in this highly important case. We have given it in the best way that the limits of this paper allowed; and, although it has run a race through many numbers, yet *reliance may be placed upon its accuracy.*

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The Legal Guide.

VOL. II.]

SATURDAY, SEPTEMBER 28, 1839.

[No. 22.

LEX LOCI DOMICILII.

PART II.

As to the manner in which instruments, executed in *England* by a domiciled *Englishman*, are to be construed and dealt with in respect of evidence by a Scotch Court, in so far as these instruments relate to the distribution of personal property, situated within the territory of *Scotland*.

LAW OF EVIDENCE in these cases.

(Continued from p. 323.)

LORD Brougham continued.—Again, there are certain rules just as strict, and many of them not less technical, governing the admission of parol evidence with us. Can it be contended, that, as often as an English succession comes in question before the *Scotch* Court, witnesses are to be admitted or rejected upon the practice of the *English* Courts; nay, that examination and cross-examination are to proceed upon those rules of our practice, supposing them to be (as they may possibly be) quite different from the *Scotch* rules? This would be manifestly a source of such inconvenience as no Court ever could get over. Among other embarrassments, equally inextricable, there would be this: that a host of *English* lawyers must always be in attendance in the *Scotch* Courts, ready to give evidence, at a moment's notice, of what the *English* rules of practice are, touching the reception or refusal of testimony,

and the manner of obtaining it; for those questions which, by the supposition, are questions of *mere fact* in the *Scotch* Courts, must arise unexpectedly during each trial, and must be disposed of on the spot, in order that the trial may proceed.

The case which his Lordship put, however, as quite decisive of this matter, he said, came nearer than any other to the one at bar, and it might, he said, with equal advantage to the elucidation of the argument, be put as arising both in an *English* and in a *Scotch* Court. By our *English* rules of evidence, no instrument proves itself, unless it be thirty years old, or is an office copy, authorized by law to be given by the proper officer, or is the *London Gazette*, unless by some special Act made evidence, or is an original record under its seal, or an exemplification under seal, which is *quasi* a record.

By the *Scotch Law*, all instruments prepared and witnessed according to the provisions of the Act of 1681 are probative writs, and may be given in evidence without any proof. Now, suppose a will of personality, or any other instrument relating to personal property, attested by two witnesses and executed in *England*, according to the provisions of the *Scotch Act*, is tendered in evidence before the *Court of Session*; it surely never will be contended that the learned judges, on being satisfied that the question relates to *English personal succession*, ought straightway to examine what is the *English* law of evidence, and to require the attendance of

VOL. II.

one or other of the subscribing witnesses, where the instrument is admissible by the *Scotch* law as probative. Of this his Lordship said he could have no doubt. But (he said) suppose the question to arise in England, and that a deed is executed in *Scotland*, according to the Act of 1681, by one *domiciled here*, would any Court here receive it as proving itself, being only a year old, without calling the attesting witnesses? It would have a strange effect to hear the circumstance of there being two subscribing witnesses to the instrument, which makes it prove itself in the Parliament House of *Edinburgh*, urged in Westminster Hall as the ground of its admission without any parol testimony. The Court would inevitably answer, two witnesses — then because there are witnesses, it cannot be admitted, but they must, one, or other of them, be called to prove it. The very thing that makes the instrument prove itself in *Scotland*, makes it in *England* necessary to be proved by witnesses. His Lordship, therefore, had no doubt whatever that the rules of evidence form no part of the foreign law, according to which their Lordships were to proceed in disposing of English questions arising in Scotch Courts. He said it by no means followed that where a sentence of a foreign Court is offered in evidence in Court —the probate, for example, of an English will, it should not be admitted; nor did his Lordship think it should be denied its natural and legitimate force. But, that it must, like all other instruments, be received upon such proof as is required by the rules of evidence, followed by the Court, before which it is tendered, he held to be quite clear; it would follow that though a probate striking out part of a will would be received, and the Court of Session would have no right to notice the part struck out—for this would be reversing, or at least disregarding the very sentence of the Court of Probate,

yet the non probate of a person's will would not prevent the Court from receiving and regarding that will, if its own rules of evidence did not shut it out. So, too, it is unnecessary here to decide what would be the course in the Scotch Courts in the case of an English will of personality, attested by one witness, after an Act should have passed requiring two. His Lordship thought, that though it might be admissible in evidence by the rules of evidence which would then govern yet no effect could be given to its disposition, because of the rules of English law requiring two witnesses, that being a requisition not of form, in order to make the paper evidence, but of substance, in order to protect testators on their dying beds.

Upon these principles his Lordship was of opinion, that the Court of Session had a right to receive and to look at the first will, with a view to examine the testator's intention regarding the fund in question *in medias res*, that upon the effect of that first will, it was unnecessary to dwell. The trust disposition seemed to his Lordship a sufficient declaration of an intention to appropriate. But the will left that intention free from all doubt. His Lordship said, no doubt if that will was wholly revoked by the subsequent one of April, 1829, there would be an end of such a declaration in *Scotland*, as well as in this country.—The judgment of the Court below was affirmed, but without costs.(a)

(*To be continued.*)

(a) See 3 Clarke and Fin. 592.

PROBLEM XXII.

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WHAT IS LIS PENDENS?

IMPERIAL PARLIAMENT.—HOUSE OF COMMONS.

Government Bills brought in and not passed in the Sessions 1836, 1837, 1838, 1839.

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SESSION 1836.	SESSION 1837.	SESSION 1838.	SESSION 1839.
GOVERNMENT BILLS BROUGHT IN, AND NOT PASSED.	GOVERNMENT BILLS BROUGHT IN, AND NOT PASSED.	GOVERNMENT BILLS BROUGHT IN, AND NOT PASSED.	GOVERNMENT BILLS BROUGHT IN, AND NOT PASSED.
<p>1. Church of Ireland. — 2. Benefices Plurality. 3. Registration of Voters. Charitable Trustees. 4. Boundaries of Boroughs. 5. Poor Laws, England. 6. Ecclesiastical Duties and Revenues. 7. Clergy Discipline. 8. Bankrupts (England). 9. Bankruptcy (Scotland). 10. Bankrupts' Estates (Scotland). 11. Municipal Corporations (Scotland). 12. Scotch Burghs, No. 1. 13. Scotch Burghs, No. 2. 14. Court of Session (Scotland). 15. Sheriff's Court (Scotland). 16. Court of Session Andals (Scotland). 17. English Municipal Corporations Act A amendment. 18. Municipal Corporations (Ireland). 19. Malt Duties (Ireland). 20. Copyholds. 21. Copyholders' Enfranchisement. 22. Deccents and Heriots. 23. Escheats. 24. Manorial Boundaries. 25. Imprisonment for Debt. 26. Ecclesiastical Courts Consolidating. 27. Court of Chancery. 28. Appellate Jurisdiction. 29. Stamp Duties.</p>	<p>1. Tithes (Ireland). 2. Benefices Plurality. 3. Registration of Voters. 4. Boundaries of Boroughs. 5. Poor Relief (Ireland) 6. Ecclesiastical Duties and Revenues — notice given of this Bill. 7. Enclosure Award. 8. Bankrupts (England). 9. Bankruptcy (Scotland). 10. Bankrupts' Estates (Scotland). 11. Municipal Corporations (Scotland). 12. Scotch Burghs. 13. Court of Session (Scotland). 14. Sheriff's Court (Scotland). 15. Registration of Births (Scotland). 16. Municipal Corporations (Ireland). 17. Medical Charities (Ireland). 18. Imprisonment for Debt. 19. Church Rates 10. Courts in China. 21. Clandestine Marriages (Scotland). 22. Copyholders' Improvement. 23. Deccents and Heriots. 24. Escheats. 25. Parliamentary Electors. 26. County of Clare Advance. 27. Courts in China. 28. Sheriff's Courts. 29. County Courts. 30. District Courts. 31. Clergy Discipline. 32. Parliamentary Burghs. 33. Post Office. 34. Pilotage.</p>	<p>1. Registration of Voters. 2. Municipal Boundaries (England). 3. Ecclesiastical Duties and Revenues. 4. Fines, &c. (Ireland), No. 1. 5. Arms (Ireland), No. 1. 6. Arms (Ireland), No. 2. 7. Bankrupts' Estates (Scotland). 8. Prisons (Scotland). 9. Registration of Leases (Scotland). 10. Registration of Voters (Ireland). 11. Kingstown and Dublin Port and Harbour, No. 1. 12. Shannon Navigation. 13. Municipal Corporations (Ireland). 14. Factories' Regulation. 15. Collection of Rates. 16. Copyholders' Enfranchisement. 17. Descents and Heriots. 18. Escheats. 19. Boundaries. 20. Copyholders' Improvement. 21. Duchy of Cornwall Possessions. 22. Grand Jury Presentments (Ireland). 23. Sea-coast Fisheries (Ireland). 24. Prisons (England). 25. Birmingham Police, No. 1. 26. County Courts. 27. Clergy Discipline. 28. Bank of Ireland.</p>	<p>1. Registration of Voters. 2. Jamaica Government. 3. Ecclesiastical Duties and Revenues. 4. Upper and Lower Canada. 5. Registration of Electors (Scotland). 6. Fictitious Votes (Scotland). 7. Registration of Leases (Scotland). 8. Heritable Securities (Scotland). 9. District Sessions. 10. Summary Jurisdiction. 11. Embankments (Ireland). 12. Grand Jury Cess (Ireland). 13. Municipal Corporations (Ireland). 14. Factories. 15. Collection of Rates. 16. Copyholders' Enfranchisement. 17. Inland Warehousing. 18. Registers of Births. 19. Slave Trade (Portugal). 20. Poddle River, Dublin. 21. Sheep-shealers (Ireland). 22. Excise Licences (Sale of Spirits). 23. District Prisons. 24. Preparation of Writs (Scotland). 25. Birmingham Police, No. 1. 26. County Courts. 27. Clergy Discipline. 28. Bank of Ireland.</p>

REGISTRATION OF ELECTORS.

CITY OF LONDON.—Sept. 21.

TOWER HAMLETS.

Whether the non-payment of the Registration Shilling is a disqualification? How to be recovered?

Mr. FALCONER, having been called upon to decide whether the non-payment of the registration shilling was a disqualification, said that the question had become one of great importance, arising from the contrary decisions that had been given: he would, therefore, at the earliest moment state what his opinion was. In Mr. Elliot's newly published work, pp. 313, 314, the matter was thus spoken of:—"A question has constantly been made whether the neglect or refusal to pay the registration shilling prevents a voter from being registered. In the case of county electors it is expressly provided, that the notice of claim shall not be deemed valid until such sum shall have been paid. In the case of borough voters the payment is not a condition precedent to the right to be registered; but every elector, after his name has been inserted on the register, becomes liable to the payment of one shilling annually, to be levied and collected from him, in addition to, and as part of, the money payable by him as his contribution to the rate for the relief of the poor. It has been generally held that the voter is not disqualified in the subsequent year by the non-payment of this sum. For, by sec. 27, he is only disqualified by non-payment of the poor-rates payable in respect of the qualifying premises; the registration shilling is not so made payable, but is only a part of his contribution to the rate generally. The proper course appears to be for the overseers to insert the shilling in the first rate made after the completion of the registry in addition to any other sum the party may be liable to pay; and if it is not then paid, it may be levied by distress as a part of the rate. If not so inserted, it may be doubtful whether it can be recovered at all." He entirely coincided with what was here laid down, and he also thought if the public were to pay attention to what was suggested, much time and labour would be spared to the parties themselves and to the public in the courts of the revising barristers.

granted to restrain the erection of buildings, which, when completed, would exclude the light from neighbouring Houses.

This was a motion to dissolve an injunction granted a few days ago by the Vice-Chancellor to restrain the defendant from continuing to raise certain buildings which are alleged to obstruct the ancient lights of the plaintiff. The plaintiff, Smith, is the owner of the house, No. 17, George-street, Hanover-square. The defendant is the owner of the house, No. 23, Hanover-square. The garden of this house was behind the house of the plaintiff, as well as others in George-street. Within about thirty feet of these houses, the defendant had commenced the erection of a building, which excluded the light and air from the back rooms of the houses in George-street; and the injunction was granted by the Vice-Chancellor on the ground that the defendant had no right to cause such an obstruction.

Mr. Richards and Mr. Roupel now moved to dissolve this injunction, and produced models of the houses and intended buildings for the inspection of the Court. They contended that the new buildings would not interfere with the perfect enjoyment of the plaintiff in the occupation of his house. The erection was not to be higher, if so high, as the trees which had covered the ground before it was commenced; and, although the prospect would not be quite so pleasing to the eye, yet still no building of such a description could be classed under the head of a nuisance, which a court of equity could be called on to interfere with. At all events, the defendant claimed a right to go on with the erection at this favourable season of the year; and if the plaintiff, when it was finished, was advised that it constituted a nuisance, the defendant, if unsuccessful in any action to abate it, pledged himself at his own cost to remove it. A jury, under such circumstances, would be enabled, by an inspection of the building when completed, to determine with safety whether it was a nuisance or not, and whether the plaintiff had sustained any material diminution of light and air. They relied on several cases in support of the view they took of the question, and, among others, cited the Fishmongers' Company *v.* the East India Company, 1 Dickens; the Attorney-General *v.* Nichol, 1 Vesey; and Squire *v.* Campbell, 1 Mylne and Craig.

Mr. Wigram and Mr. Pigott, for the plaintiff, maintained that the building of the defendant would materially obstruct the light and air hitherto enjoyed by the occupants of the houses in George-street. The trees were not an obstruction, as Lord Palmerston, the owner of the house, always gave permission to have any branches lopped off which grew too near the windows. With respect

Law Reports.

COURT OF CHANCERY.—Aug. 8.

SMITH *v.* ELGER.*Appeal from the Vice-Chancellor.*

NUISANCE—STOPPAGE OF LIGHTS—Injunction.—Whether an Injunction shall be

o the difference of light and air, it was only necessary to observe that the trees were planted six yards apart, while the building in dispute would present to the eye a continued dead wall. Juries, when called upon to decide as to the continuance or removal of erections of this description, always had a leaning, and not an unnatural one, against inflicting on any one the expense of a removal. The plaintiff would, therefore, be prejudiced by allowing the erection to be completed; and it would be more just to stop its proceeding further. The cases cited were all different in their features from the present one, as the right to the enjoyment of the light and the obstruction of it were both too plain to admit of a doubt.

The LORD CHANCELLOR, without calling on the other side, said that the principle on which the Court interfered by injunction was purely for the maintenance of the legal right of the parties, either when that right clearly appeared to be invaded, or when there was good reason for anticipating that it would be invaded. If there was a doubt of the legal right, then the Court left the parties to establish it at law, putting them, if it thought fit, on such terms as the exigencies of the case seemed to require. In the present case it appeared that the defendant was erecting a building at thirty feet from the plaintiff's windows, and that it was not to be more than half the height of the plaintiff's house. It was of great importance to the defendant to finish it in the season favourable for building, and when finished it seemed reasonable to believe that a better judgment could be formed as to its being, or not being, a nuisance. His Lordship thought that the defendant ought to be permitted to finish the building at his peril, leaving the plaintiff to bring an action if he was so advised. In the event of such action being brought and the plaintiff obtaining a verdict, then the Court would deal with the case as it thought fit when the result of the trial was made known.

Injunction dissolved.

VICE-CHANCELLOR'S COURT.—Aug. 22.

WELLESLEY v. WELLESLEY.

DEED OF SEPARATION—*Construction of Covenant to secure an Annuity for the separate use of the Wife by charge on real Estate. Whether it shall operate on the first acquired real Estate of the Husband*—**PRACTICE**—*want of parties*—**DEMURRER.**

This was a demurrer to a bill by the Hon. Mrs. Wellesley (formerly Mrs. Bligh) and Colonel Paterson, her father, and trustee in a separation deed, executed in June, 1834, against her

husband, the Hon. Tilney Long Pole Wellesley, and his eldest son and the trustees in a deed which the father and son executed in December, 1834. By the separation deed Mr. Wellesley covenanted that he would, on the 1st of February, 1835, either by a charge on real estate, or by an investment in the funds, or by the best means then in his power, secure payment to Colonel Paterson, during the life of Mrs. Wellesley, of £1,000. a-year, in trust for her separate use. The deed also contained a covenant that Mr. Wellesley would pay Mr. Bicknell (Mrs. Wellesley's solicitor), £1,000. by instalments, for her own use, within a year after its date. Colonel Paterson, on the other hand, by the same deed, covenanted to indemnify Mr. Wellesley against the debts of Mrs. Wellesley. Mr. Wellesley, under the marriage settlement with his former wife, was tenant for life of considerable estates, with remainder to his eldest son in tail male, and the eldest son on coming of age, became entitled, as tenant in tail mail in possession, to other estates. In December, 1834, Mr. Wellesley and his son, who had come of age, executed deeds by which the family estates in Wiltshire and Essex, to which they were entitled, as already mentioned, were mortgaged to the Amicable Insurance Company for £462,000, which the trustees were to receive and to apply upon a variety of trusts for creditors, with an ultimate trust for Mr. Wellesley himself, and with a power to Mr. Wellesley to charge the estates with a jointure of £1,500. a-year for his present wife, or any wife he might hereafter marry. Mr. Wellesley not having performed his covenant on the 1st of February, 1835, the present bill was filed to attach his interest in the trust property for satisfying the covenant, or to compel him to exercise his power of jointuring to the extent of the £1,000. a-year. There had been a former bill against the trustees of the Amicable Insurance Company, which sought to affect the estates with the covenant. But that bill had been abandoned as soon as the real nature of the arrangement of December, 1834, became known to the plaintiff.

Mr. Knight Bruce and Mr. Foller appeared for the trustees who demurred for want of equity and for want of parties. On the ground of want of equity the learned counsel contended that the covenant did not give the plaintiff any lien on any particular estates of Mr. Wellesley's.

Mr. Jacob and Mr. Willcocks supported the bill.

His HONOUR said, on the first point, as to the general want of equity, there did appear to him there was an equity. He knew nothing of any other property which Mr. Wellesley had, except as far as the bill stated it. It is alleged that in June, 1834, he was seised for life of

ROLLS' COURT.—June 9.

GARLAND v. LITTLEWOOD AND OTHERS.

TRUSTEES and EXECUTORS—their liabilities.

various estates, without impeachment for waste, under deeds by which his eldest son was first tenant in tail in remainder. And, under the will of his grandfather, Mr. Long, the eldest son was at the same time tenant in tail in possession of other estates. That being the state of Mr. Wellesley's property, the only property he had in June, 1834, he entered into the articles with Colonel Paterson. Then his Honour found that, by the deeds of December, 1834, the estates of which Mr. Wellesley was seized for life, with remainder to his son in tail male, were so limited to trustees (who were the parties demurring) upon trust to raise £462,000. to be applied in a manner specified in great detail, but with an ultimate trust for the benefit of Mr. Wellesley himself; and then, by this very instrument, a power is expressly given to him to limit to his present wife, or any woman or women he should afterwards marry, a jointure of £1,000. a year. His Honour could not but think, considering Mr. Wellesley could not out of his own life estate have satisfied the covenant, and seeing the precise manner in which the benefits were given to him by the deeds of December, 1834, he could not but think it quite according to legal principle to hold that the deeds of June and December were parts of the same legal transaction, that is to say, in other words, that the deed of June, 1834, ought to be taken in connection with the deed of December, 1834; and that the very powers and benefits contained in the latter deed were given to him to enable him to perform the covenant in the deed of June, 1834. In June you have the father and wife contracting together, and, in December you have the father and son so dealing with each other as to enable the father to perform his contract, considering what has been done in Courts of Law as well as of Equity. As to treating deeds as made *uno statu*, it was not too much to hold that these deeds were to be taken together as one and the same transaction. He could not but think, therefore, having regard to the particular manner in which the deeds were framed, Mrs. Wellesley had an equity to have the covenant specifically performed by the provisions which were introduced into the deed of December, 1834. But as the bill was framed it was impossible to get on without having some at least of the *cestuis que* trust of that deed before the Court. He should therefore overrule the demurrer for want of equity, and allow the demurrer for want of parties, with liberty generally to amend.

This bill was filed by the children of John Garland, formerly a maltster and publican at Hatherne, in Leicestershire, against Thomas Littlewood, Robert Deaville, and others, to establish the will of John Garland, and to make Littlewood and Deaville personally liable for monies which it was alleged ought to have come to their hands. Upon the hearing of the cause a decree was made referring it to the Master to take an account of Garland's estate and effects come to the hands of Littlewood and Elizabeth Garland (the wife of the testator), or to the hands of John Owen, the personal representative of Deaville, who had died. The Master, by his report, found that there had come to the hands of Elizabeth Garland £609. 3s. 3d., and from the examination *viva voce* of John Nuttall, that there had come to the hands of Mrs. Garland, Littlewood, and Deaville £1,522. 10s. 2d., and to the hands of Mrs. Garland, Littlewood, and Owen, £237. 10s.

It appeared that Garland, the testator, by his will, dated May 29, 1818, bequeathed all his property to Littlewood and Deaville, upon trust that his wife Elizabeth should have the use of it for her life, she continuing his widow and maintaining his family; and after decease, he directed his property to be divided among his children, and he made his wife, Littlewood, and Deaville executors. There were three children, one son, John, who died, and two daughters, the plaintiff Ann, the only living child, and Elizabeth, now dead. Nuttall was the attorney employed by Garland in his lifetime. After the testator's death he received various sums of money due to the testator on mortgage, and procured the signature of the two trustees, Littlewood and Deaville, to the receipts endorsed upon the conveyances of these mortgages, to the amount of £1,500. Nuttall paid £1,000 of this money to Mrs. Garland; other sums he paid to the trustees, but other sums he did not account for, and he became insolvent. Mrs. Garland, after her husband's death, carried on his business as maltster and publican, but failed in it. It was contended on the behalf of the trustees, Littlewood and Deaville, that Nuttall was not their agent, but the agent only of Mrs. Garland, and that they were not responsible for his receipts.

The case came on upon exceptions to the Master's report, and also upon further directions and costs.

Lord LANGDALE said, it was the duty of the executors to collect the property and pay the debts, and it was the duty of the trustees to keep

the property for the children. The widow was the acting executor. She and Littlewood only proved; Deaville did not. The widow possessed herself of the whole of the stock in trade and household furniture. Shortly after the testator's death Littlewood, and afterwards Deaville, visited the house, and they both expressed a wish that the widow should carry on her husband's trade, and Littlewood made an inventory of the effects. This was consistent with their allegation, that the whole property was in the widow's separate possession. It was possessed by Mrs. Garland alone. He could do nothing with respect to the stock in trade and furniture. The case was different with respect to the sum of £890. By deeds executed by the trustees, they acknowledged £890, and other sums to have been received by them. They were described in those deeds as executors, but they acted rather as trustees than executors. A sum of £1,200, and afterwards increased to £1,500, was secured on mortgage, and the £890, was part of a sum of £1,000, paid by Nuttall to Mrs. Garland, which £1,000, was part of the £1,500. The trustees had no right to consent to this £890, being taken out from its proper security and applied for Mrs. Garland's personal enjoyment. They were not at liberty to convert the mortgage into money, so as to let her have the enjoyment of it in any other manner than in receiving the interest. No sufficient reason had been shown why the trustees should not be charged with this money. The defendant's exception as to the £890, must be over-ruled; the other exception allowed.

The case was then heard on further directions, and costs.

Lord LANGDALE said, a sum of £110, was part of the money invested, and therefore comprised in the inquiry. It was in the power of the trustees, and they were chargeable with it. With respect to other sums with which the plaintiffs now sought to charge the trustees, the plaintiffs did not upon the hearing obtain from the Court a declaration or inquiry to charge the defendants for what they might have received without wilful default; but only got a decree for the common account of what the defendants had actually received. The parties, on going into the Master's office, could only have regard to the decree, and the defendants could not now be charged in the manner desired. Nor could he direct an inquiry under the decree, which he could not alter.

As to the costs, Mr. Pemberton, for the defendant, said, the bill was filed thirteen years after the death of the testator; it was delayed until the mother became insolvent, so that the executors could not have any recompense from her. The plaintiffs, her children, had partici-

pated in all the benefits the mother had received. The defendants had not received one shilling of the money, but they were charged because they had joined in executing deeds, and so had made themselves responsible for what had never come into their hands. He also said, that during the life of Mrs. Garland, who took a life estate under the will, the amount of the income of the sums decreed to be paid by the defendants should be paid to the defendants, Mrs. Garland being primarily liable.

Mr. Kindersley, for the plaintiffs, said, the ground of the defence, that Nuttall was not acting for all the three executors, but for Mrs. Garland only, failed, and therefore the defendants should pay the costs.

Mr. Pemberton.—The suit was general for the administration of the estate, and there was no reason why Littlewood and Deaville, because they were ordered to pay something, should pay the whole costs of the suit.

Lord LANGDALE.—The defendants had been right in parts of their resistance, but not in other parts. It would be improper to charge them with the whole costs. In taxing the costs the Master must distinguish how much had been occasioned by the defendants' resistance to those claims which they ought to have been and had been allowed.

PREROGATIVE COURT.—July 15.

In the Goods of THOMAS HOWARD, deceased.

NEW WILL ACT.—Imperative necessity for the signature of the testator to be "at the foot or end" of the Will or Codicil—The Court has no discretion.

In this case Thomas Howard (deceased), had made his will, dated 27th March, 1839, which he duly signed in the presence of two witnesses. After the signature and attestation was written an appointment of executors. It appeared by an affidavit, made by the person who prepared the will, that he wrote the appointment of executors, and that the testator signed the will *after that addition was made*, and upon application being made for probate, it was contended that as the words were added before the signature was made, probate ought to be granted.

SIR H. JENNER said that all discretion was taken away from the Court, which must place the same construction upon the Act as if it were a question as to the disposal of real property. The signature is not "*at the foot or end*." Suppose that the words added had been a disposal of the residue—the testator has not signed the will *at the end*.—Probate refused.

COURT OF BANKRUPTCY.—Sept. 17.

FIAT against JAMES ROLF.

Ex parte CHARLES EDWARD LE PINE.

RULE in BANKRUPTCY that a retired partner cannot prove against the separate estate of his former partner, if any debts for which he was jointly liable with the Bankrupt shall remain unsatisfied—What circumstances shall take a case out of this rule.

Mr. Le Pine and the bankrupt carried on business in partnership previous to, and up to, March 1837. On the 31st March, 1837, the partnership was dissolved, and by the deed of dissolution between Le Pine and the bankrupt, the latter in future was to carry on the business alone, the stock and debts being transferred to him, and it was referred to Mr. Quilter to ascertain the value of each partner's share in the joint stock, and the bankrupt was to give Le Pine a warrant of attorney, with judgment thereon, to receive such sum as should be found due to him, at certain periods therein mentioned. Mr. Quilter estimated Le Pine's share in the joint stock at £1,029. 7s 2d. The bankrupt had paid to Le Pine the greater portion of this sum, leaving a balance still due. At the time of the bankruptcy, which took place in March 1839, there were some few debts owing by the partnership of Le Pine and the bankrupt, previous to the dissolution, unpaid, and those debts were still owing.

Mr. Le Pine now claimed to prove for this balance against the estate of the bankrupt.

Mr. Randall opposed the proof, upon the ground that the admission of it would be allowing Le Pine to come in competition with the joint creditors of the bankrupts and himself; for if there should be a surplus on the separate estate of the bankrupt, that would go over and form a fund for the payment of the outstanding debts of Le Pine and the bankrupt.

Mr. Chambers, on the other hand, contended that this was a proveable debt, and would be barred by the certificate; that the rule mentioned by the learned counsel in opposition only applied where the retiring partner allowed his name to remain in the firm, "*Ex parte Ellis*," 2 Gl. and Jam. 312, and that there was no instance of creditors having the benefit of a supposed surplus, unless the parties were partners at the time of the bankruptcy. He thought this analogous to the case of "*Ex parte Cook*," Mont. Rep. 228, where a member of a firm carrying on trade on his separate account, and having supplied goods to the firm, was allowed to prove against the joint estate.

In answer to some questions of the Commissioner, it appeared that the outstanding joint

creditors knew of the arrangement between the partners, and seemed to assent to it, though one of them had a joint judgment, on which he had since acted.

Mr. Commissioner HOLROYD said, that it was admitted there were some outstanding creditors of Le Pine and the bankrupt still unsatisfied, but from the admissions also made, it appeared to him that the creditors had assented to the arrangement between Le Pine and the bankrupt. It is undoubtedly a rule in bankruptcy that a retiring partner cannot prove against the separate estate of his former partner if any debts for which he was jointly liable with the bankrupt remain unsatisfied; and the reason given for this rule, is that there may possibly be a surplus of the separate estate, which would be liable to pay the joint debts remaining unsatisfied, and that by admitting a retiring partner to prove in such a case he would come in competition with creditors to whom he was jointly liable with the bankrupt. This was certainly a very remote consequence, and it was not clear upon what principle it could possibly apply, unless in a case where the separate creditors got 20s in the pound, and there really existed a surplus; for if there was no surplus, then the rejection of the proof did not benefit the joint creditors, but only gave more to those who had proved under the separate estate. His Honour thought from two late cases, "*Ex parte Grazebrook*, 2 Dea. & Ch. and *Ex parte Hall*," 3 Dea., it would not require much to take the case out of this rule. Upon the authority of these cases he decided that there was sufficient in the present case to take it out of the above rule, and to enable him to admit the proof.

Proof allowed.

Sept. 21.

Act for abolishing Arrest for Debt on Meas Process, 1 & 2 Vict. c. 110, sec. 8.

BAIL BONDS.

COURSE OF PROCEEDINGS SUGGESTED BY THE COMMISSIONERS WITH REFERENCE TO THE DIFFICULTIES THAT EXISTED WITH RESPECT TO TAKING BAIL BONDS.

Mr. Commissioner HOLROYD said he would make a few observations upon a clause in a recent Act of Parliament, which he considered of great importance to the mercantile world. He alluded to 1 and 2 Victoria, cap. 110, sec. 8, proceedings under which were becoming more numerous, and he understood much inconvenience had arisen from solicitors not knowing what was the practice required to be adhered to in proceeding under the Act. By the section of the Act above referred to, where a creditor, if a trader whose debt amounts to £100 or upwards, files an af-

davit in the Court of Bankruptcy that the debt is due, and that the debtor is a trader, and has caused the debtor to be personally served with a copy of the affidavit, and with a notice in writing requiring immediate payment of the debt, if the debtor do not, within twenty-one days after personal service of the affidavit and notice, pay the debt, or secure or compound for the same to the satisfaction of the creditor, or enter into a bond in such sum and with such two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve of, to pay such debt, &c., the trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of the affidavit and notice, provided a fiat issue within two months. The words of the Act of Parliament, as to entering into the bond, were very general, and he thought it would have been desirable if the act had expressly authorized the Commissioners of the Court of Bankruptcy to make rules and orders for the justifying of the sureties in the same manner as the several courts of law were authorized by the 4th of William and Mary, cap. 4, sect. 2, with respect to the justification of bail. He also thought power was wanting to extend the time for entering into the bond, or to take it conditionally, or to take it as of course upon a certain sum being lodged in court. But, considering the difficulties under which practitioners were labouring, his Honour was desirous of suggesting for their guidance a course of proceeding in his opinion best adapted to further the object which he considered the Legislature had in view. The Act of Parliament said that the debtor may secure or compound for the debt to the satisfaction of the creditor, or enter into a bond in such sum and with such two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve of. Now his Honour considered that the object of this enactment was to give the creditor a proper security, and at the same time to prevent the possibility of a debtor being harassed by a creditor, who, without good reason, was dissatisfied with the security offered, and therefore, in case the creditor would not agree to the security offered, it authorized the Commissioner to approve of the amount of the security, and of the sureties. He had, therefore, endeavoured to suggest such a course of proceeding to be adopted under this clause of the act as would give to the creditor a bond for the security of his debt with two such sureties as he ought to be satisfied with. In considering this matter he had not lost sight of the provisions of some other Acts of Parliament, which his Honour thought somewhat analogous to the present, and the proceedings under them. He alluded more particularly to the 10th section of the 6th George IV., c. 16, relating to bonds required in certain cases from traders having privilege of Parliament, which

section was taken from a similar one in the statute 4th George III. c. 33, and a bond given under that Act had been considered as analogous to a recognizance of bail in error. (See 3 B. and A. 273.) At common law no bail in error was required. It depended entirely upon statutes, and one of the principal was 3 James I., c. 8, by which no execution is stayed, unless the person bringing the writ of error, with two sufficient sureties such as the Court shall allow of, first be bound by recognizance to prosecute the writ of error with effect, &c. He also wished to add, that he had conferred with two of his brother Commissioners (Commissioners Evans and Fane), and they agreed with him in the following course of proceeding. He should, however, further state that Mr. Commissioner Evans did not like requiring copies of the affidavits to be taken, and he (Commissioner Holroyd) was as desirous to avoid it; and, with consent of the creditors' attorney, affidavits might be dispensed with altogether: but, in the absence of such consent, he thought it essential to secure the original affidavits by filing them previous to the hearing, and then his present opinion was, that the only safe mode of bringing the contents of them before the Court was by an office copy. This, however, more clearly showed the necessity of the Commissioners, or the major part of them, having power to make rules for regulating the practice in all their courts. Uniformity of practice was most desirable. His Honour trusted that in the ensuing session of Parliament any difficulties that existed with respect to taking these bonds would be speedily removed. He would now state what he considered to be the most advisable course of proceeding under the Act. At the same time he did not mean to say that it was a course which must of necessity in every case be strictly followed. It appeared to him the easiest and most convenient mode of satisfying the mind of the Commissioners of the sufficiency of the sureties; and if the course which he now pointed out were departed from, without some good cause being shown, he should be very slow in giving his approval of the bond. If any course more convenient could be suggested he would give it his best attention, his wish being to facilitate the proceedings under the Act.

COURSE OF PROCEEDING UNDER THE 1ST AND 2ND VICTORIA, CAP. 110, SEC. 8.

" Any debtor desirous of entering into a bond with sureties under the 8th section of the 1st and 2nd Victoria, cap. 110, should cause to be given to the creditor or his attorney a notice in writing signed by the debtor or his attorney of the debtor's intention so to proceed.

" The names and descriptions of the proposed sureties should be fully stated in the notice, and also the day and time at which the debtor in-

tends to proceed before the Commissioner at the Court of Bankruptcy.

“The notice should be 24 hours at least, if the creditor and the debtor's proposed sureties reside in town, and two days or more if the creditor or the debtor's proposed sureties reside elsewhere, according to the distance and means of communication.

“The sureties need not attend personally, but may make affidavit of their sufficiency.

“Copies of the affidavits of sufficiency should be annexed to the notice.

“All affidavits intended to be used before the Commissioner should be filed in the office of the chief registrar of the Court of Bankruptcy previous to the hearing, and office copies thereof taken.

“At the day and time stated in the notice the debtor or his attorney should be prepared with the bond duly stamped, and with office copies of the affidavit of the execution thereof by the attesting witness, and of the affidavits of sufficiency, and of the affidavit of the service of notice of the debtor's intention to enter into the bond.

“With the consent of the creditor or his attorney the Commissioner will approve of the bond without requiring affidavits.”

A professional gentleman present put it to the learned Commissioner whether, for the information of solicitors practising in the Court, these proposed regulations ought not to be posted in some conspicuous part of the building. He thought in detail the question was one of interest and importance.

Mr. Commissioner HOLROYD concurred with the suggestion so made; and a copy of the regulations was ordered to be posted in the Court.

CENTRAL CRIMINAL COURT.—Sept. 19.

CASES OF STABBING.

We think it right to take notice of the determination of the Court, as expressed by Mr. JUSTICE COLTMAN, in cases of this sort, upon the trial of *James Stanley*, who was indicted for cutting and wounding John Cardingue, with intent to maim and disable him, or to do him some grievous bodily harm

The prosecutor, it appeared, accompanied by two other persons, went to levy a distress for rent upon the goods of the prisoner, when the latter, on seeing them enter the room, exclaimed, “I know what you are come for, and whoever touches my goods, I'll have his blood!” He then seized a clasp knife, and was advancing towards one of the men, when the prosecutor interposed, and begged of him to be quiet, upon

which the prisoner stabbed him in the face close to the right eye.

The Jury found the prisoner guilty.

Mr Justice COLTMAN said, that the offence of stabbing had become so prevalent of late, that it became necessary to visit it with the severest punishment allowed by law. In this case the crime was committed under very aggravated circumstances, for the prosecutor had offered no insult or injury to the prisoner; he merely came, in the execution of his duty, to execute a legal distress warrant, when he was attacked in a most violent and unprovoked manner by the prisoner, and his life very narrowly escaped being sacrificed: under these circumstances, the prisoner must be removed for a long period from this country. *The sentence of the Court was, that he be transported beyond the seas for fifteen years.*(a)

OFFICE OF SECONDARY OF THE CITY OF LONDON.

FEES AND CHARGES UPON TRIALS OF ISSUES REFERRED TO THE SHERIFFS.

REPORT of the Committee of the Corporation as to the office of Secondary:—

“To the Right Hon. the Lord Mayor, Aldermen, and Commons of the City of London, in Common Council assembled,

“We, whose names are hereunto subscribed upon committee in relation to the Secondaries and the Sheriffs' Courts of this city, to whom, on the 19th day of September, 1833, it was referred to inquire into the nature and extent of the duties performed by the secondaries, with a view to ascertain whether the same could not be efficiently performed by one person; also to ascertain whether a satisfactory arrangement cannot be made with the present secondaries to consolidate the office; also to inquire into the amount of fees now demanded, with a view to ascertain whether the same may not be increased so as to afford an adequate remuneration to the secondaries for the discharge of the duties; also to fix the amount of salary to be received, and to report such regulations as we might deem necessary to be observed by the secondaries in the discharge of their duties, do certify that we referred the consideration of the said references to a sub-committee, who have since reported that they have proceeded therein from time to time, and, after due consideration, are of opinion, with respect to that part which relates to a consolidation of the office of secondary, that unless there is a material change in the duties of the office,

(a) See the case of *Francis Hastings Medhurst*, ante Vol. I. pp. 380-394.

by a transfer of the judicial part of those duties to the judge of the Sheriffs' Court, and the secondaries are relieved from their attendance at the Central Criminal Court and on state occasions, the present duties as performed by those officers cannot be efficiently executed by one person. And as there did not appear, either on the ground of economy or with reference to the convenience of the public, to be any good reason for consolidating the office, they could not recommend this honourable Court to effect such consolidation.

"With respect to that part of the reference which related to the fees received by the secondaries, the sub-committee further reported that since the period of such reference an act had passed the legislature for the administration of justice, by which the judges are empowered to sanction a scale of fees, and such scale having been sanctioned and allowed by the judges, the same is now acted upon by the secondaries, agreeably to the recommendation contained in our report presented to this Court on the 2nd of April, 1834; and it appearing from these accounts that such fees for some years past have been more than sufficient to pay the stipulated salaries of these officers, together with the charges and expenses of their office, the sub-committee are of opinion, as no charge was now made on the corporation, that it was unnecessary to inquire further at present into the amount of such fees, and to consider and report upon any regulations to be observed in the discharge of the duties of the office of secondary.

"But it appearing that one of the sources of fees received by the secondaries arose from the trial of referred issues from the superior courts under the provision of the 3rd and 4th of Wm. IV., cap. 42, the sub-committee directed Mr. Arabin, the judge of the Sheriffs' Court (before whom such issues are also tried), and the secondaries to make returns in writing of the number of issues referred to them during the last year respectively, with the fees and charges thereon; and having received the same, it appeared that before Mr. Arabin the number of cases entered was 133, of which 105 were tried before him and 28 withdrawn, and that the charges upon such cases tried amounted to 17s. 10d.; and that before the secondaries the number of cases referred was 235, of which 177 were tried before them and 58 withdrawn, and that the fees and charges upon each case tried amounted to 17. 13s.; and that upon each case withdrawn, the secondaries received the sum of 4s."

The Report, after referring to the evidence of Mr. Arabin on the subject, stated that the sub-committee were of opinion that it was deserving of consideration whether the fees in both courts

should be assimilated or not, and also whether a portion of them should be paid into the chamber towards the expenses of the Sheriffs' Court, subject to the regulations of the Court of Common Council. The sub-committee, it added, annexed the following statement of receipts and disbursements of the office of secondary in the years 1836, 1837, and 1838, with the balances received by the secondaries during these years respectively, viz.:—

	Receipts.	Disburse- ments.	Balances received by the Secondaries
	£. s. d.	£. s. d.	£. s. d.
1836..	3,151 10 2	972 12 9 <i>½</i>	2,178 17 4 <i>½</i>
1837..	3,350 3 4	867 0 2	2,483 3 2
1838..	3,973 12 6	890 17 6 <i>½</i>	3,082 14 11 <i>½</i>

The Report ends thus:—"That we your committee agree with the report of the sub-committee, and recommend it for adoption; and are proceeding in the consideration of the remaining references, and hope shortly to be enabled to present a detailed report thereon. All which we submit, &c.

"R. TAYLOR,
A. GALLOWAY,
W. A. PEACOCK,
J. DAVIES,
W. JOHNSON,
R. THOMAS,
H. DE JERSEY,
W. H. ASHURST,
R. OBBARD."

NEW METROPOLITAN POLICE ACT.

2 & 3 Vict. CAP. XLVII.

An Act for further improving the Police in and near the Metropolis.—[17th August, 1839.]

(Continued from p. 336.)

VI. And be it enacted, that it shall be lawful for the Lord High Treasurer or three or more Commissioners of her Majesty's treasury, by warrant under their hands and seals, to direct the issue out of the consolidated fund of Great Britain and Ireland to the receiver of the Metropolitan Police district of a yearly sum, not greater than twenty thousand pounds, free of all rates, taxes, and impositions, for defraying the increased charge of the establishment of the Metropolitan Police force by reason of that force being required to perform the duties heretofore performed by the horse-patrol and by the surveyors and constables of the Thames Police, and also the issue of such further sum as shall be needed for the payment of the superannuation allowances of such surveyors and constables as have been superannuated under the provisions of an act passed in the third year of the reign of King George the Fourth, or any subsequent Act for the more effectual administration of the office of a Justice of the peace in and near the metropolis, or who may hereafter become enti-

ted to superannuation allowances under the provisions of any such Act.

VII. And be it enacted, that it shall be lawful for the said Commissioners to administer to any constable belonging to the Metropolitan Police force an oath to execute the office of constable within the royal palaces of her Majesty and ten miles thereof; and every constable who shall be so sworn shall have the powers and privileges of a constable within the said royal palaces and ten miles thereof.

VIII. And be it enacted, that it shall be lawful for the said Commissioners of Police, if they shall think fit, on the application of any person or persons showing the necessity thereof, to appoint and swear any additional number of constables to keep the peace at any place within the Metropolitan Police district, at the charge of the person or persons by whom the application shall be made, but subject to the orders of the said Commissioners, and for such time as they shall think fit; and every such constable shall have all the powers, privileges, and duties of other constables belonging to the Metropolitan Police force: provided always, that it shall be lawful for the person or persons on whose application such appointment shall have been made, upon giving one calendar month's notice in writing to the Commissioners, to require that the constables so appointed shall be discontinued, and thereupon the Commissioners shall discontinue such additional constables; and all monies received on account of any such additional constables shall be paid to the receiver of the Metropolitan Police, and shall be accounted for by him in like manner as other monies receivable by him.

IX. And be it enacted, that, in addition to the returns relating to the Metropolitan Police which by former acts are required to be laid annually before Parliament, there shall also be laid annually before both Houses of Parliament, together with such returns, a statement of the total number of persons belonging to the Metropolitan Police force on the first day of January of the year in which each return is laid before Parliament, distinguishing the number of persons in each class or rank of such force, with the salaries and allowances enjoyed by each class.

X. And, be it enacted, that no toll shall be demanded or taken on any turnpike-road or bridge for any horse or police van passing along such road or bridge in the service of the Metropolitan police, provided that the rider of such horse or driver of such van shall have his dress and accoutrements according to the regulations of the Police force at the time of claiming the exemption; and every person who shall fraudulently claim to take the benefit of the exemption from toll herein contained, not being lawfully

entitled thereunto, shall for every such offence be liable to a penalty not more than five pounds; and in all such cases the proof of exemption shall be upon the person claiming the same.

XI. And be it enacted, that the said Commissioners of Police shall take care that a sufficient number of constables belonging to the Metropolitan police force shall be in attendance upon every Magistrate sitting at any Police court within the limits of the Metropolitan Police district, and at every other criminal court holden within the said district, for the purpose of executing such summonses and warrants as may be directed to them.

XII. And be it enacted, that after the passing of this Act all summonses and warrants to be issued in any criminal proceeding within the said district, shall be served and executed by a constable of the Metropolitan Police force, and by none other.

XIII. And be it enacted, that when any warrant shall be directed or delivered to any of the said constables, unless it be necessary for the due execution thereof that such warrant be executed without delay, the constable shall deliver the same to the superintendent or other his superior officer belonging to the Metropolitan Police force, who shall appoint, by indorsement thereon, one or more constables to execute the same; and every constable whose name shall be so indorsed shall have the same powers, privileges, and protections for and in the execution of such warrant as if the same had been originally directed to him or them by name.

XIV. And be it enacted, that every constable who shall be guilty of any neglect or violation of duty in his office of constable shall be liable to a penalty not more than ten pounds, the amount of which penalty may be deducted from any salary then due to such offender, or, in the discretion of the Magistrate, may be imprisoned with or without hard labour, for any time not more than one calendar month.

XV. And be it enacted, that no constable belonging to the Metropolitan Police force shall be at liberty to resign his office, or to withdraw himself from the duties thereof, unless expressly allowed so to do, in writing, by the superintendent under whom he may be placed, or unless he shall give to such superintendent one calendar month's notice of his intention; and every constable who shall so resign or withdraw himself without such leave or notice shall be liable to forfeit all arrears of pay then due to him or to a penalty not more than five pounds.

XVI. And be it enacted, that every constable belonging to the Metropolitan Police force who shall be dismissed from or shall cease to hold and exercise his office, and who shall not forthwith deliver over all the clothing, accoutrements,

appointments, and other necessaries which may have been supplied to him for the execution of his duty, to the superintendent, or to such person and at such time and place as shall be directed by the said superintendent, shall be liable to imprisonment, with or without hard labour, for any time not exceeding one calendar month; and it shall be lawful for any Justice of the peace to issue his warrant to search for and seize to the use of her Majesty all the clothing, accoutrements, appointments, and other necessaries which shall not be so delivered over, wherever the same may be found.

XVII. And be it enacted, that every person, not being a constable of the Metropolitan Police force, who shall have in his possession any article being part of the clothing, accoutrements, or appointments supplied to any such constable, and who shall not be able satisfactorily to account for his possession thereof, or who shall put on the dress, or take the name, designation, or character of any person appointed as such constable, for the purpose of thereby obtaining admission into any house or other place, or of doing or procuring to be done any Act which such person would not be entitled to do or procure to be done of his own authority, or for any other unlawful purpose, shall, in addition to any other punishment to which he may be liable for such offence, be liable to a penalty not more than ten pounds.

XVIII. And be it enacted, that every person who shall assault or resist any person belonging to the Metropolitan Police force in the execution of his duty, or who shall aid or incite any person so to assault or resist, shall for every such offence be liable to a penalty not more than five pounds, or, in the discretion of the Magistrate before whom he shall be convicted, may be imprisoned for any time not more than one calendar month.

XIX. And be it enacted, that no office or employment in the Metropolitan Police force shall prevent the holder thereof from receiving any half-pay to which, if he did not hold such office or employment, he might be or become entitled.

XX. And be it enacted, that, instead of the salary heretofore payable to the said Commissioners of Police, it shall be lawful for her Majesty to direct that a salary not exceeding the rate of twelve hundred pounds by the year shall be paid quarterly to each of the said Commissioners out of the consolidated fund of the United Kingdom of Great Britain and Ireland.

XXI. And be it declared and enacted, that the said Commissioners of Police, and also the surgeon, receiver, and clerks, employed in the Metropolitan Police office, are within the provisions of an Act passed in the fifth year of the reign of his late Majesty, intituled "An Act to

alter, amend, and consolidate the laws for regulating the pensions, compensations, and allowances to be made to persons in respect of their having held civil offices in his Majesty's service;" and that the clerks and officers who were appointed to the said office in the year one thousand eight hundred and twenty-nine shall be deemed to have been employed therein before the fourth day of August in that year.

XXII. And be it enacted, that there shall be deducted from the pay of every constable belonging to the Metropolitan Police force a sum after such yearly rate as the Secretary of State shall direct, not being a greater rate than two pounds ten shillings in a hundred pounds, which sum so deducted, and also the monies accruing from stoppages from any of the said constables during sickness, and fines imposed upon any of the said constables for misconduct, and from any portion of the fines imposed by any Magistrate upon drunken persons, or for assaults upon police constables, as shall be directed to be paid to the receiver for the benefit of this fund, and all monies arising from the sale of worn or cast clothing supplied for the use of the police, shall from time to time be invested in government stock by and in the name of the receiver, and the interest and dividends thereof, or so much of the same as shall not be required for the purpose herein-after mentioned, shall likewise be invested in such stock, and accumulate so as to form a fund to be called "The Police Superannuation Fund," and shall be applied from time to time for payment of such superannuation or retiring allowances or gratuities as may be ordered by the Secretary of State at any time to any of the said constables as hereinafter provided.

XXIII. And be it enacted, that it shall be lawful for the Secretary of State to order that any of the said constables may be superannuated, and receive thereupon out of the Police superannuation fund a yearly allowance, subject to the following conditions, and not exceeding the following proportions: that is to say, if he shall have served with diligence and fidelity for fifteen years, and less than twenty years, an annual sum not more than half his pay; if for twenty years, or upwards an annual sum not more than two-thirds of his pay; provided, that if he shall be under sixty years of age it shall not be lawful to grant any such allowance, unless upon the certificate of the said Commissioners of Police that he is incapable, from infirmity of mind or body, to discharge the duties of his office; provided also, that if any constable shall be disabled by any wound or injury received in the actual execution of the duty of his office, it shall be lawful to grant to him any allowance not more than the whole of his pay; but nothing herein contained shall be construed to entitle any constable abso-

lutely to any superannuation allowance, or to prevent him from being dismissed without superannuation allowance.

XXIV. And whereas it is expedient to amend and simplify the laws now in force relating to depredations committed on the River Thames, and in the docks and creeks adjacent thereto; be it enacted, that from the passing of this Act an Act passed in the second year of the reign of King George the Third, intituled "An Act to prevent the committing of thefts and frauds by persons navigating bum-boats and other boats upon the River Thames," shall be repealed.

XXV. And be it enacted, that from the first day of August in the year one thousand eight hundred and thirty-nine every person who shall use, work, or navigate any boat whatsoever upon the River Thames for the purpose of selling, disposing of, or exposing for sale to and amongst the seamen or other persons employed in and about any of the ships or vessels upon the said river any liquors, slops, or other articles whatsoever, between London Bridge and Limehouse Hole, shall be deemed to keep such boat for gain, and shall be within all the provisions of an Act passed in the eighth year of the reign of his Majesty King George the Fourth, intituled "An Act for the better regulation of the watermen and lightermen on the River Thames between Yantlet Creek and Windsor," concerning persons who keep, within the limits of the said Act, any boat to be let out for hire or gain.

XXVI. And be it enacted, that every person who within the Metropolitan Police district shall knowingly take in exchange from any seaman or other person, not being the owner or master of any vessel, any thing belonging to any vessel lying in the River Thames or in any of the docks or creeks adjacent thereto, or any part of the cargo of any such vessel, or any stores or articles in charge of the owner or master of any such vessel, shall be deemed guilty of a misdemeanor.

XXVII. And be it enacted, that every person who shall unlawfully cut, damage, or destroy any of the ropes, cables, cordage, tackle, headfasts, or other the furniture of or belonging to any ship, boat, or vessel lying in the River Thames or in any of the docks or creeks adjacent thereto, with intent to steal or otherwise unlawfully obtain the same or any part thereof, shall be deemed guilty of a misdemeanor.

XXVIII. And be it enacted, that it shall be lawful for any constable to take into custody every person who, for the purpose of preventing the seizure or discovery of any materials, furniture, stores, or merchandize belonging to or having been part of the cargo of any ship, boat, or vessel lying in the River Thames or the docks or creeks adjacent thereto, or of any other articles unlawfully obtained from any such ship or vessel,

shall wilfully let fall or throw into the river, or in any other manner convey away from any ship, boat, or vessel, wharf, quay, or landing-place, any such article, or who shall be accessory to any such offence, and also to seize and detain any boat in which such person shall be found or out of which any article shall be let so fall, thrown, or conveyed away; and every such person shall be deemed guilty of a misdemeanor.

XXIX. And be it enacted, that every person who, for the purpose of protecting or preventing any thing whatsoever from being seized within the Metropolitan Police district on suspicion of its being stolen or otherwise unlawfully obtained, or of preventing the same from being produced or made to serve as evidence concerning any felony or misdemeanor committed or supposed to be committed within the Metropolitan Police district, shall frame or cause to be framed any bill of parcels containing any false statement in regard to the name or abode of any alleged vendor, the quantity or quality of any such thing, the place whence or the conveyance by which the same was furnished, the price agreed upon or charged for the same, or any other particular, knowing such statement to be false, or who shall fraudulently produce such bill of parcels knowing the same to have been fraudulently framed, shall be deemed guilty of a misdemeanor,

XXX. And be it enacted, that every person who shall be found within the Metropolitan Police district in or upon any canal, dock, warehouse, wharf, quay, or bank, or on board any ship or vessel, having in his or her possession any tube or other instrument for the purpose of unlawfully obtaining any wine, spirits, or other liquors, or having in his or her possession any skin, bladder, or other material or utensil for the purpose of unlawfully secreting or carrying away any such wine, spirits, or other liquors, and any person who shall attempt unlawfully to obtain any such wine, spirits, or other liquors, shall be deemed guilty of a misdemeanor.

XXXI. And be it enacted, that every person who shall, within the Metropolitan Police district, bore, pierce, break, cut open, or otherwise injure any cask, box, or package containing wine, spirits, or other liquors, on board any ship, boat, or vessel, or in or upon any warehouse, wharf, quay, or bank, with intent feloniously to steal or otherwise unlawfully obtain any part of the contents thereof, or who shall unlawfully drink or wilfully spill or allow to run to waste any part of the contents thereof, shall be deemed guilty of a misdemeanor.

XXXII. And be it enacted, that every person who shall, within the Metropolitan Police district, wilfully cause to be broken, pierced, started, cut, torn, or otherwise injured, any cask, chest, bag, or other package containing or prepared for

containing any goods while on board of any barge, lighter, or other craft lying in the said river, or any dock, creek, quay, wharf, or landing-place adjacent to the same, or in the way to or from any warehouse, with intent that the contents of such package or any part thereof may be spilled or dropped from such package, shall be deemed guilty of a misdemeanor.

XXXIII. And be it enacted, that any superintendent or inspector belonging to the Metropolitan Police force shall have power, by virtue of his office, to enter at all times, with such constables as he shall think necessary, as well by night as by day, into and upon every ship, boat, or other vessel (not being then actually employed in her Majesty's service) lying in the said river or creeks, or in any dock or docks thereto adjacent, and into every part of every such vessel, for the purpose of inspecting and upon occasion directing the conduct of any constable who may be stationed on board of any such vessel, and of inspecting and observing the conduct of all other persons who shall be employed on board of any such vessel in or about the lading or unloading thereof, as the case may be, and for the purpose of taking all such measures as may be necessary for providing against fire and other accidents, and preserving peace and good order on board of any such vessel, and for the effectual prevention or detection of any felonies or misdemeanors.

XXXIV. And be it enacted, that it shall be lawful for every superintendent, inspector, or serjeant belonging to the Metropolitan Police force, having just cause to suspect that any felony has been or is about to be committed in or on board of any ship, boat, or other vessel lying in the said river, docks, or creeks, to enter at all times, as well by night as by day, into and upon every such ship, boat, or other vessel, and therein to take all necessary measures for the effectual prevention or detection of all felonies which he has just cause to suspect to have been or to be about to be committed in or upon the said river, docks, or creeks, and to take into custody all persons suspected of being concerned in such felonies, and also to take charge of all property so suspected to be stolen.

XXXV. And be it enacted, that it shall be lawful for every superintendent or inspector belonging to the Metropolitan Police force, with such constables as he shall think necessary, at any time between sun-rising and sun-setting, to enter any ship, boat, or vessel (except her Majesty's ships) in the said river, docks, and creeks, and to search the same for unlawful quantities of gunpowder, and also to exercise the same powers of seizing, removing to proper places, and detaining all such unlawful quantities of gunpowder found on board any such ship, boat, or vessel, and the barrels or other packages in which such

gunpowder shall be, as are given to persons searching for unlawful quantities of gunpowder under the warrant of a justice by virtue of an Act passed in the twelfth year of the reign of King George the Third, intituled "An Act to regulate the making, keeping, and carriage of gunpowder within Great Britain, and to repeal the laws heretofore made for any of those purposes."

XXXVI. And be it enacted, that every master or commander or other officer of any ship, boat, or vessel (except her Majesty's ships), who, while such ship or vessel shall lie or be in the river Thames between Westminster Bridge and Blackwall, keep any gun on board such ship, boat, or vessel shotted or loaded with ball, or cause or permit to be fired any gun on board such ship, boat, or vessel before sun-rising or after sun-setting, shall be liable for every gun so kept shotted or loaded to a penalty of five shillings, and for every gun so fired shall be liable to a penalty of ten shillings.

XXXVII. And be it enacted, that every master or commander or other officer of any such ship, boat, or vessel, or any other person on board of the same, who, while such ship, boat, or vessel shall lie in the said river between Westminster Bridge and Blackwall, shall heat or melt, or cause or permit to be heated or melted, on board such ship, boat, or vessel, any pitch, tar, rosin, grease, tallow, oil, or other combustible matter, shall for every such offence be liable to a penalty not more than five pounds.

XXXVIII. And be it enacted, that the business and amusements of all fairs holden within the Metropolitan Police district shall cease at the hour of eleven in the evening, and shall not begin earlier than the hour of six in the morning; and that if any house, room, booth, standing, tent, caravan, waggon, or other place shall, during the continuance of any such fair, be open within the hours of eleven in the evening and six in the morning, for any purpose of business or amusement, in the place where such fair shall be holden, it shall be lawful for any constable to take into custody the person having the care or management thereof, and also every person being therein who shall not quit the same forthwith upon being bidden by such constable so to do; and the person so then having the care or management of any such house, room, booth, standing, tent, caravan, waggon, or other place shall be liable to a penalty not more than five pounds, and every person convicted of having been therein, and of not having quitted the same forthwith upon being bidden by a constable so to do, shall be liable to a penalty not more than forty shillings.

(To be continued.)

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 14, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 28th Sept. 1839.

The Legal Guide.

VOL. II.]

SATURDAY, OCTOBER 5, 1839

[No. 23.

LEX LOCI DOMICILII.

PART II.

As to the manner in which instruments, executed in *England* by a domiciled *Englishman*, are to be construed and dealt with in respect of evidence by a Scotch Court, in so far as these instruments relate to the distribution of personal property, situated within the territory of *Scotland*.

LAW OF EVIDENCE in these cases.

WHETHER the ENGLISH RULE OF CONSTRUCTION is to be applied?

WHETHER the ENGLISH RULE OF EVIDENCE is to be applied?

THE SUBTLETIES of the ENGLISH LAW of EXECUTORY DEVISES, 140 CASES!

(Continued from p. 338.)

IN further illustration of the opinion we have ventured upon this intricate subject, and which becomes the more necessary, seeing that WE STAND ALONE,—we take the following argument between *Lord Brougham* and *Dr. Lushington*, which took place in the House of Lords at the hearing of *Yates v. Thomson* (a). *Lord Brougham* observed—In *England* we should have some difficulty in admitting the wills in evidence—I do not know how the practice is in *Scotland*,—how could any Court, before which this question should have arisen, have access to

those two instruments? By the laws of evidence in *England*, where the personality is in question, you cannot produce the will itself for any purpose of a civil action, and prove the testator's hand-writing by the attesting witnesses; that could not be given in evidence; it could not get to the Court; the only evidence is the probate, unless on certain issues, such as a question of sanity, for instance, or a collateral question; but for no testamentary purpose, as I apprehend, could the will be produced. I do not say that is the *Scotch Law* of evidence; but it does not follow that the case is to be decided by *English Law*. It may be that the *Scotch Courts*, acting as *Scotch Courts*, with respect to *Scotch property*, must decide by the *Scotch Law*. These are feelers, by which they are to arrive at their point, though the general principle would be, that the *English Law* is to prevail.

Dr. Lushington said,—I submit that the will of a person domiciled in *England*, made according to the law of *England*, governs the distribution of the testator's personal estate all over the world.—*Anstruther v. Chalmers*, (2 Sim. 1.)

Lord Brougham.—The law of *England* must be looked to for the *lex domicili*, for the construction as well as the effect of a will, and *SIR JOHN LEACH*'s decision in *Anstruther v. Chalmers* would be a grave authority to show it was so; but as this was a *Scotch estate*, it might be a question,

(a) See *Clarke and Fin.* 569.

under the law of Scotland, whether, in construing an English made instrument, though the party was a domiciled Englishman, upon a personal matter, you were not to look to the rules of the law of Scotland. I feel some difficulty as to that question; the law of Scotland knows nothing of ordinary executorial devises; they have one chapter that comes near them—the doctrine of list deliveries on general failure of issue; but the *subtleties of our law* of executorial devises they know nothing of; it is one of the nicest points in the English law, upon the effect of all those *sixty-four cases* often mentioned in *Lord Thurlow's* time: and I asked *Mr. Preston* a few days ago how many more he could shew me, and he said *one hundred and forty!*—A domiciled Englishman in England making an English will, according to your present contention, the Scotch Courts must construe that English will according to the English law; but supposing he limits a chattel personal, say some Bank stock made personal chattel by Act of Parliament, upon a general failure of issue, that is to say, to A. B. and according to the English law, I will say, with remainder to C. D.; the Scotch would say,—“whom failing,”—and if C. D. should die without issue, or without children, then over to E. F., the English law would then raise this question, must it be to C. D. dying without issue generally, or must the bequest, in order to vest, be given over to E. F. if C. D. dies, without having issue living at the time of his death: and then you go into all the general learning, to show whether it is *a general or a special* failure of issue; *in the one case* an executorial devise would be good; *in the other bad.*

I am inclined to think, in the first place, if you read these words, without going out of the four corners of this paper, and without looking into the cancelled will, it contains a sufficient indication and a declaration that will do. “Now if this transaction should not be closed before my death, I have, in a separate will, which respects my

property in *England*, directed my trustees or executors in that will” what they shall do. Supposing it had been so, that would raise a question whether you had a right to travel out of this instrument, and look at the unproved or cancelled will. But it is no such thing; the deed says “to assign or indorse the notes or receipts of the Royal Bank to my said trustees.”(a) They will contend on the other side, that this is a sufficient *testamenti dictio*, without travelling out of this deed, into the cancelled will; and that they do not require the cancelled words. In cases with respect to property in *England*, it has been held, that *reciting and referring to a thing as done is sufficient though it was never done.* If a man says, “I have, in the first part of my will, given such an estate to A,” A. shall have that estate, though the gift is not contained in the first part of the will.

Dr. Lushington.—But the persons appointed to do the act, are the executors mentioned in that instrument, and can your Lordship doubt, that if the testator cancelled that very thing that appoints them, it all falls to the ground?

Lord Brougham.—I will tell you my idea of that. If by a valid subsisting will admitted to probate, a man gives £1000. to A. B. whom he has appointed his executor in his former will, and if he, the next day after he has executed that instrument, cancels the will by which he has appointed A. B. his executor, no man can doubt that, under the subsisting will, A. B. would take the £1000. Suppose A. B. is not mentioned, but the testator says, “I hereby give the person I have appointed my executor in my will made on such a day £1000.” and next day, he revokes or cancels that will. May you look into such a will for the purpose of seeing who the person is? For that raises the question to which we must come in this case, and it is a very important one; and it

(a) See ante, p. 322.

never has been decided yet, either in this country or in Scotland, that if the law of the country where the testator lives and dies (his *lex domicilii*) is to regulate the disposition of his personal property under the will, that law is also to regulate the construction of the will, which is one difficulty. That point has never been decided, and I have very great doubts about it, namely, whether the Judges in Scotland must not only take the English law as their guide in the construction of the will, and in working out what was the intention of the testator, but whether they must also take the technical rules of the English law as to evidence in getting to the case in the Scotch Court: that is what you have got to combat; and I have great doubts about it, I must say, though I incline to the opinion of the Judges of the Court below, still I am very far from thinking it so very clear a case, because the points are raised for the first time, viz. Whether the *English* rule of construction is to be applied; and secondly, whether the *English* rule of evidence is to be applied? Both those questions are distinctly raised and we must decide them; we cannot travel to a decision here without deciding those questions, and yet the Judges below never seem to have said a word about them.

PROBLEM XXIII.—VOL. 2.
POWERS APPENDANT TO A LIFE ESTATE.
 What is the effect of Alienation by Tenant for Life upon a *Power appendant* to the Life Estate?

TO THE EDITOR OF THE LEGAL GUIDE.
ANSWER TO PROBLEM 21. VOL. II.

MORTGAGES.

IN WHAT MANNER AND TO WHAT EXTENT MAY INTEREST DUE ON A MORTGAGE DEBT BY AGREEMENT *inter partes* BE CONVERTED INTO PRINCIPAL AND CARRY INTEREST.

In considering this subject, it is of importance to remember that the Courts of Equity

protect with peculiar jealousy the debtor against any attempts of the mortgagee to take advantage of the debtor's necessities to impose on him harsh terms, consequently an agreement entered into at the time of the loan for converting interest into principal, from time to time, as it becomes due, is considered oppressive, unjust, and tending to usury, and consequently cannot be supported. The following rules must be observed to render valid any agreement *inter partes* converting interest into principal:—

1st. Interest must have *actually* accrued due, as it then becomes a debt, and removes every objection to such agreement; it must have no taint of extortion, otherwise equity will interpose for the relief of the mortgagee, as in the case of *Thornhill v. Evans*, 2 Alk. 330, in which the mortgagee compelled the mortgagor to account every six months, and convert interest into principal at £5. per cent., the interest reserved in the deed being £4. 10s. Lord Hardwicke decreed that the mortgagee should receive interest at £4. 10s. only for such arrears of interest as, by agreement in writing, the mortgagor had consented should be converted into principal.

2ndly. The mortgage duty must be paid on the amount of interest converted into principal by agreement *inter partes*, in like manner as on any other fresh advance, in which light Equity considers it; but inasmuch as a further loan made by a mortgagee, after a notice of puise incumbrance, is not allowed to be tacked, but must be postponed to that incumbrance, it follows that a mortgagee shall not be allowed to convert interest into principal, as against a subsequent charge, of which he had notice at the time of the agreement. (*Digby v. Craggs*, Acab. 612. 2 Eden. 200.)

3rdly. The conversion of interest into principal must appear by the *manifest intention* of the mortgagor; it is not sufficient that an account be stated between the parties. As a general proposition, it may be laid down

that the agreement that the interest shall become principal, and carry interest, must be declared by writing under the hands of the parties (*Brown v. Backhouse*, 1 P. Wms. 654.); but this will not extend to the case of a balance on a banking account, which, by the custom of the trade, is made of principal and of *interest turned into principal* by successive rests, and interest on such interest. (*Rufford v. Biggs*, 5 Russel, 346.) (a.)

In the case of *Howard v. Harris* (1 Vern. 190.), Lord Keeper North attempted to introduce as a general principle, that as to so much of the interest as was reserved in the body of the mortgage deed, it should be accounted principal, for being ascertained by the deed, an action of debt would lie for it; and therefore it was reasonable there should be damages given for the non-payment of the money: and although it was urged there was not any such precedent in the Court, and, if established, every scrivener would reserve all his interest half-yearly, from time to time, so long as the money should be contained on the security, which would be to change the law and practice of the Court, and make all mortgagees pay interest upon interest; yet the *Lord Keeper* said, he was clear in that distinction between debt and damages, and saw no inconvenience that could ensue; it would only quicken men to pay their just debts, and he decreed accordingly: but the rule so attempted to be introduced has not been followed, and it is conceived its establishment would have had the effect above alluded to—that of making all mortgagors pay interest upon interest, and might have been the means of oppression on the debtor. (*Coote on Mortgages*, p. 525.)

H. T. D.

(b) We advise our correspondent, instead of confining his attention to one book upon a given subject, and taking for granted all he may happen to find there, to *look up the law* from decided cases to the time of his

writing—to search for and read the Reports. It is very evident, that in answering this Problem, he has paid more attention to "Coote upon Mortgages," than to any other authority, and so strong has he pinned his faith to that work for the correctness of his answer, that he has even copied its blunder, (although evidently an error of the press.) He has given us the law as it stood in the times of Atkins, Ambler, P. Williams, and Vernon; but with one solitary exception, he does not even notice the modern doctrine, or acquaint us whether that remains the same as it was a century back—and even that solitary exception is a mere reference to a case that does not exist—it is certainly *correctly copied* from Coote upon Mortgages, but the name of the case in fact is *Rufford v. Bishop*, and not *Rufford v. Biggs*. (See 5 Russell, 346.) Had he turned his attention to the report of that case, he would certainly have shewn Sir John Leach's opinion, which travels through the old decisions. This case was a *mortgage of land to bankers*, to secure a *current balance*, and his Honor said—"It is very true you cannot in the ordinary case of a loan of money, secured on land, stipulate *a priori*, that interest shall become principal. The opinion of *Lord Cowper*, in the case of *Ossulton v. Yarmouth*, (1 Salk. 449.) that as to mortgages, an agreement to convert interest into principal after it is due, must be evinced by writing, may admit of some question. When *Lord Eldon*, in the case of *ex parte Brown*, 9 Ves. J. 223. where he decides that rests may be made between merchants, afterwards adds, 'that the principle cannot be applied to a real security,' I must understand him to be speaking of a common mortgage security, or loan of money. It being admitted, that the mode of dealing between these parties by rests, would, because it is according to the course of trade, support an action at law, for the several balances reported due. I cannot apprehend any prin-

ple why, in such case, a security upon land may not be given for the final balance which may be due between the banker and his customers. I have looked with much anxiety through the books for authority on this point, and I have fortunately found it in the case of *Lord Clements v. Latouche*, 1 B. & Beattie, 420. in which *Lord Manners* affirmed this mode of dealing by rests, stating, that the principle as to rests in common mortgages, was not applicable to the case when the mortgage was made, as a collateral security for the balance which might eventually be due from the customer to his banker. It is true, that in that case, *Lord Manners* has given annual rests only, and seems to throw some doubt upon rests at a shorter period. But it is admitted here, that such rests are legal.—In this case, rests of principal and interest had been made yearly, and half yearly, according to the custom of the trade. There was no written agreement. See also *Blackburn v. Warwick*, 2 Younge and Coll. *Sackett v. Bassett*, 4 Mad. 58. The principle upon which the equitable doctrine is founded is this.—When parties who are entitled to the repayment of a principal sum, with interest, have neglected to enforce payment of the interest, that was their own omission, and the Court leaves them to take the consequences of that neglect, and will not give them an equity founded on their own laches. This rule is consistent with equity and common sense; but there is no good reason why, if the parties settle the matter between themselves, and the one party gives time to the other for payment of the arrears, in consideration of the allowance of interest on the balance, they should not afterwards be compelled to abide by that settlement, but such settlement as relates to the conversion of interest into principal, will not affect subsequent incumbrances, such conversion being a further advance *pro tanto*. See *Digby v. Craggs*, 1 Ed. 200.; *Harris v. Harris*, 3 Atk 722. See also as to the present prac-

tice of the Courts, for paying principal, interest, and costs, *Whalton v. Cradock*, 1 Keene 969.; *Brewin v. Austin*, 2 id. 211. per the *Master of the Rolls*—*Bruere v. Wharton*, 7 Sim. 483. per the *Vice-Chancellor*, who adheres to the old practice.

EDITOR.

Imperial Parliament.

HOUSE OF COMMONS.

Return to an Order of the Hon. the House of Commons, dated the 9th of August 1839; for a Return of the Names and Titles of all Bills, Private as well as Public, which, having passed the House of Commons in the present Session, have not been returned from the other House of Parliament; also of all Bills, during the same period, which, having been returned from the other House of Parliament with Alterations, have been afterwards dissented from and dropped in the House of Commons; with the dates at which such Bills passed this House.

PRIVATE BILLS.

A Return of the Names and Titles of all Private Bills which, having passed the House of Commons in the present Session, have not been returned from the other House of Parliament.

1. Belper Small Debts.
2. Hatfield (York) Small Debts.
3. Wirksworth Small Debts.
4. Halifax, Huddersfield, &c. Small Debts, No. 1.
5. Halifax, Huddersfield, &c. Small Debts, No. 2.
6. Norwich Improvement.

N B. There has been no private bill returned from the other House of Parliament with alterations, and afterwards dissented from and dropped in the House of Commons.

EDWARD JOHNSON.

Private Bill Office, House of Commons,
August, 1839.

PUBLIC BILLS.

A Return of the Names and Titles of all Public Bills which, having passed the House of Commons in the present Session, have not been returned from the other House of Parliament; also of all Bills, during the same period, which, having been returned from the other House of Parliament with Alterations, have been after-

- wards dissented from and dropped in the House of Commons; with the dates at which such Bills passed this House.
- 1.—Bills which, having passed the House of Commons, in the present Session, have not been returned from the other House of Parliament.

Read Third Time and passed in the House of Commons:

Admiralty Court	August 5
Copyholds Enfranchisement . .	July 3
Clerks of the Peace	June 10.
Double and Treble Costs . . .	June 10.
Electors' Removal	June 27.
High Sheriffs' Expenses	June 13.
Joint Tenants Voting (Ireland) .	July 4.
Inland Warehousing	July 22.
Register of Births, &c	July 18
Slave Trade (Portugal)	July 25.
Sheep Stealers (Ireland)	August 2.

- 2.—Bills which, having been returned from the other House of Parliament with Alterations, have been afterwards dissented from and dropped in the House of Commons.

Read Third Time and passed in the House of Commons.

Bills of Exchange	June 14.
Another Bill brought in and passed.	

Municipal Corporations (Ireland)	July 15.
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Law Reports.

VICE-CHANCELLOR'S COURT.—June 21.

CLOUGH v. LAMBERT.

HUSBAND and WIFE—DEEDS of SEPARATION (a)—Whether it is absolutely necessary that in order to be effective these Deeds should contain a Covenant by the Trustees to indemnify the Husband against the Wife's debts, or that the Deed should show some circumstances on which a decree of divorce, a *mensā et thoro* would be pronounced.

In this case a deed of separation had been executed by the plaintiff and the late Mr. Clough, by which an annuity of £100. was secured to Mrs. Clough for her life, and was virtually decided a few days ago on a motion against the executors for payment of the arrears of the annuity, stood in the paper of short causes to-day. The learned counsel for the plaintiff asked for the usual decree in a creditor's bill against the executors.

Mr. Girdlestone, for the executors, submitted the deed of separation was one to which the Court could not give effect. It had been

frequently regretted by different judges that deeds of separation had been upheld to such an extent by courts both of law and equity, but it was universally admitted they ought to contain one or two ingredients to have any validity. Either there should be a covenant by the trustee to indemnify the husband against the debts of the wife, or some circumstance should be shown on the face of the deed on which a decree of divorce *a mensā et thoro* would be pronounced by the Ecclesiastical Courts. Neither of these circumstances could be found in the present deed. It contained a simple recital that unhappy differences existed between the parties, and that they agreed to separate; the husband then covenanted not to intermeddle in any way with the wife, and to pay to Johnson (who was a trustee for her) an annuity of £100., being at liberty to deduct the amount of any debts therefrom that might be recovered from him on her account. This was all the deed contained, without either of the circumstances which were essential to give it validity in this Court.

The VICE-CHANCELLOR said, nothing had been stated to induce him to think the foundation of the deed was such as the Court could not admit. The Court could not presume it to be invalid, for it might happen, for any thing he knew, that all those circumstances which were required to obtain from the Ecclesiastical Court a divorce *a mensā et thoro* were included in the recital that unhappy differences existed. It was impossible for the Court to know what those unhappy differences were, it was enough for it to know this was a deed, and a deed not requiring any consideration, and it was for those who relied on the policy of the law to show the circumstances were such as not to warrant a deed of separation. His Honour would be sorry to increase the number of cases in which these deeds of separation had been upheld, but it was not for him wildy, and without evidence as to the real nature of the unhappy differences, to assume the deed was bad in law. In his opinion, therefore, the wife might sustain her claim as a volunteer against other volunteers, but not as against creditors.

ROLLS COURT.—June 22.

CASBORNE v. BARSHAM AND OTHERS.

SOLICITORS' LIABILITIES.—Circumstances under which a Solicitor obtaining a security deed from his client shall be construed as having obtained it by undue influence.

A motion was made by the defendants in this cause, for the new trial of a feigned issue di-

(a) See Jones v. Wait, ante vol. 1, p. 280.

ected by the Court to be tried between the parties respecting the validity of a deed. The bill was filed by the Rev. Walter John Spring Casborne, Rector of Fakenham, Suffolk, against William James Barsham, of Ixworth, and two other defendants, Robinson and Mathew, praying that the deed in question, which was executed by Dennis Chandler, might be delivered up to be cancelled, or if not, that it might stand as a security only for what was really due from Chandler to Barsham, that accounts might be taken, and that the bills of costs of Barsham, who was an attorney, and had been concerned for Chandler, might be taxed. It appeared that the plaintiff as Rector brought a suit in the Exchequer to recover tithes against Dennis Chandler, then owner of an estate of about 70 acres of land, which he had since sold, in Fakenham, and which had been purchased by his father as free from tithes, and for which tithes had not been paid for many years. Barsham was employed by Chandler, as his attorney, to defend this suit, and the counsel consulted were of opinion that there was a good defence. However, on the 2d of July, 1832, the Court of Exchequer pronounced their decree, by which they declared that the Rector (Casborne) was entitled to the tithes, and there was a reference to the Master to take an account of them. The plaintiff's present bill alleged that Chandler was then under the control of Barsham, who on the 22d of August, 1832, obtained from him the deed in question, by which Chandler assigned to him and to the two other defendants, Robinson and Mathew, all his effects, crops on the farms, and property, upon trust to pay Barsham the costs of preparing the deed, and all other costs and monies owing to him, and to pay the residue among the other creditors of Chandler. Under this assignment Barsham sold the property for £924. 16s. 8d. The bill charged that this deed was made with a view to defeat the plaintiff's claims for the tithes recovered and for his costs of the suit. The plaintiff in due course obtained the order of the Court of Exchequer against Chandler, for payment of the arrears of tithes and of the costs of the suit; but Chandler went to prison and took the benefit of the Insolvent Debtors' Act, and was discharged on the 28th of July, 1834. The plaintiff at the hearing was appointed assignee, and a sum of £80. and a copy of the deed from Chandler to the defendants were handed over to the plaintiff by the Court, and he was recommended to proceed to set aside the deed. The bill alleged that Barsham was during the whole time Chandler's solicitor, that the deed was prepared by Barsham without any previous instructions from and without the knowledge of Chandler, and that Mr. Sams, the brother-in-law and partner of

Barsham, went four times to Chandler's house to procure him to execute it, and at last obtained the execution by fraud. On the first hearing of the cause, Lord Langdale directed an issue to be tried whether the deed of assignment by Chandler to Barsham was obtained by Barsham from Chandler either by fraud or by undue influence, as his solicitor, and his Lordship expressed his opinion that Barsham might be examined as a witness. The defendant Barsham, and the other two defendants, Robinson and Mathew, pleaded in two separate pleas that the deed was not obtained by fraud or by undue influence. The cause was tried at the Suffolk Assizes, and the jury found that the deed *was obtained by undue influence*, but not by fraud.

June 26.

LORD LANGDALE gave judgment upon the motion. His Lordship said the issue was to try whether the execution of a deed of the 20th of August, 1832, by which Dennis Chandler conveyed his estate and effects to the defendants as trustees, was obtained by the defendant Barsham, a solicitor, by fraud or by undue influence. The verdict of the jury on the trial was, that the deed was obtained by undue influence, but not by fraud. Chandler stated that he put his whole trust in Barsham, who was his solicitor, but that Barsham had no particular control over him. Other witnesses stated that Barsham had acquired great professional influence over him, and there was evidence respecting the circumstance that took place before and at the time the deed was executed. There was an inequality between the parties, there being an habitual exercise of opinion in one, and an habitual deference to that opinion in the other, from which it was inferred that the Court might impute the exercise of undue influence. Similar cases had not unfrequently occurred between parent and child, and sometimes between solicitor and client, but such cases did not rest solely on the nature of the transaction and the influence, but it was required to be shown that some advantage had been obtained, or threats or undue persuasion used, or that the transaction complained of was contrary to the policy of the law. The question here was, whether Barsham, acting as Chandler's solicitor, had availed himself of his influence in that character for his own advantage. The jury had negatived fraud, and that finding was not disputed. The plaintiff, Casborne, had sued Chandler in the Exchequer for tithes, and had procured a decree. Costs became due from Chandler to Barsham, who had defended the suit for him. Although the deed was of such a nature as he (Lord Langdale) did not think Chandler ought to have been advised to execute,

yet there was not evidence sufficient to satisfy him that Barsham obtained the execution by undue influence in his character of solicitor, and therefore the defendants were entitled to a new trial.

Mr. Pemberton.—A new trial of the issue altogether?

Mr. Cooper.—In the disjunctive, precisely in the terms of the former issue?

Lord LANGDALE.—The issue must be the same as it was before.

June 25.

REES v. PHILLIPS.

LESSOR and LESSEE.—*Parol Agreement—Whether a Parol Agreement can prevail in Equity so as to avoid a written Contract.*

Mr. Pemberton, for the plaintiff, stated that this bill was filed by the plaintiff against the defendant, Sir William Phillips, to have the benefit of a parol agreement to reduce the rent reserved in a lease granted to them. At law no parol agreement could prevail so as to vary a contract under seal, but it was not so in equity, and the present suit was for a declaration of the Court that the defendants were bound by a parol agreement entered into in 1815, and that Edwards, one of the defendants, might be restrained from proceeding under a lease granted in 1806 in an action at law against the plaintiff. On the 17th of November, 1806, the then owners of certain coal-mines in Pembrokeshire granted a lease by indenture to Henry Rees the elder, and Henry Rees the younger, of all the coal-mines, the lessees paying one-third of all such sums as should arise from the sale of the coals and culm raised. Possession under this lease was taken, but the colliery was worked in such a manner that a very small proportion of coal was sold, and consequently a very small proportion of rent was paid. In 1815 the plaintiff requested to have the rent reduced from one-third of the money received from the sales to one-fourth, which he stated would induce him to work the mines more than he had done. The lessor consented to the reduction, and the consequence was that old pits were cleared, new shafts were sunk, and from 1815 to the end of the lease, rent, at the rate of one-fourth instead of one-third of the proceeds of the sales, was paid. The lessor Langharne died, having by his will devised the estate to William Edwards for 1,000 years, upon certain trusts, and subject thereto to James Edward Phillip Langharne, his eldest son, who became entitled, subject to the trust term. He continued to receive the rent at the rate of one-fourth, until his death in December, 1819. He devised the

estate, subject to the trust term, to his brother, the defendant, Sir William Phillips, for life, who continued for some time receiving the rent at the rate of one-fourth. In 1825 he called upon the plaintiff, and inquired why the reduced rent had been paid to him instead of the rent reserved by the lease. Explanation was given to him, and he appeared satisfied, and continued to receive it at the rate of one-third. A suit was instituted to carry into execution the trusts of the will of James Edward Phillip Langharne, to which the defendant was a party, and in which a receiver was appointed, who continued to receive the rent at the rate of one-fourth, but in October, 1827, the plaintiff, who was the survivor of the lessees, received a letter from the defendant, Sir William Phillips, that he should insist upon being paid rent at the rate of one-third. Other applications were afterwards made in which the defendant said he had learned that a covenant in a lease could not be varied by a parol contract, and that the difference in the rental had amounted to £300., but if any proposal were made he would come to an arrangement. In 1836 Edwards, the trustee, in whom the 1,000 years term was vested, at the instance of the defendant, brought an action at law for the difference between the fourth and the third, on which the present bill was filed and the common injunction to restrain Edwards from proceeding in the action was obtained. In July, 1836, the defendant, Sir William, put in his answer, and moved to dissolve the injunction. Cause was shown on the merits, and the injunction was ordered to stand. He submitted that the plaintiff was entitled to the declaration his bill prayed for.

Mr. Kindersley, for the defendant, said, that at law a contract under seal could not be avoided by parol, and although a court of equity would enforce such parol contract where there was a consideration for it, it would not do so where there was none. There was no contract in writing, not the scrap of a letter. The evidence consisted of a marksman, a working collier, who said he heard something pass; of the son of the plaintiff's agent, who heard his father say it was so; and of another person, who saw the parties under a hedge. None of these conversations were so much as hinted at in the bill. Where a man rested his case upon the admission of a contract, or upon conversations, he must state them in the pleadings. The plaintiff was not entitled to a decree on the evidence. The lessees were bound by covenant to search for and dig mines, and no consideration passed from them for the diminution of rent. The agreement was a mere *nudum pactum*.

Mr. Pemberton, in reply, said, in point of fact there had been a reduction. That was proved, and also that there was a great increase

of the working of the mines. Accounts also were settled on that foundation.

Lord LANGDALE.—The conversations not having been stated in the bill, could not be taken as direct proof of the agreement, but without them the inference was so strong, a communication made that if the reduction of rent were agreed to the working of the mines would be increased, proof that the works were increased, and settlements of accounts made on the foundation of the agreement, that there was enough to support the plaintiff's case. The injunction must be made perpetual, and the defendants must pay the costs.

COURT OF EXCHEQUER.—June 24.

Sittings in Equity.

ROTHSCHILD v. THE QUEEN OF PORTUGAL. (a)

Whether a Foreign Sovereign Power is amenable to the Jurisdiction of an English Court of Equity, being a suitor voluntarily in an English Court of Law, and consequently must answer a Bill for Discovery?

ALDERSON B. said, before he gave his opinion finally upon the whole case, he wished to have an opportunity of reading the bill, in order to ascertain whether any part of the discovery prayed for by the bill was material to the question at issue in the Court of Law. The question then clearly was, whether the delay in selling the Portuguese bonds deposited as the collateral security for a debt, clearly under ordinary circumstances bearing interest, was such a laches on the part of Messrs. Rothschild as to deprive them of the right of charging Her Most Faithful Majesty with such interest in the account current between them. Now, if the condition of Her Most Faithful Majesty, through her lawfully authorized agents, was such as to induce Messrs. Rothschild, as reasonable men, to suppose that by such delay they were acting in conformity with her Majesty's wishes, they would probably be entitled to charge her with that interest. If the letters charged in the bill to have been written by her authority were so written, his Lordship thought, many of them, at all events, if not the whole correspondence, very proper to be laid before a jury, in order to prove that fact. Then, if so, the bill, which prayed, amongst other things, a discovery whether those letters were so written, prayed a discovery material to the plaintiff's defence at law. It might be true that part of the discovery prayed went beyond the discovery to which the plaintiffs were by law entitled. But this was immaterial upon the present demurrer, which was

a demurrer to the whole bill, and was not confined to the objectionable parts of it. He was therefore of opinion that Her Most Faithful Majesty, being voluntarily a suitor in a Court of English Law, became subject as to all matters connected with that suit to the jurisdiction of this Court of Equity; that the discovery prayed for by this bill was material to the plaintiff's defence at law in that suit; and that this demurrer was too large, and must be over-ruled, and that it must be with costs.

SHERIFFS' COURT—GUILDHALL.

Sept. 27.

SLACK v. WELLS.

POOR LAW AMENDMENT ACT—BASTARDY. Liability of the reputed Father of a Bastard Child.

The plaintiff in this case was a single young woman, in humble circumstances, and the defendant a tradesman of respectability, residing at Westerham, in Kent. About seven years ago an intimacy subsisted between the parties, the result of which was the plaintiff became the mother of a child, of which Mr. Wells was the reputed father, and the present action was brought to recover the sum of £7. 10s., being an arrear of three shillings a week, which had, down to a certain period, been paid by the defendant. The child was born in March, 1833. On condition that it was not affiliated, the defendant agreed to pay three shillings weekly towards its maintenance, and this he continued to do until the passing of the Poor Law Amendment Act, when the father discovered that as no order of affiliation had been made, he was no longer bound by law to contribute to the support of a child, which, by his former act, he had tacitly admitted to be his own. He had since married. A negotiation took place, and he consented for a time to pay the weekly stipend through the medium of a person of the name of Thompson; but, from some cause or other, Mr. Wells changed his mind, and discontinued the payment.

Mr. Ryland, for the plaintiff, observed that, notwithstanding her youthful indiscretion in one instance, she had ever since acted in a becoming manner; and, to her credit be it said, by her industry as a laundress, she kept an aged and infirm father without the walls of a workhouse. Having no other person in the world to whom she could apply for assistance, she again applied to the defendant, through the medium of an attorney; but his answers were, "Tell her to send the child to me, and I'll provide for it." She would not comply with that overture; and a further application was made, when the defen-

(a) See the report of this case ante Vol. I. p. 187.

dant, in words or in effect, said, "Tell her to send in her bill, and I'll pay it;" but this promise had never been kept, and the child remained a complete burden upon a comparatively helpless mother. The question to be considered was, were these expressions of a nature to render him liable in point of law as it now stood? That he was liable *prima facie* there could be no doubt. That the defendant had regularly paid three shillings a week without resistance, down to the passing of the new act, was quite clear, and he should prove in evidence that, after its passing, he caused the payments to be resumed. These facts, coupled with his verbal expressions which had been noticed, raised the question, has he or has he not, by a subsequent tender and promise, taken himself out of the purview of the clause under which he sought to shelter himself?

Mr. Serjeant ARABIN.—I understand that after the passing of the amended act, as it is called, having in the first instance refused payment, he entered into another arrangement, and resumed it for a time?

Mr. Petersdorff (for the defendant).—Yes; but there was no original obligation, there being no affiliation of the infant.

Mr. Serjeant ARABIN.—I have a strong opinion that this action cannot be sustained, and I am very sorry for it; that being so, I think the plaintiff had better consent to a nonsuit. I am sorry to say the law is against her. Is the defendant here?

Mr. Petersdorff.—No, my Lord.

Mr. Serjeant ARABIN (addressing the counsel and attorney for the defence).—Tell him from me that it is my anxious desire that he should pay the demand, and I think the jury agree with me (the jury rose and bowed in the affirmative); there can be no doubt he is the father of this child.

A desultory conversation took place upon the impolicy and iniquity of the clause under consideration, after which a nonsuit was entered.

Mr. Serjeant ARABIN again expressed his hope that the defendant would be informed of the sentiments of the jury.

Summer Assizes.

MIDLAND CIRCUIT.—1839.
Leicester.

CHARGE of the LORD CHIEF BARON to the GRAND JURY, occasioned by a paper put into his Lordship's hands, called "The Address of the Northern Political Union to the Middling Classes."

Gentlemen, it has not been my habit, upon occasions like the present, to travel out of the

immediate objects for which the grand juries are assembled. But I should not discharge the duty of the station in which I am placed, if I abstained from calling your attention to some observations on the momentous crisis which appears to be approaching—if, indeed, we are not already involved in it. I have not received any information that your county has yet been visited by the calamity which has disturbed several parts of the kingdom, and which, in some instances, has been displayed in seditious riots, and in the burning and the destruction of property by tumultuous assemblies of the people. But the nature of your population, and your contiguity to the county where these disastrous events have occurred, make it more than probable that this county also may be afflicted by the same scourge, unless every precaution that the law allows is taken to resist it, and unless these precautions are seconded by the spirit and energy of gentlemen of your rank and station acting in union with the mass of the population which, I have no doubt, are well affected to the laws and constitution of their country. I am further led to advert to this subject by a paper which has lately been put into my hands, called "The Address of the Northern Political Union to the Middling Classes." It is composed with great eloquence and ability, and very dexterously employs those topics which, at all times and under every form of government, are adapted to inflame the minds of the labouring classes against those who have property and who employ them, representing that riches are the fruits of labour, and therefrom deducing a consequence, very captivating to the labourer, that he who produces wealth ought to enjoy it. There is no form of government under which it would be difficult to persuade him who is destined to ride on the box that it would be more just and expedient that he should change places with his master and ride in coach. Moreover, this address, after painting in strong colours the advantages of a government by the people, and referring to the republic of America and the republics of the ancient world, first invites the middle classes to join the labouring class in effecting that revolution, upon which they are at all hazards determined; and in case of their refusal denounces them as the victims of that universal conflagration and ruin through which they mean to wade to their object.

Gentlemen, I must say, that no government, nor any form of civil society, can long be safe where such papers are permitted to circulate with impunity—to excite the poor against the rich—to encourage the destruction of that capital which alone can set labour in motion, and afford employment to the industrious, and to hold out a delusive theory to the multitude to excite in

them a notion that they, the mass, who in the due course of nature must be the governed, ought by right to be the governors, and to usurp by violence and bloodshed that dominion which they could not wield for a moment without destruction to themselves as well as their employers. They propose to do nothing less than to pull down the monarchy, to destroy the aristocracy, and to set up, in place of our present constitution, some visionary commonwealth, formed upon their own fanciful theories.

Gentlemen, I will venture to say that no government, that no form of civil polity, was ever constituted by a theory to last a day; I will go further and say, that no constitution of civil government was ever mended by a theory. It is practice and experience alone that give wisdom, and furnish a rule and a principle, for mending what may appear defective in the political constitution of a people. The proper objects of all social unions are the security of property, and the security of person. But for these objects why should men submit to any restraint upon their natural liberal? It is because, in a state of nature, the person, as well as the possession of each individual, is ever at the mercy of the strongest; that the union and organization of numbers become necessary to restrain the hand of violence, and to make the protection of each individual the common cause of all. The numerical strength of a people should therefore be so organized that it may ever be directed to the protection of property and of person. The attempt to govern by placing political power in the hands of the multitude is an attempt to subvert the very foundations of civil society. Power and property, the two great elements of the political edifice, must be united in order to give it stability. For if the property has not the power, the power will obtain the property, and there must be a perpetual convulsion and struggle till they are combined. The attempt, therefore, can only be followed by plunder and bloodshed. But if you could suppose, that by one universal agrarian law the whole territory were equally apportioned amongst the nation, so that each was doomed to earn his own subsistence by digging with his own spade, what would this be but a scheme of universal pauperism and misery—without capital, without power to resist internal violence or foreign invasion—the direct road to slavery and despotism? The best government, therefore, is that which more effectually in practice provides for the two objects—the security of property, and the security of personal liberty. Gentlemen, I have read and have meditated as much upon these topics as most men of the present age, and I will venture to assert with the most perfect confidence that the history of nations, whether ancient or modern, furnishes no example of any government which so effec-

tually provides for, and secures, these two great objects as the government of these realms. I put aside all theories of the constitution as set forth by writers; they are vain, and have sometimes led to mischief. But I desire to point out to your consideration those matters which form the practice and the habits of our social union, and which, I am sure, you will recognize, though they are not noticed, much less made the subject of panegyric, by any theoretical writer. I say, then, that under the forms of a limited monarchy, limited by the very institutions which support it, the people of this country have enjoyed greater practical liberty of person, and security for property, than were ever afforded by any republic whatever. In effect, the constitution of this country may be considered as formed of a number of small republics, gradually increasing in extent and importance, till they are combined under the great authorities of the state, at the head of which the monarch is placed. By the action and reaction of these upon each other, the force of the democracy on the one hand, and of the monarch on the other, either of which, if unchecked in its progress, would, like a mighty torrent, overwhelm the land, is broken into a number of small and circuitous channels, which, whilst they refresh and invigorate the soil, cannot waste or destroy it. Look for example to a parish, where all matters of local interest are governed by a vestry, consisting of the inhabitants; they repair their own roads; they provide for their own poor, for their own clergyman; appoint their own officers; and in general, without any interference of the Government, have the superintendence of all their own local interests. From a parish ascend to the divisions of a county, where the inhabitants are assembled four times a-year, at quarter sessions, for the purpose of taking part in the administration of justice; the grand juries are formed of the people of that district; so the petty juries—presided over by gentlemen who act as justices of the peace. These, you see, are instances of the administration of justice—the most important function of a government, in the hands of the people themselves. Again, if you ascend to the counties at large, twice in the year are assembled the principal gentlemen of the county to meet the judges, and to render the most important assistance in the administration of justice. No man can be put upon his trial for any offence without their previous sanction, after a full inquiry, by themselves, into the circumstances of his case; nor can he be finally condemned without the intervention of another jury, assembled at the same place and time, consisting of his equals, and who have no interest or wish but to do impartial justice: add to this the exercise and superintendence of the general police of the county, by the

principal gentlemen in rank, station, and property, who perform the important duties of magistrates, without pay, and without intervention of the Government, except when they find occasion to seek advice or assistance. Finally, the Parliament, formed by the representatives of the people, the hereditary nobility, the heads of the church, and the Crown—without the concurrence of all which estates no law can be made, and no tax imposed.

Thus the people are in a constant state of healthy agitation in the performance of all those functions which in other states are generally vested exclusively in the Government. The result of all this has been the security of property, the encouragement of industry, the advancement of prosperity, with a greater degree of personal and individual liberty than was ever enjoyed by any other people.

Gentlemen, this is not the work of any theory; our usages have grown up by time, been improved by experience, and have become grafted into the habits and affections of the people. I agree with the great statesman of the last age, Mr. Edmund Burke, who says, there is no such thing as liberty in the abstract. It cannot result from a single law, nor even from the will of the people. It must be bound up with, and form part of, the customs and usages which distinguish one nation from another. The liberty of an Englishman, therefore, is English liberty. No true Englishman can be attached to any other sort of liberty. The most perfect system of laws in theory, as well as the most perfect forms of government which the philosopher can devise, are of no force, unless they have been rendered by usage congenial to the feelings and manners of the people. “*Quid leges sine moribus?*” says the poet, who speaks only the language of truth in saying that laws avail nothing unless founded upon the habits and usages of a nation.

Gentlemen, entertaining these opinions, I cannot do better on this occasion than borrow from her Majesty's proclamation which has just been read to you the precept which she has thereby commanded me, as one of her judges, to inculcate, which is, that I should exhort you to follow that example which her Majesty informs you she has determined to set to her people, of discountenancing all vice, immorality, and impiety, and generally all those persons who by their conduct and character are disturbers of the public peace; and, on the other hand, to give countenance and encouragement to those only who show by their conduct a disposition to fulfil the duties of religion, and support the authority of the law. Indeed I will venture to say, that if every gentleman would strictly adhere in his own sphere, and within the circle of his own

influence to the injunctions contained in this her Majesty's proclamation, the necessity of providing gaols and new system of prison discipline would be greatly diminished.

Gentlemen, I have been induced to address these topics to you, because I cannot but feel that under the circumstances in which we are placed, our chief reliance for the preservation of all our happy institutions depends upon the spirit, the zeal, and the energy of the gentry of England in animating, and by their example encouraging, that part of the population which is well affected to resist the machinations and the violence of those who have declared war against their country.

ABOLITION OF ARREST FOR DEBT AMENDMENT ACT.

CAAME INTO OPERATION 1st OCTOBER, 1839.

2 & 3 Vict. Cap. XXXIX.

An Act to amend an Act passed in the last Session of Parliament, for abolishing Arrest on Meane Process in Civil Actions except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England. [17th August, 1839.]

Whereas by an Act passed in the last Session of Parliament, intituled “An Act for abolishing Arrest of Meane Process in Civil Actions except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England,” it was amongst other things enacted, that the sum of three shillings and no more shall be paid to any printer or proprietor of a newspaper for the insertion of any advertisement by that Act directed to be inserted in any newspaper, and all printers and proprietors of newspapers were thereby required to insert the same, on payment of the said sum of three shillings for the insertion thereof, in such form as the Court for the Relief of Insolvent Debtors, or any Commissioner thereof, shall from time to time direct: and whereas it is just and expedient that the said Act should be altered and amended as hereinafter mentioned: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that so much of the said Act as is hereinbefore recited shall be and the same is hereby repealed; and that from and after the passing of this Act all printers and proprietors of newspapers shall and are hereby

required to insert any advertisement or advertisements by the said recited Act directed to be inserted in any newspaper, on payment of a reasonable compensation for the insertion thereof, in such form as the said Court, or any Commissioner thereof, shall from time to time direct.

II. And whereas it is expedient that persons residing at a distance greater than ten miles from the Court-house in Portugal Street, who may be willing to enter into recognizances of sureties for the due appearance of insolvent debtors before the Court, or before Commissioners on their Circuits, or before justices of the peace in Berwick-upon-Tweed, should be enabled to enter into such recognizances without the necessity of appearing for such purpose before the Court itself at its usual and ordinary place of sitting; be it therefore enacted, that the Chief Commissioner and other the Commissioners of the Court for Relief of Insolvent Debtors for the time being shall and may, by one or more commission or commissions under the seal of the said Court, from time to time as occasion shall require, empower such and so many fit and proper persons as they shall think necessary, in all and every the several towns and counties within England and Wales and the town of Berwick-upon-Tweed, to take and receive all and every the recognizance or recognizances of sureties into which any persons shall be willing to enter for the due appearance of insolvent debtors according to such several and respective recognizances, and in such form as the Court, in pursuance of the statute in that behalf, may and shall direct, and require.

III. And be it enacted, that in any case of a prisoner whose estate and effects shall have been or shall hereafter be, by order of the Court for Relief of Insolvent Debtors, vested in the provisional or other assignee, and who shall be confined in the gaol of any county, town, or place other than in London, Southwark, Middlesex, or Surrey, and who shall have filed his schedule in the said Court according to the statute in that behalf, it shall and may be lawful for any person or persons who may be willing to enter into such recognizances as before mentioned, whose usual and ordinary place of residence shall be distant more than ten miles from the Court-house in Portugal-street, London, to appear before a person duly appointed and empowered in manner aforesaid, and there to enter into and acknowledge such recognizance of sureties for the due appearance of the insolvent, according to such forms and in such terms and manner as shall or may be prescribed by the said Court; which said recognizances of sureties so taken as aforesaid shall be transmitted and filed in the said Court, with an affidavit of the due taking of the said recognizances of such sureties by some credible person present at the taking thereof, upon

payment of such fees as have been usually received for the taking of recognizances in the said Court; which recognizances so taken, transmitted, and filed shall be of the like force and effect as if the same were taken before the said Court; for the taking of every such recognizance of sureties the person or persons so empowered shall receive only the sum or fee of two shillings and sixpence and no more.

IV. And be it enacted, that the Commissioners of the said Court shall make such rules and orders regulating the amount and for the taking of such recognizances as to them shall seem meet, so as such sureties be not compelled to appear in person in the said Court to justify themselves, but the same may and is hereby directed to be determined before the said Court, or a Commissioner thereof, by affidavit or affidavits duly taken before the person or persons so empowered as aforesaid who are hereby empowered and required to take the same.

V. And be it enacted, that any Commissioner of the said Court on his circuits shall and may take and receive all and every such recognizances of sureties as any person or persons shall be willing to make and acknowledge before him, which, being transmitted, shall without oath be filed in manner aforesaid, upon payment of the usual fees.

VI. And be it enacted, that as soon as such sureties shall have justified by affidavit in manner aforesaid, and such recognizances as hereinbefore mentioned shall have been filed, the said Court shall thereupon issue a warrant to the gaoler for the discharge of such insolvent from custody accordingly, and who shall have such and the like privileges, and be subject to such and the like liabilities as the statute in that behalf directs.

VII. And be it enacted, that this Act shall commence and come into operation on the first day of October, one thousand eight hundred and thirty-nine, except where any other commencement is specified in this Act.

NEW METROPOLITAN POLICE ACT.

2 & 3 Vict. CAP. XLVII.

An Act for further improving the Police in and near the Metropolis.—[17th August, 1839.]

(Continued from p. 351.)

XXXIX. And be it enacted, that if it shall appear to the Commissioners of Police that any fair usually holden within the Metropolitan Police district has been holden without lawful authority, or that any fair lawfully holden within the said district has been usually holden for a longer period than is so warranted, it shall be competent

to such Commissioners to direct one of the superintendents belonging to the Metropolitan Police force to summon the owner or occupier of the ground upon which such fair is usually holden to appear before a magistrate at a time and place to be specified in the summons, not less than eight days after the service of the summons, to show his right and title to hold such fair, or to hold such fair beyond a given period (as the case may be); and if such owner or occupier shall not attend in pursuance of such summons, or shall not show to the magistrate who shall hear the case sufficient cause to believe that such fair has been lawfully holden for the whole period during which the same has been usually holden, the magistrate shall declare in writing such fair to be unlawful, either altogether or beyond a stated period (as the case may be); and the Commissioners shall give notice of such declaration by causing copies thereof to be affixed on the parish church and on other public places in and near the ground where such fair has been usually holden; and if, after such notices have been affixed for the space of six days, any attempt shall be made to hold such fair if it shall be declared altogether unlawful, or to hold it beyond the prescribed period if it shall be declared unlawful beyond a certain period, the Commissioners of Police may direct any constable to remove every booth, standing, and tent, and every carriage of whatsoever kind conveyed to or being upon the ground for the purpose of holding or continuing such fair, and to take into custody every person erecting, pitching, or fixing, or assisting to erect, pitch, or fix, any such booth, standing, or tent, and every person driving, accompanying, or conveyed in every such carriage, and every person resorting to such ground with any show or instrument of gambling or amusement; and every person convicted before a magistrate of any of the offences last aforesaid shall be liable to a penalty not more than ten pounds.

XL. Provided nevertheless, and be it enacted, that if the owner or occupier of the ground whereon any such fair has been usually holden shall, when summoned before the magistrate, enter into a recognizance in the penal sum of two hundred pounds (which recognizance such magistrate is hereby authorized to take) with condition to appear in the Court of Queen's Bench on the first day of the then next term, and to answer to any information which her Majesty's Attorney or Solicitor-General may exhibit against such owner or occupier touching his right and title to such fair, and to abide the judgment of the Court thereon, and to pay such costs as may be awarded by the Court, which costs the said Court is hereby authorized to award, then, notwithstanding the magistrate may have declared such fair to be

unlawful, the Commissioners of Police shall forbear from giving notice of such declaration, and from taking any further measures thereon, until judgment shall be given by the said Court against the right and title to such fair; and the magistrate taking such recognizance shall forthwith transmit the same to one of her Majesty's principal Secretaries of State, to the end that the same may be filed in the said Court, and such further directions may be given thereon as to such Secretary of State may seem fit.

XLI. And be it declared and enacted, that after the passing of this Act every person who, by reason of his or her freedom of the mystery or craft of Vintners of the city of London, or of any right or privilege of such mystery, shall claim to be entitled to sell foreign wine by retail, to be drunk or consumed on the premises within the Metropolitan Police district, without licence, shall be subject to all the provisions of all Acts made for the regulation of persons so licensed (except those provisions which require or refer to the taking out of a licence either from any justice of the peace or from the Commissioners of Excise), and, in the case of any offence committed by him or her against the tenor of the licence granted under the provisions of any Act for the sale of exciseable liquors by retail to be drunk or consumed on the premises, shall be liable to be dealt with, proceeded against, and punished in like manner as if selling wine by licence and not by virtue of such claim or privilege.

XLII. And be it enacted, that no licensed victualler or other person shall open his house within the Metropolitan Police district for the sale of wine, spirits, beer, or other fermented or distilled liquors on Sundays, Christmas Day, and Good Friday before the hour of one in the afternoon, except refreshment for travellers.

XLIII. And be it enacted, that every person licensed to deal in exciseable liquors within the said district, who shall knowingly supply any sort of distilled exciseable liquor to any boy or girl apparently under the age of sixteen years, to be drunk upon the premises, shall be liable to a penalty not more than twenty shillings, and upon conviction of a second offence shall be liable to a penalty not more than forty shillings, and upon conviction of a third offence shall be liable to a penalty not more than five pounds.

XLIV. And whereas it is expedient that the provisions made by law for preventing disorderly conduct in the houses of licensed victuallers be extended to other houses of public resort; be it enacted, that every person who shall have or keep any house, shop, room, or place of public resort within the Metropolitan Police district, where provisions, liquors, or refreshments of any kind shall be sold or consumed, (whether the same shall be kept or retained therein or procured else-

where,) and who shall wilfully or knowingly permit drunkenness or other disorderly conduct in such house, shop, room, or place, or knowingly suffer any unlawful games or any gaming whatsoever therein, or knowingly permit or suffer prostitutes or persons of notoriously bad character to meet together and remain therein, shall for every such offence be liable to a penalty of not more than five pounds : Provided always, that if the offender be a licensed victualler, or licensed to sell beer by retail to be drunk on the premises, this enactment shall not be construed to exempt him from the penalties or penal consequences to which he may be liable for committing an offence against the tenor of the licence to him granted.

XLV. And be it enacted, that every person who shall make or use or allow to be made or used any internal communication between any house, shop, room, or place of public resort not licensed for the sale of wine, spirits, beer, or other exciseable articles within the said district, and any house, shop, room, or place licensed for the sale of wine, spirits, beer, or other exciseable articles, or in which wine is sold by a free vintner, shall be liable to a penalty not more than ten pounds for every day that such communication shall be open.

XLVI. And be it enacted, that it shall be lawful for the said Commissioners of Police, by order in writing, to authorize any superintendent belonging to the Metropolitan Police, with such constables as he may think necessary, to enter into any house or room kept or used within the said district for stage-plays or dramatic entertainments, into which admission is obtained by payment of money, and which is not a licensed theatre, at any time when the same shall be open for the reception of persons resorting thereto, and to take into custody all persons who shall be found therein without lawful excuse ; and every person keeping, using, or knowingly letting any house or other tenement for the purpose of being used as an unlicensed theatre shall be liable to a penalty not more than twenty pounds, or in the discretion of the magistrate may be committed to the House of Correction, with or without hard labour, for a time not more than two calendar months ; and every person performing or being therein without lawful excuse shall be liable to a penalty not more than forty shillings, and a conviction under this Act for this offence shall not exempt the owner, keeper, or manager of any such house, room, or tenement from any penalty or penal consequences to which he may be liable for keeping a disorderly house, or for the nuisance thereby occasioned.

XLVII. And be it enacted, that every person who, within the Metropolitan Police district, shall keep or use, or act in the management of any house, room, pit, or other place for the pur-

pose of fighting or baiting lions, bears, badgers, cocks, dogs, or other animals, shall be liable to a penalty not more than five pounds, or in the discretion of the magistrate may be committed to the House of Correction, with or without hard labour, for a time not more than one calendar month ; and it shall be lawful for the Commissioners of Police, by order in writing, to authorize any superintendent belonging to the Metropolitan Police force, with such constables as he shall think necessary, to enter any premises kept or used for any of the purposes aforesaid, and take into custody all persons who shall be found therein without lawful excuse, and every person so found shall be liable to a penalty not more than five shillings, and a conviction under this Act of this offence shall not exempt the owner, keeper, or manager of any such house, room, pit, or place from any penalty or penal consequence to which he may be liable for the nuisance thereby occasioned.

XLVIII. And be it enacted, that if any superintendent belonging to the Metropolitan Police force shall report in writing to the said Commissioners that there are good grounds for believing any house or room, within the Metropolitan Police district, to be kept or used as a common gaming-house, and if two or more householders dwelling within the said district, and not belonging to the Metropolitan Police force, shall make oath in writing to be by them taken and subscribed before a magistrate, and annexed to the said report, which oath every magistrate is hereby empowered to administer and receive, that the premises complained of by the superintendent are commonly reported and are believed by the deponents to be kept or used as a common gaming-house, it shall be lawful for the Commissioners, by order in writing, to authorize the superintendent to enter any such house or room, with such constables as shall be directed by the Commissioners to accompany him, and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who shall be found therein, and to seize and destroy all tables and instruments of gaming found in such house or premises, and also to seize all monies and securities for money found therein ; and the owner or keeper of the said gaming-house, or other person having the care and management thereof, and also every banker, croupier, and other person who shall act in any manner in conducting the said gaming-house, shall be liable to a penalty not more than one hundred pounds, or, in the discretion of the magistrate before whom he shall be convicted of the offence, may be committed to the House of Correction, with or without hard labour, for a time not more than six calendar months ; and

upon conviction of any such offender, all the monies and securities for monies which shall have been seized as aforesaid shall be paid to the said receiver, to be by him applied towards defraying the charge of the police of the metropolis; and every person found in such premises without lawful excuse shall be liable to a penalty not more than five pounds: Provided always, that nothing herein contained shall prevent any proceeding by indictment against the owner or keeper or other person having the care or management of any gaming-house; but no person shall be proceeded against by indictment and also under this Act for the same offence.

(To be continued.)

NOTICE TO CORRESPONDENTS.

R. G.—See "Legal Guide," Vol. I. p. 175.
J.C.S. C. will be answered at our Publishers'.

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The Publishers beg respectfully to inform the Subscribers and the Profession that this Part will contain a NEW FORM of a TRUST DEED for MORTGAGE Security, with copious Notes; and will also embrace the present state of the Law relating to Branches of Trust committed by Trustees on selling Trust property, which has required considerable labour and attention on the part of the Author; and the additional circumstance of his state of health having compelled his going into the country has prevented the publication on the 1st instant. The MS. has been received, and is in the press: the Part shall appear next week.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, 5th October, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, OCTOBER 12, 1839.

[No. 24.

LEX LOCI DOMICILII.

PART II.

As to the manner in which instruments, executed in *England* by a domiciled *Englishman*, are to be construed and dealt with in respect of evidence by a Scotch Court, in so far as these instruments relate to the distribution of personal property, situated within the territory of *Scotland*.

LAW OF EVIDENCE in these cases.

WHETHER the ENGLISH RULE OF CONSTRUCTION is to be applied?

WHETHER the ENGLISH RULE OF EVIDENCE is to be applied?

(Continued from p. 355.)

LORD BROUFGHAM continued.—

Could the appropriation not have been effected by the testator himself in his life-time?

Dr. Lushington replied—I mean to establish before your Lordships, on the authority of the case of *Lord Minto v. Elliott*, that it could not; for, in order to make a valid appropriation during the party's life-time, there must be an interest created in some third party.—He read extracts from the judgments of *Lord Gifford*, in the case just cited, and of *Chief Baron Alexander*, in *Gaskell v. Gaskell* (a).

Lord Brougham said—The reason why they talk of a testamentary deed in Scot-

land is this: By a testament in Scotland you cannot convey a real estate or touch it at all; it must be by deed *inter vivos*, but then there is in Scotland the seal; there is no difference between simple contract and bond debts, consequently they do not talk of a deed as we do. By a deed, they mean an instrument under seal; a will does not require a seal, a deed does.

His Lordship further said, in the course of the arguments for the respondents: I take the case to consist of two branches; the one is the question of evidence of English instruments, and the Scotch Court dealing with them in two ways; the other is the appropriation. Perhaps you, my Lord-Advocate, do not mean to deny, nor does, I suppose, Dr. Lushington on his part mean to deny, that his case might stand on the second ground, that of appropriation, which ever way the first is disposed of? You have two points whichever way we decide; the first point is the one I wish particularly to call my Lord-Advocate's attention to, and that is,—you have to show, though I think you may assume, that the law of domicile is to govern the decision—then two questions arise in applying that principle; are you to take the construction which the English law would put upon the instrument, or are you to come at the conclusion by the Scotch law principle?

That is the first question, and upon that question I am inclined to think that it is the

(a) *You. & J.* 502. 510.

English law that is to govern. The second is a different question, whether or not the English or the Scotch law of evidence is to regulate the admission or rejection of certain evidence in this case. We are putting the two points on the true ground, whether the one law or the other is to be the governing rule. Again, supposing it is decided that the Scotch law is to govern, you are to satisfy me that by the Scotch law, regard being had to the confirmation and the proceedings there, you have a right to avail yourselves of them. Then comes the question of appropriation kept apart from the other two. That seems to me to be the scheme of the argument. It is not merely a technical matter, but a very substantial matter, for it is whether it is the man's last will or not; the question raised on admitting a paper to probate is, whether it is testamentary or not? He may have one will which is a testamentary per and not revoked by the last will, but he may also have a paper which ceased to be his will, because he has made his last will. A man may have two wills, but he cannot have two last wills. How you can ever make this out to be a subsisting will, my Lord Advocate, I cannot say. This, I take upon me to say, would never be admitted to probate in England—I mean the former will of April, 1828.

The question is, whether an English rule of evidence is to be applied, or a Scotch rule of evidence. By the law of England, if a man makes a will written all with his own hand, and bequeaths £1,000. to one, and £1,000. to another, and the residue to a third, and signs it with his own hand, and it is in every respect in the form of a will according to the English law as it at present stands—in short, suppose he makes such a will as would be admitted to probate, suppose it to have been proved as his last will at Doctors' Commons; then suppose any person gets possession of that will (which ought to have been regularly filed at Doctors'

Commons) by spoliation or by negligence of the officer in bringing it down, which he may be compelled to do by a *subpoena ducet tecum*—suppose you bring down that original will and produce it at York, at *nisi prius*, and even prove it was out of Doctors' Commons, and in the custody of the proper officer, what you would think of that in Scotland would be, that it would be the most perfect proof of the instrument, yet by the rules of evidence in England, it cannot be received at *nisi prius*, and the party would be non-suited, or have a verdict passed against him if he did not choose to be non-suited, if he had not another instrument, and if he only produced the original will. By our rules of evidence he must produce the probate, which is a sentence of a court of competent jurisdiction declaring that to be the will; that is the probate without the will but with a copy of the will, so that is a case in which a copy is evidence and not the original. It is the sentence of a Court, and proves itself under the seal of the Court. Now, if that be so in the case of a will which has had probate, how much more is it the case where you produce a will which never has had probate, consequently a Court and Jury here, or a Court of Equity, never could look at that instrument, it is the probate alone that lets it in *quasi will*. They might see it for other purposes, as in a question of forgery, or they might see it if it were referred to in another instrument, or in a question of sanity. Now that is the law here; and this being the case of a domiciled Englishman, is the law here to be the governing rule as to the admissibility of evidence in Scotland, where the action is brought?

(*To be continued.*)

PROBLEM XXIV.

VOL. 2.

TRUSTS BY OPERATION OF LAW.

What expressions of a Testator will amount to such an absolute conversion of real estate

into personal, that a void or lapsed legacy even out of the proceeds of the Sale, shall, as if the property had been personal, fall into the residuary bequest, instead of resulting to the Heir?

Imperial Parliament.

HOUSE OF COMMONS.

STOCKDALE v. HANSARD.

Third Report of the Select Committee appointed to inquire into the proceedings in the action of *Stockdale v. Hansard*, and who were empowered to report their opinion thereupon from time to time to the House;—have proceeded in the consideration of the matters to them referred, and have agreed to the following report:—

Your committee, in their report of the 15th of June, in which they submitted for the consideration of the House their views as to the different lines of conduct which might be pursued with respect to the damages awarded against the defendants in the action of *Stockdale v. Hansard*, expressed their hope that they might shortly be enabled to present to the House a further report, in which it was their intention to have entered into the consideration of the important general questions which have been raised by these proceedings. They have now to entreat the indulgence of the House in stating that this hope has been disappointed, and that they have not found it possible to complete the task which they were called upon to undertake.

The consideration which they have already given to this important subject has been sufficient to satisfy their own minds that the opinion upon it, expressed by a former committee and confirmed by a vote of the House in the year 1837, was strictly in accordance with the law and with the constitution of this country; but they have found that much more labour and research than they had anticipated will be required in preparing such an exposition as they would wish to furnish, of the grounds on which this conclusion is to be supported, and in weighing, as they deserve, the reasons assigned for the contrary judgment which has been pronounced by the Court of Queen's Bench. The late period of the session at which this inquiry was commenced, and the professional avocations of some of their members, whose legal and constitutional learning rendered their assistance of the greatest value to them, have made it impossible for your committee satisfactorily to accomplish an under-

taking which has proved thus laborious. Under these circumstances it has appeared to them that it will be advisable rather to postpone for a time making their final report than to present one which they know must necessarily be incomplete and unsatisfactory to themselves, upon a question so deeply affecting the authority of the House, and its means of discharging the high duties with which it is entrusted.

Your committee are not insensible to the inconvenience of this delay, but upon the whole they think it will be attended with less disadvantage than must result from their attempting to agree to a report without having been able to give it all the consideration it requires; and they are the more disposed to come to this conclusion in consequence of the opportunity which has recently been afforded to the House of manifesting its determination to maintain its privileges by its own authority. They trust that the resolutions which the House adopted, upon the notice given to Messrs. Hansard of another action for the publication of a report printed by order of the House, will serve as a warning of the consequences to which any similar proceeding will expose the parties by whom they may be attempted.

For these reasons, your committee beg leave respectfully to request that they may be permitted to defer, for the present, the further prosecution of their inquiry, in order that the consideration of this subject may be resumed on the commencement of the ensuing session.

20th August, 1839.

Law Reports.

VICE-CHANCELLOR'S COURT.—June 26.

STUBBS v. LISTER.

Mortgagor and Mortgagees—Liability of a Joint Stock Bank to produce the Bank Books and Paper to Shareholders and their Assignees in Bankruptcy.

Mr. Richards moved for the inspection of certain books, papers, and documents belonging to the Liverpool Union Bank. The plaintiffs were the assignees of two persons who were jointly holders of shares in the bank to the amount of £10,000. These shares were deposited with the bank by way of security for any advance made in the course of a banking account to the proprietors of the shares. The parties, however, having become bankrupt, and the shares being sold, the assignees filed the present bill for an account of the produce of the sale, charging that the whole amount had not been accounted for, and the motion was now made for the inspection of books and papers belonging to

the banking company, to enable the plaintiffs to establish the charge of fraud made against them. The company did not resist the production of such books and documents as were produced at the public meetings of the shareholders, but refused the inspection of any other, on the ground of an express stipulation in the deed of partnership which constituted the company, that no shareholder should be at liberty to call for or inspect any books, papers, or documents of the company, but such as were produced at the request of a general meeting of the shareholders. The learned counsel, in support of the motion, submitted, that although a mere shareholder might be bound by such a covenant, it could not affect the plaintiffs, who stood in the characters of customers to the bank from the time of the deposit, or the bank, who from that moment were mortgagees of the shares, and that if the Court permitted such covenants to operate as a bar to discovery, there was no transaction, however fraudulent, that might not be concealed.

The VICE-CHANCELLOR said it was clear to him that the question was one merely between shareholders and the bank, and although the bank were mortgagees and the shareholders mortgagors, the transaction was only a mortgage of shares, which could not give a mortgagee a greater right than a shareholder. He did not agree that such covenants would protect a transaction, however fraudulent, for if a bill were filed alleging the whole affair to be a bubble, and stating the grievance complained of in the bill as a particular instance of the fraud, the Court would certainly interfere. His Honour directed the order so far only as it related to the inspection of the books and papers produced at public meetings of the shareholders.

ROLLS COURT.—June 29.

GREENWOOD AND ANOTHER, EXECUTORS OF JOHN BOWLES, v. WAKEFORD.

TRUSTEES, their liabilities.—EXECUTORS OF TRUSTEES.—RULE. Where persons undertake to be Trustees, they are not entitled to act with caprice, but if they find the Trust property involved in complicated questions, which they did not contemplate when they undertook the trust, they have a right to come to the Court for relief, which will judge of the circumstances.

This bill was filed by the plaintiffs, executors of John Bowles, who was the surviving trustee in the settlement on the marriage of Miss Bowles with the defendant Wakeford. The bill was originally filed in the name of Miss Wakeford,

then an infant, the issue of the marriage; but upon her attaining 21, she withdrew from the suit.

Mr. Pemberton, for the plaintiffs, stated, that the defendant, the husband, had received from the original trustees, Edward and John Bowles, portions of the trust monies comprised in the settlement, upon the security of his promissory note and the deposit of title deeds, in a manner not authorized by the settlement, and that the plaintiffs, the executors of the surviving trustee, could not safely act in their office as executors, unless the marriage settlement monies were replaced on proper securities, conformably with the settlement, and the differences arising from the price of stocks were made good by the defendants, for otherwise the plaintiffs, as executors, might hereafter be made liable for the conduct of their testator.

Mr. Kindersley, for the defendant Wakeford, the husband, contended that, however desirable it might be to have an appointment of new trustees in lieu of the executor of the surviving trustee, the plaintiffs were not entitled to call for it. The plaintiffs had themselves stated that they had not incurred any personal responsibility, and they were now creating a great and unnecessary expense by asking the Court to do that for them which they might have done for themselves by a mere declaration. The suit was not brought for any beneficial purpose, or to obtain relief from any real responsibility, as the loan of the money to the husband by the now deceased original trustees was sanctioned by the daughter, the only issue of the marriage, and the only party who had a right to complain. The suit could not, at all events, be entirely sustained, and even if the Court should consider it might be sustained in part, the plaintiffs ought to pay the costs occasioned by that part of their bill which was not sustainable.

Mr. Temple, for Miss Wakeford, said she was the only issue of the marriage, and therefore the party most beneficially entitled under the settlement, and she made no complaint. The bill prayed a remedy for an alleged breach of trust, and also for an appointment of new trustees. It was for the trustees to show that they had taken the best and cheapest method for the latter purpose. The alleged breach of trust was, that the trust stock had been sold out, and the proceeds advanced to Wakeford, who had engaged to replace the stock, but had not done so. The letter of the 11th of August, 1824, from John Bowles, the surviving, but now deceased, trustee, called upon Wakeford to pay the money into the bankers. The object of the application was, that the money lent should be repaid, and not that the stock should be replaced. There had been, he would admit, some antecedent difficulty in the

advance, and a member of the family beneficially interested, or a person responsible for the advance, might have a right to file the bill, but that was not the present case. The parties interested did not, nor ever did, claim their full rights under the settlement. The bill was filed under such circumstances, that even if the plaintiffs, the representatives of the surviving trustee, were technically right, they were so morally wrong that the Court would not give them costs. The money was a loan to Mr. Wakeford, the father. Miss Wakeford was at the time very nearly of age. Mrs. Wakeford, the party entitled to the life interest, was living with her husband, who expended the money in support of her and his daughter. It did not appear that the plaintiff ever made the wife or daughter acquainted that this suit would be brought. Mrs. Wakeford said she had not refused, because she had not been requested, but if she had been, she would have refused to have joined in the suit. Miss Wakeford, who was, when the suit was instituted, nearly 20, now said that the suit was without her knowledge, and that she disapproved of and disclaimed it. As to the other prayer of the bill, for appointing new trustees, the costs of that were always in the discretion of the Court. There ought not to have been a long expensive bill for that appointment. A petition might have been presented under the Act for that purpose at a trifling expense. This bill and answer extended to 100 brief sheets, and the expenses were fourfold more than was necessary. He asked that the Court would not give the trustees their costs, on account of their not having proceeded by petition, and thereby followed the policy laid down by the legislature. He prayed the Court to protect the trust estate from the expense of the proceeding. As to the plaintiff's complaint of the liability of the real estate of the surviving trustee to be charged, the bill stated that those estates had devolved upon his coheiresses at law, who were made parties to this suit, and therefore, with regard to the real estate, the plaintiffs were not liable by their own showing, and therefore had no right to complain. The bill, to a great extent, had been improperly framed, and, so far as it was so, the costs of it ought not to be thrown upon the estate. If any costs were to be given to the plaintiffs, it should only be for so much of the bill as was necessary. There was no dispute in the family, the wife and daughter were perfectly satisfied as the matter stood, and they were satisfied that the husband should receive the rents and dividends, which were applied for their common support.

The Counsel for the coheiresses at law of John Bowles, the surviving trustee, prayed that they might be dismissed. It had been contended that by John Bowles's will his trust estates had

passed to the devisees; other parties had contended that they did not so pass, but descended to the testator's coheiresses, on which account they had been made defendants to the suit. They submitted to such directions as the Court should make, and prayed to have their costs.

Mr. Pemberton replied. The greatest part of the costs of which the defendants now complained had been occasioned by their own fault. But for their misconduct the costs would not have been one-tenth part so much. They said there was no pretence for appointing new trustees; that there were no trusts to be executed; that the bill was wantonly filed; that there was nothing but what might have been done without the intervention of the Court; and they stated in their answer that there was no necessity for new trustees. His (Mr. Pemberton's) reply was, that the defendants themselves, on the death of John Bowles, called upon the plaintiffs to appoint new trustees. The plaintiffs looked, in consequence, into the deeds, and found there was no power given to appoint them. They then examined further into the matter, and found that of the £200. mortgage money lent to the plaintiff, not one shilling had been restored; that the £2,000. stock sold out had not been restored or repaid; and that the title deeds deposited by the defendants to secure this money were no longer in the possession of the trustees, and they also found that there was an attempt to recall the voluntary settlements made by Mr. Wakeford in 1823. The funds were gone, the deeds were not forthcoming, some of them were no longer in existence. The plaintiffs were the representatives of a surviving trustee, liable for every shilling of the money, and the defendant, Wakeford, instead of saying he would do all he could to replace it, called upon the plaintiffs to let the matters remain as they were, so that the money was not forthcoming. Whenever the order was obtained for paying the money into court, the execution of it was resisted, and only upon the writ of execution being issued was it forthcoming. Neither the money nor the stock before that time were forthcoming, and Miss Wakeford, who had now attained 21, said she did not want the stock replaced. Did she at the time abandon her interest in it? No: she said, "I will lie by." And what would have been the course? Could any body deny that on a bill filed by her it would have been the bounden duty of these executors to replace the stock? Why ought the plaintiffs to have left the breach of trust to be remedied until Wakeford was dead, and the claim would fall upon themselves? The plaintiffs were the trustees in fee of the legal estate of that property on which the £200. was originally secured by mortgage. The equity of redemption of the mortgaged estate had been purchased by Wake-

ford, and by him conveyed to Davis to uses similar to those in Wakeford's marriage settlement. It might be proper that this estate should be taken in lieu of the £200. mortgage money, but the settlement being after marriage, and voluntary, would not be good against Wakeford's creditors, although it would bind him.

Mr. Pemberton.—The freeholds by the marriage settlement of Mr. and Mrs. Wakeford, were limited to the trustees and their heirs during the life of Mrs. Wakeford in trust, to receive the rents and pay them to her. It was doubtful whether these freeholds were vested in the devisees of John Bowles or his co-heiresses. It depended upon the codicil of John Bowles, which was set out on the bill. The words are, "I declare that the devise in my will of the residue of my real estates was not intended to include any estate vested in me as trustee or mortgage in fee." The co-heiresses were made defendants to the suit. The stock was sold out for, and at the request of, Wakeford, who undertook to restore it. The irregularity in not taking the consent of the wife in writing would make the trustees liable for that stock. The power to advance the money to the husband was only upon his bond, and no bond had been taken. Miss Wakeford, the only issue of the marriage, had attained 21, and from the age of Mrs. Wakeford, who had the interest for her separate use for life, there was no probability of other issue. There was no clause against anticipation, and therefore her consent would be sufficient. There were two voluntary settlements, one on the 6th of July, 1823, in which Wakeford assigned his life interest under the settlement on his marriage to trustees, for the benefit of his family; the other on the 4th of September, 1823, when Wakeford conveyed to the trustees the equity of redemption he had purchased of the estate, on which the £200. settled, was mortgaged. In 1828, Wakeford desired to recal these settlements, and Mrs. Wakeford wrote to the trustees on the subject, stating that the circumstances on account of which those two settlements were made had ceased. Upon the death of John Bowles these deeds were not found to be in his possession. Copies of them were in Court. He submitted the plaintiffs were entitled to a decree for the appointment of new trustees with respect to the real estate and the £200. secured upon mortgage, which deed and also the stock sold out should be replaced; and that there should also be a declaration respecting the voluntary settlements made after the marriage. The great perplexity of the proceedings had arisen from the conduct of the defendant Wakeford, who represented upon his answer that the deeds had never been deposited at all. The bill could not have been made shorter than it was. If the

defendants had not acted as they had done—if they had not resisted the application of the plaintiffs in every shape, then, instead of 60, the bill might not have been more than six brief sheets; and it was entirely in consequence of the mode in which the case was met that the great expense had arisen. Where a party had accepted a trust he could not denude himself of it for his own caprice except at his own expense, but it was entirely different in the representatives of a trustee. This distinction had always been taken—that although the original trustee must abide by what he had undertaken his representatives were entitled to be discharged from it. The case of "*Coventry v. Coventry*" would prove that.

Lord LANGDALE.—The plaintiffs were the executors and devisees of John Bowles, who was the survivor of the two trustees of Mr. and Mrs. Wakeford's marriage settlement. That settlement comprised property of different sorts, freehold estates, mortgage money, and stock. John Bowles died on the 25th of April, 1836, and the plaintiffs had the duties of their testator cast upon them. Application was made to them to appoint new trustees which induced an inquiry respecting the trusts. The consequence was that there was nothing found in the condition in which it ought to have been, pursuant to the deed in which the trusts were created. There had been various dealings with the trust property between the deceased trustees and Wakeford the tenant for life. The property had been altered in condition, and the alteration had been made in a manner inconsistent with the trusts. The plaintiffs found that the estate of their testator was necessarily subject to very great responsibility. There was in the settlement a power of advancing money to the husband upon his bond, with the consent in writing of his wife. The money had been advanced without the bond and without such written consent. There was an infant child of the marriage, and there was legal possibility of future issue. That infant had a right to insist that this advance was a breach of trust, and that the stock should be replaced, for it had been sold out in a manner not appointed by the deed. The representatives of the surviving trustee, finding themselves in this situation, were naturally desirous to relieve the estate of their testator from the responsibility thus thrown upon it. There was a clear demand against them on a breach of trust, in which their testator had concurred for the benefit of the husband. He (Lord Langdale) was surprised to hear it argued that the plaintiffs had not a right to apply for relief. There might have been a bill against them by the wife or daughter, through their next friend praying for relief from their testator's estate. The plaintiffs had a right to come against the husband to set this matter right. If a bill had been filed by the daughter

and the wife by which the husband and the estate of the deceased trustee had been called upon to pay, the plaintiffs, as trustees of that estate, would have a right to come against the husband. The trustees of the surviving trustee, finding relief impossible without the assistance of the Court, filed the present bill for replacing the stock and bringing the money into Court. The daughter, then an infant, had since come of age. The husband, the wife for her separate use, and the daughter for her interest in remainder, were the three parties concerned, and although there was a legal possibility of further issue, Mrs. Wakeford was of such an age as to make it satisfactory that no future interest would arise. The wife and daughter did not desire to have these funds restored. Consequently the plaintiffs were relieved from responsibility on that score, and did not now seek to prosecute the suit for a restitution of the fund, but they wished to be relieved from further responsibility. The proceeds of the stock were brought into Court; they asked nothing for that, but they wanted to convey to new trustees the real estate, which was a security for the money, and which was at present vested in them. They had a right to do this, for they had a right to be relieved from further responsibility. He (Lord Langdale) thought, that under the codicil of John Bowles, the devisees did take the legal estate. The life interest of Mr. Wakeford was also vested in the plaintiffs by Wakeford's voluntary settlement. The plaintiffs had a right to be relieved from these trusts. With respect to the equity of redemption assigned to Davis, the plaintiffs were not subject to responsibility on that account, and had nothing to convey. With regard to the costs, the rule was, where persons undertook to be trustees, they were not entitled to act with caprice, but if they found the trust estates involved in complicated questions, which they did not contemplate when the trust was undertaken, they had a right to come to the Court for relief, and the Court would judge of the circumstances. There might be some difference between the person who undertakes the trust and the person who represents that individual; but in this case, if John Bowles himself had come, and desired to be relieved, he (Lord Langdale) thought he would be entitled to relief. He had no doubt about the costs; and it seemed to him so clear, that he could not help feeling some surprise at the course taken by the defendants. Was it to be endured that persons who had trusts cast upon them which had become perplexed and intricate, should not be able to be relieved from them without having the whole costs of the suit thrown upon them? The bill must be dismissed with costs against the two co-heiresses to whom it would have descended if it had not passed by the

codicil. He thought the trust estates of John Bowles did pass by his codicil; but the question was open to considerable discussion. The costs of the co-heiresses must be added to the costs of the plaintiffs and be paid by the defendants. His Lordship then directed a reference to the Master to approve of new trustees and carry the decree into execution.

COURT OF BANKRUPTCY.—Sept. 30.

FIAT AGAINST OLIVER SPRINGETT IRON.

ACT OF BANKRUPTCY—BILL OF SALE—*Whether a Bill of Sale given for a pre-existing debt of the whole of a Trader's property is an Act of Bankruptcy.*

The facts of this case appeared to be these:—About January last Iron borrowed £245. of a Mr. Wilson, for the purpose of taking a chymist and druggist's shop, and entering into business. Being unable to repay this money in April last, he applied to a Mr. Westrup for assistance. Mr. Westrup agreed to lend Iron his acceptance for £245., and Iron was to provide the money to meet it. Iron failed to do so, and Westrup being compelled to take up his acceptance, which became due on the 20th of July, he applied to Iron for security. Iron said he had no other security than his shop fixtures and furniture, and the drugs and stock in the shop, and that he would be happy to give Westrup a bill of sale of the whole of the property. Iron then got the bill of sale prepared, and it bore date and was executed on the 1st of August. After this Iron continued on the premises, in the employ of Westrup, and carried on the business for him till last Wednesday, when Westrup sold the property by public auction. Iron left Westrup's service on the following morning. When Westrup applied to Iron for the bill of sale, Iron told him he had no other property but that in the bill of sale.

Mr. Commissioner HOLROYD said he was clearly of opinion that the bill of sale given to Westrup was in itself an act of bankruptcy. This was not a *bona fide* sale of the property by Iron to Westrup for a new consideration, but the bill of sale was given for a pre-existing debt, and was manifestly an assignment of the whole of Iron's property. Under these circumstances, though given at the instance or request of Westrup, it could not be considered otherwise than voluntary and in contemplation of bankruptcy. It could not have relieved Iron from any present difficulty, but, on the contrary, stopped his trading altogether, and was therefore in itself an act of bankruptcy without actual fraud. Nor could this bill of sale be protected by the statute

2 Victoria, c. 11, or by the 2nd and 3rd Victoria, c. 29. The learned commissioner then referred to the cases of *Newton v. Cander*, 7 East, *Thornton v. Hargraves*, 7 East, and *Siebert v. Spooner*, 1 Mee. and Wel. 714, and *Bevan v. Nunn*, 9 Bin. 112.

Fiat confirmed as to the act of bankruptcy.

Sept. 30.

FIAT AGAINST HELDER & CO. SOLICITORS.

BARRISTERS' FEES.—*Whether a Promissory Note for a Barrister's Fees marked by the Solicitor, and charged to the Client is provable by the Barrister against the Estate of the Bankrupt.*

Mr. Simons, a barrister, tendered a proof for £45. on a promissory note, which was objected to on the ground that the note was given for counsel's fees, for which it was contended Mr. Simons could maintain no action.

It appeared that the fees arose from drawing certain bills, in Chancery and conveyancing, and that the bankrupts, after the labour was performed, marked the fees on the instruction, and had charged their clients with the amount of these fees.

Mr. Commissioner HOLROYD said he thought that the proof on this promissory note was admissible, for supposing a barrister could not maintain an action to recover fees for drawing, still he thought, under the circumstances of this case, the moral obligation on the solicitors to pay the fees which they had marked, and charged to their clients as paid, was a sufficient consideration to support an express promise made by the solicitors to pay the amount of them. His Honour cited "*Lee v. Muggridge*," 5 Term Reports, 36.

Proof admitted.

We could say much upon this subject. We do hope, however, that the evident rising respectability of the profession will be the means of abolishing the odious credit system, which is a modern innovation upon the good old custom of paying the barrister's fees, either with the papers or before the work is delivered. Where an attorney obtains credit from a barrister for such labour as only those who perform it, (and in most cases it is performed even over the midnight lamp) can judge of its intensity, and for that credit he obtains not only payment, but ample remuneration; no expression can be deemed too

harsh as applied to any attorney who would defraud his counsel of his hard-earned fees. We do not apply any expression of the kind to the bankrupts in the above reported case. We do not even know them, nor ever heard of them. Nor does it appear that the objection to the proof was a voluntary act of their own.

INSOLVENT DEBTORS' COURT.—Sept. 28.

Case of THOMAS JAMES FELLGATE.

ADJUDICATION ANNULLED.—*Power of the Court to annul its Adjudication, where a remand had been ordered, and the Insolvent obtains his discharge from custody at the suit of his detaining Creditor.*—*OPINION OF the ATTORNEY-GENERAL!*

In this case Mr. Woodroffe applied on the 9th July last for an order of the Court to vacate the adjudication made in this matter. The insolvent had been a collecting clerk to Mr. Thomas Harris, a brewer in the Hampstead-road; he embezzled sums amounting, as he admitted in his schedule, to £2,845; but it was stated that his defalcations exceeded £3,000: his salary was £300 a-year besides expenses. He was ordered by the Court to be remanded for a period of eighteen calendar months, for contracting the debt by means of a breach of trust. Mr. Harris was, according to the new act, not in a situation to detain him until after the judgment was pronounced, not having charged him in execution; the consequence was, that within an hour the insolvent procured his discharge from the detaining creditor, and when the detainer at the suit of Mr. Harris was taken to the Queen's Bench prison in two hours after the judgment was given, the insolvent was out of custody. A case had been laid before the Attorney-General, who was of opinion, that as the insolvent had obtained his discharge by other means than by the order of the Court, he had renounced the act, and therefore was not entitled to the benefit after the term for which he was remanded should have expired. The application was made in accordance with the opinion so given. The warrant of remand had not gone to the Queen's Bench, but it was supposed to have issued to Whitecross-street Prison, from which the insolvent, after he had petitioned, had removed himself by *habeas corpus*.

Mr. Woodroffe said the act was miserably defective, and no remedy had been proposed; he was bound to bow to the opinion of the Attorney-General, but if it was not his opinion, he should call it a very indifferent one. It was said to be his act, and some alteration should be made.

Mr. Commissioner NICHOLS said there could

be no doubt of the defective state of the new act, but he could not see how the Court could remedy the complaint.

Mr. Woodroffe now again applied to the Court for the adjudication to be cancelled. He stated that Mr. Commissioner Bowen mentioned that on the circuit it was a common practice to order a discharge conditionally, but if the party obtained his discharge otherwise than in the manner ordered, he considered that he had obtained no benefit under the act; that case was somewhat analogous to the present. The act directed a warrant to issue to the gaoler, but that direction had not been complied with.

The Chief Clerk said the discharge on bail had been sent to the Queen's Bench; he could not find a new copy of causes. There seemed to him some mystery.

The CHIEF COMMISSIONER thought the circumstance was an additional reason for granting the application; the warrant of remand not having been forwarded to the proper place, the document could not have been filed.

Mr. Woodroffe said the insolvent, it was understood, had left the country until the period of remand had expired. Mr. Harris would, however, proceed against him under the opinion given by the Attorney-General, who had had the glaring defects of his own bill (as it was called) brought before him.

The COURT referred to the copy of adjudication issued to the insolvent's attorney, in which the insolvent was described as a prisoner in Whitecross-street.

The CHIEF COMMISSIONER ordered that no warrant should issue to the Queen's Bench Prison, and that the adjudication made should be cancelled. The insolvent's attorney was required to bring the one he had received into court, if he had not given it to the insolvent.

Mr. Cooke instanced a case in which he some years ago went before Mr. Justice Bayley at chambers, under similar circumstances, and he decided that the party was entitled to the act on the adjudication being pronounced; the warrant was merely to protect the gaoler.

The COURT said the question was an important one.

The adjudication was cancelled.

Sept. 28.

CASE OF WILLIAM LEE.

VESTING ORDER—Its effect against the Estate of the debtor after he had been liberated upon bail, and not taken the benefit of the Act. FIRST CASE under the compulsory clause in favour of creditors.

Mr. Lee had been arrested on mesne process, and surrendered in discharge of his bail in Ja-

nuary, 1838, on the 9th of May, in the same year, he was charged in execution by Messrs. Chew and Vorley, for £15. 15s.; he remained in custody for twelve months at their suit, and on the 10th of May last gave notice, that he should apply to be discharged; the debt being under £20., and he having been in prison a year, he was ordered to be discharged by the superior Court on the 25th of May, a few days before Messrs. Chew and Vorley obtained from this Court a vesting order under the compulsory clause, which was served on the 23rd of May. Lee had been discharged in September on special bail without taking the benefit of the Act, and was now at liberty.

Mr. Cooke contended, that inasmuch as the debt to Chew and Vorley no longer existed, the vesting order should be annulled, and not bind the estate of the party.

The learned CHIEF COMMISSIONER remarked, that a vesting order was for the benefit of the person applying and the other creditors.

Mr. Cooke said this was the first time the question had been mooted.

The COURT ordered a rule nisi to issue.

Sept. 28.

WILLIAM RICHARD BROWNE'S CASE.

COMPENSATION to GOVERNMENT OFFICERS—Whether assignable so as to be effectual against the Assignees of an Insolvent Debtor.

Mr. Cooke applied for a Rule calling upon Mr. Joseph Simon Holt, Mr. Alfred Holt, and Mr. George Turnstall, Annuitants upon the Compensation fund of the Insolvent to shew cause why the fund should not be set aside for the benefit of all the creditors.

The insolvent, who had been one of the cocket writers in the Customs, had an annual compensation of £500 granted to him on the abolition of the office; he held besides another situation in the same department of the Government, which he still retained, and out of which, on his discharge under the act, a sum of £100 a-year was set aside for the benefit of the general body of the creditors. He had charged the compensation allowance with several annuities, which exhausted the whole fund; the assignees, however, came to the Court for an order of recommendation to the Board of Customs for that sum to be set aside for the creditors generally, and the point raised, on their behalf was that the compensation was not assignable. The matter was argued, and the Court held that it could be assigned, and refused the recommendation. The assignees subsequently raised a question in the Court of Queen's Bench relative to an annuity of £150

granted on the allowance to a gentleman named Earle. The point was, that a second deed, made in 1837, by which Mr. Earle consented to take a lesser sum than the annuity granted two years previously, had not been enrolled, and was consequently void. The Court of Queen's Bench decided in favour of the assignees, and ordered the power of attorney given by the insolvent to Mr. Earle (under which he received the compensation, and, after paying himself, handed the residue to the other annuity creditors) to be cancelled. The assignees then came to this Court for a recommendation as regarded the £150 a-year, and, after argument, the application was granted; but the money was ordered to be paid into Court to abide an application on the subject to the Court above in the next term. The present application was to obtain a recommendation on the part of the assignees for the remainder of the compensation (£350), on the ground that the power of attorney had been given up to be cancelled, and consequently the only person who could receive it was the insolvent; he had placed himself in the hands of the assignees for the benefit of the general body of his creditors, and had declined to execute another power for the benefit of the other annuity creditors. The Commissioners of Customs had refused to recognize the kind of annuities granted, and a minute of the Lords of the Treasury was referred to on the subject. The assignees were anxious that the question, which was of importance to the numerous creditors, should be brought before the Court for their determination; it involved a point of some interest. The debts, with liabilities, were about £6,000.

The Court granted a rule *nisi*.

Mr. Cooke, who made the application, said that if the assignees succeeded a considerable annual sum would be obtained for the creditors, and they would resign to Mr. Browne the £100 a-year they were now receiving out of his salary.

October 7.

Mr. Malins this day shewed cause for the Annuitants, and contended that the Court had decided that the allowance was assignable, and, therefore, could not grant the present prayer. It was intended to make an application to the Court of Queen's Bench and to the Court of Chancery.

Mr. Cooke urged that the position of the parties had been materially altered by the power of attorney being set aside. The only person now entitled to receive the money was Mr. Browne, who had refused to sign another power of attorney, acting with the assignees. It was essentially necessary, if the proceedings threatened were adopted, that the assignees should be armed with the recommendation of the Court, espe-

cially as the customs would not acknowledge the annuities granted.

The CHIEF COMMISSIONER said the Court of Queen's Bench having decided against the power of attorney, the compensation belonged to the insolvent, and, consequently, to his assignees. The court would grant the recommendation, with directions that the money should be paid into court to abide any subsequent application.

Rule made absolute.

Oct. 4.

COUNTRY ATTORNEYS MADE COMMISSIONERS TO TAKE BAIL.

The COURT, in pursuance of the power given them by the amended act (a), which came into operation on the 1st October, has issued commissions to attorneys in the country to take bail. By this regulation the liberation of insolvents will be much facilitated.

MRS. LIVINGSTONE'S CASE.

Assignees—their liability to pay £20. per cent. on monies withheld by them.

A creditor of the insolvent applied to the Court to charge the assignees twenty per cent. on the monies received under the insolvency, and to cause them to file an account. The insolvent was discharged some years back, when £20 a-year was set aside for the creditors. They had, however, received nothing of this apportionment, but one of the assignees had received the money: this assignee was a Middlesex magistrate. The other assignee had received no part of the money in question.

The COURT enlarged the rule in order to attach the assignee who had received the money, and to commit him.

ECCLESIASTICAL COURT,

Exeter.

MERTEN v. THE CHURCHWARDENS OF ST. LEONARD.

RIGHT TO PEWS.—WHETHER a Parishioner entitled to a pew in the parish Church leaving the parish for a time, and letting his house, forfeits his right to the Pew—WHETHER such a right is exclusive.

The following case was decided by the Rev. P. Nicholls, of Rockbeare, who sat for the Chancellor of the Diocese.

The facts were these:—Mr. Henry Merten, who resides at Mount Radford, had been in pos-

(a) *See ante*, p. 361.

session of a pew ever since the church was built, it being then assigned to him. About twelve months since he left England for a few months, for the benefit of his health, and let his house, furnished, to two ladies, who were, according to his directions, to occupy his seat in the church until his return, but the first Sunday after he left, on the ladies going to church, they were told they could not sit in Mr. Merten's seat, as it had been given to another family; the cushions and hassocks had been removed to another pew, where they were told they might sit, and there they did sit until Mr. Merten returned, when Mr. Merten took possession of his former seat, but was told he had no right to it. Mr. Merten, understanding that the churchwardens were about to apply to the Bishop on the subject, wrote his lordship a letter on the 5th of the present month, explaining the circumstances, and also stated that "several of his neighbours, who had left, had let their houses for longer and various terms, and returned to them again without in any one instance losing their seats; he therefore considered he had been unfairly dealt with, but expressed his readiness to submit to the Bishop's decision, whatever it might be." This letter was placed in the hands of Mr. Ralph Barnes by the Bishop, and he replied to it on the 10th inst. stating, that he had been desired by the Bishop to say that the settlement of all disputed matters to regard to church seats belonged to the Ecclesiastical Court. The power of the ordinary to control the churchwardens in the exercise of their authority to seat the parishioners, could be exercised only in court, on proceedings being taken there. The Bishop, however, desired him to say, that he hoped the churchwardens, who, he could not doubt were desirous of doing their duty, would pay due attention to his just claim—a claim undoubted—to be placed in a seat agreeably to his situation in the parish; but how far the churchwardens did right, on Mr. Merten quitting his house; in assigning the seat he occupied, not to his tenants, but to other parishioners, it would be improper to intamate an opinion. At the Bishop's suggestion, he would put the letter of Mr. Merten into the hands of the Chancellor. The matter was brought under the notice of a parish meeting, when the resolutions agreed to upon it, were sent to Mr. Merten by the churchwarden, as follow:

"Resolved unanimously, that the churchwardens be requested to state all the circumstances and obtain the opinion of the ordinary for their guidance, relative to the occupation of the pew No. 28, claimed to be occupied by Mr. Merten, to the exclusion of Captain Shaw and his family, who had been appointed by the churchwardens for the past year; and that this

meeting respectfully suggests that both Mr. Merten and Captain Shaw refrain from the occupation of the pew in question until such opinion be obtained."

The case was accordingly stated to the Rev. Surrogate, who gave the following decision:—

"To the Churchwardens of the Parish of St. Leonard, Exeter.

" Gentlemen,—Having considered all the circumstances of the case, which you have submitted to my arbitration, I am of opinion that Mr. Merten has been improperly displaced, and ought to be reinstated in quiet possession of the seat or pew in question.

" I think it right, however, to add, that in the want of church room, of which you complain, if Mr. Merten's seat be more than sufficient for the accommodation of himself and daughter, you will not only be justified in introducing a third person, of equal rank and station of life, but that it is your duty to do so.

" I remain, Gentlemen,

" Your faithful and obedient servant,
" H. NICHOLLS."

"Rockbeare Vicarage, September 19, 1839."

The above decision was made without expense to either party, and both parties agreed to abide by the decision, which shows that cheap and speedy justice may be had even in the Ecclesiastical Courts, where the litigants will consent to give way a little to reason and discretion.

BRENTFORD PETTY SESSIONS.

RANGERSHIP of BUSHY PARK—Right of the Ranger to pursue and kill Game upon Hounslow Heath, which since 1813 has become private property and been built upon.

Mr. Rose Sawyer, of Bushy-park, gamekeeper to her Majesty the Queen Dowager, and Mr. Joseph Nichols, Gentleman, of Whitton, in the parish of Twickenham, appeared on summons, to answer informations preferred against them by Mr. George Dawes, under the 1st and 2d of William IV., cap. 32, sec. 30, charging that they "did on the 17th day of September instant (and within three calendar months from the date hereof) each commit a trespass by entering and being in the day time upon land situated on Hounslow-heath, in the parish of Isleworth, in the said county of Middlesex, in the occupation of the said George Dawes, in search and pursuit of game," whereby they had each subjected themselves to the payment of a penalty not exceeding 40s and costs.

Mr. Kirby, of No. 5, Grays-inn-square, soli-

citor to Her Majesty the Queen Dowager, attended on behalf of Mr. Sawyer. Both defendants pleaded "not guilty."

James Giddens deposed, that on Tuesday, the 17th ult., he was pursuing his business as game-keeper, when he heard a report of some guns, and on proceeding in the direction of the spot, he found the defendants on the land in the occupation of Mr. Dawes, with a pointer and a spaniel dog, and each of the defendants with a gun. The land belongs to Sir Frederick Pollock, but Mr. Dawes is the occupier. Saw no game killed by either party. He went to them, and told them they were on trespass, and took their names, and begged them to desist. Mr. Sawyer said they would not. He would not go off until he had killed some bird, witness believed a partridge, which he had followed there. The defendants then kept on hunting the dogs, until, being convinced they could not find the bird, they went off.

Mr. Kirby said, he appeared there for the defendant Sawyer, or, more properly, perhaps, on behalf of Her Majesty the Queen Dowager, under whom Sawyer holds the appointment of deputy-gamekeeper, as well as that of gamekeeper under the Crown.

Mr. Clark, clerk to the Bench, said, then the Bench were to understand that the defence set up was, that the Queen Dowager was the gamekeeper, and that in pursuance of her right as such, she had delegated authority to the defendant Sawyer to act in her name.

Mr. Sawyer said that was the case. The Queen Dowager was the gamekeeper, having the rights of free warren, by virtue of which he, as her deputy, claimed the exemption allowed by the 35th section of the above Act, which enacts, "That provided always, and be it enacted, that the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox, already started upon any other land, nor to any person *bond fide* claiming and exercising any right, or reputed right, of free warren or free chase, nor to any land or any steward of the Crown of any manor, lordship, or royalty, nor to any gamekeeper lawfully appointed by such lord or steward, within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty."

Mr. Wheels, the head-keeper to the Queen Dowager, also observed, that he and the other keepers had shot over the property for between the last 20 and 30 years.

Mr. Kirby informed the Bench, that the Queen Dowager claimed the right of free warren, in pursuance of letters patent granted to Her Majesty Queen Adelaide during the lifetime of

her royal consort, King William IV. The letters patent were too unwieldy instruments to bring with him, but he had brought with him the following extract therefrom:—"And further of our more special grace, certain knowledge, and mere instruction, we have given and granted, and by these presents do give and grant, unto our said most dearly beloved consort, the office and keeping of our game of hare, partridge, pheasant, and heron, and all other wild fowl of the river, as well within our own grounds and woods as in other men's grounds and woods, whatsoever they be, in or about our manor of Hampton-court and Hounslow-heath, within our county of Middlesex (that is to say, from Staynes-bridge to Brainsford (Brentford) Bridge), to have, hold, exercise, and enjoy the said office of keeper of our game aforesaid, and our said most dearly beloved consort, as well by herself as by her sufficient deputy or deputies, for and during our pleasure." These letters patent, he contended, had never been recalled or cancelled.

Mr. Pownall said, he understood the grant of free-warren had been made to Queen Adelaide, from the terms of an old grant, by virtue of which the right of free warren had been vested in the Crown, extending to all Hounslow-heath, and even to Windsor. An act of Parliament, termed the Enclosure Act, had since been passed, by which large portions of Hounslow-heath, in the parishes of Isleworth and Heston, had been disposed of; and whether that act of Parliament, which conferred on certain individuals rights over certain allotments, rode over the rights claimed by the Queen Dowager or not, he could not say. At any rate, in his opinion the question would open a wide field for contentions between the persons to whom the allotments had been made and the Crown. He would wish to be informed whether the appointment of Mr. Sawyer as deputy-keeper had been renewed since the demise of his late Majesty.

A reply having been given in the negative,

Mr. Clark said, the terms of the patent, as shown by her Majesty's solicitor, were addressed to her as Queen Adelaide, and could therefore only apply to her in her station as Queen consort. She was now no longer the reigning Queen, and unless those rights had been renewed to her, they must have become vested in the reigning Sovereign.

Mr. Kirby contended that the whole of the appointments vested in her Majesty while Queen consort had been continued to her since she has been Queen Dowager. With regard to the Enclosure Acts, he supposed they contained the usual enactment of "saving the rights of the Crown." It had not in former reigns been considered necessary to renew such appointments, as all deputations continue as a *matter of course*.

He himself held the appointment of steward of the same manor, and also as steward of the Duchy of Cornwall, neither of which had been renewed since the accession of her present Majesty.

Mr. Sawyer said, that his late Majesty while Duke of Clarence held the same appointments, which he afterwards delegated to his Royal Consort.

Mr. Kirby further contended, that the Queen Dowager took the appointment as *femme sole*. They were appointments not incidental to her office as Queen.

Mr. Clark considered the appointments having been made by the King, in his capacity as such, they must necessarily cease on his demise.

Mr. Pownall considered, if the appointments were given Queen Adelaide as ranger of Bushy-park, they were vested in her for life, but if only as Queen consort, it was quite a different matter.

Mr. Dawes then handed in a letter he had received from Sir F. Pollock relative to the matter, in which that learned gentleman stated, that if the Crown possessed any such right as that claimed by the Queen Dowager, it must by necessity pass to the next sovereign, and the letter pledged Sir F. Pollock, should the Bench decide in favour of her Majesty, to bring a suit in the name of Mr. Dawes to try the matter.

The Bench then conferred together; after which

Mr. Pownall said, the question was one which involved points of the utmost public importance, and would affect property to the value of nearly £2,000,000. sterling. If the Queen Dowager held the appointments as Ranger of Bushy-park, they were doubtless for life, and her being now Queen Dowager would not affect them. He felt it was a matter which affected not only Mr. Dawes, but also every tenant and proprietor of property situate between Brentford-bridge and Staines-bridge, and, if the claim was established, would open a door for every place built upon and the gardens attached within that district being liable to the entrance of the Queen's game-keeper, who might assert his right to follow game over the property, whether the owner or occupier liked it or not. He thought the Bench ought to have the Enclosure Acts before them, as well as the letters patent. Hounslow-heath had, in the year 1813, been sold and made private property; houses had been built and gardens planted, and he felt that it was a most important question they had to decide on—no less an one than whether the rights of the individuals who had so invested their money should be infringed on. The solicitor for the Queen Dowager was,

appeared, not prepared to go very fully into the case, which he considered was most requisite; and he should, therefore, suggest that the further

discussion of the matter should be adjourned for a fortnight, that all parties might be prepared with all the necessary documents, and the matter fully argued.

Adjourned for a fortnight.

LANDLORD AND TENANT.—DISTRESS FOR RENT.

NEW METROPOLITAN POLICE ACT.

The following correspondence with the Secretary of State for the Home Department, upon one of the clauses of this extraordinary and despotic Act of Parliament, took place last week:—

“ 16, Charlotte-street, Bloomsbury, Oct. 1.

“ MY LORD,—I most earnestly entreat your earliest attention to the following case, which involves important interests of landlords of house property within the metropolitan districts. On Thursday last, September 26, I was called upon to assist, with another appraiser, in making a condemnation of goods distrained upon for the sum of £33. for rent due to Midsummer-day last, in Carnaby-street, St. James's, Westminster. On completing our valuation, we waited upon the parochial constable to be sworn to the truth of the inventory; he refused to interfere, stating he now had no authority, the first clause in the new Police Act taking away all power from constables appointed under Courts Leet, and referring us to the police constables for assistance. We therefore repaired to Marlborough street-office, and requested to be sworn by some police constables who were there; they also refused, saying they had no power. We therefore applied to the presiding magistrate, who, after hearing the case, also informed us he could not assist, the new Police Bill giving him no power, although it has destroyed all authority formerly invested in parochial constables. Under these peculiar circumstances, the broker who levied, not feeling himself justified in retaining the goods, abandoned the distress, the landlord, by this defect in the new Police Bill, losing the amount of his rent, viz. £33., and also made liable to an action of trespass.

“ My Lord, should this be a proper construction of the new Police Bill, all power to compel payment for rent due by a distress warrant is null and void: a fearful situation for owners of house property in the metropolitan districts to be placed in.

“ As Secretary of State, I therefore humbly solicit your advice for myself and others, who may be called upon under similar circumstances, to know in what manner the law of distress can be carried out, and who, if any, is the proper

officer to swear appraisers to an inventory under a distress warrant for rent.

I remain, most respectfully, my Lord, your humble servant,

"JOHN M'LAREN."

"To Lord Normanby, Secretary of State
for the Home Department."

ANSWER.

"Whitehall, Oct. 3.

"Sir,—I am directed by the Marquis of Normanby to acknowledge the receipt of your letter of the 1st inst. respecting the powers of constables to administer an oath as to the truth of an inventory in a case of distress for rent, and I am also to inform you, that the parochial constables could have acted quite legally until the 30th ult., and were wrong in refusing to swear the parties. The Metropolitan Police constables were also wrong, as they had full power to swear under the 10th George IV., c. 44.

"Arrangements are now made for going through the necessary forms at the station-houses, and no difficulty can occur if appraisers apply there.

"I am Sir, your humble servant,

"F. MAULE."

NEW METROPOLITAN POLICE ACT.

2 & 3 Vict. CAP. XLVII.

An Act for further improving the Police in and near the Metropolis.—[17th August, 1839.]

(Continued from p. 388.)

XLIX. And be it enacted, that it shall not be necessary, in support of any information for gaming in, or suffering any games or gaming in, or for keeping or using or being concerned in the management or conduct of a common gaming-house, under this Act, to prove that any person found playing at any game was playing for any money, wager, or stake.

L. And be it enacted, that after the passing of this Act, every pawnbroker within the Metropolitan Police district, and every agent or servant employed by any such pawnbroker, who shall purchase or receive or take any goods or chattels in pawn or pledge of or from any person apparently under the age of sixteen years shall be liable to a penalty not more than five pounds.

L1. And be it enacted, that on the application of the minister or churchwardens of any church, chapel, or other place of public worship within the Metropolitan Police district to the Commissioners of Police, it shall be lawful for the said Commissioners to make orders for regulating the route and conduct of persons who shall drive any cart or carriage, or who shall drive any cattle, sheep, pigs, or other animals, within such parish or place, during the hours of divine service on

Sunday, Christmas Day, Good Friday, or any day appointed for a public fast or thanksgiving, and any orders which shall be so made shall be printed and affixed on or near the church, chapel, or place of public worship to which the same shall refer, and in some conspicuous places leading to and contiguous thereto, and elsewhere, as the Commissioners of Police shall direct; and every breach of any such order shall be deemed a separate offence.

LII. And be it enacted, that it shall be lawful for the Commissioners of Police, from time to time and as occasion shall require, to make regulations for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets and thoroughfares within the Metropolitan Police district, in all times of public processions, public rejoicings, or illuminations, and also to give directions to the constables for keeping order and for preventing any obstruction of the thoroughfares in the immediate neighbourhood of her Majesty's palaces and the public offices, the High Court of Parliament, the Courts of Law and Equity, the police courts, the theatres, and other places of public resort, and in any case when the streets or thoroughfares may be thronged or may be liable to be obstructed.

LIII. And be it enacted, that no proprietor of any stage carriage duly licensed to carry passengers for hire shall be liable to any penalty for any deviation from the route or line of route specified in his licence, which the driver of such stage carriage shall make by virtue of any regulation or direction made or given by the Commissioners of Police.

LIV. And be it enacted, that every person shall be liable to a penalty not more than forty shillings, who, within the limits of the Metropolitan Police district, shall, in any thoroughfare or public place, commit any of the following offences; (that is to say,)

1. Every person who shall, to the annoyance of the inhabitants or passengers, expose for show or sale (except in a market lawfully appointed for that purpose), or feed or fodder any horse or other animal, or show any caravan containing any animal, or any other show or public entertainment, or shoe, bleed, or farry any horse or animal, (except in cases of accident,) or clean, dress, exercise, train, or break any horse or animal, or clean, make, or repair any part of any cart or carriage, except in cases of accident where repair on the spot is necessary:

2. Every person who shall turn loose any horse or cattle, or suffer to be at large any unmuzzled ferocious dog, or set on or urge any dog or other animal to attack, worry, or put in fear any person, horse, or other animal:

3. Every person who by negligence or ill-use

in driving cattle shall cause any mischief to be done by such cattle, or who shall in anywise misbehave himself in the driving, care, or management of such cattle, and also every person not being hired or employed to drive such cattle, who shall wantonly and unlawfully pelt, drive, or hunt any such cattle :

4. Every person having the care of any cart or carriage who shall ride on any part thereof, on the shafts, or on any horse or other animal drawing the same, without having and holding the reins, or who shall be at such a distance from such cart or carriage as not to have the complete control over every horse or other animal drawing the same :

5. Every person who shall ride or drive furiously, or so as to endanger the life or limb of any person, or to the common danger of the passengers in any thoroughfare :

6. Every person who shall cause any cart, public carriage, sledge, truck, or barrow, with or without horses, to stand longer than may be necessary for loading or unloading, or for taking up or setting down passengers, except hackney carriages standing for hire in any place not forbidden by law, or who by means of any cart, carriage, sledge, truck, or barrow, or any horse or other animal, shall wilfully interrupt any public crossing, or wilfully cause any obstruction in any thoroughfare :

7. Every person who shall lead or ride any horse or other animal, or draw, or drive any cart or carriage, sledge, truck, or barrow, upon any footway or curbstone, or fasten any horse or other animal so that it can stand across or upon any footway :

8. Every person who shall roll or carry any cask, tub, hoop, or wheel, or any ladder, plank, pole, showboard, or placard, upon any footway, except for the purpose of loading or unloading any cart or carriage, or of crossing the footway :

9. Every person who, after being made acquainted with the regulations or directions which the Commissioners of Police shall have made for regulating the route of horses, carts, carriages, and persons during the time of divine service, and for preventing obstructions during public processions, and on other occasions hereinbefore specified, shall wilfully disregard or not conform himself thereunto :

10. Every person who, without the consent of the owner or occupier, shall affix any posting-bill or other paper against or upon any building, wall, fence, or pale, or write upon, soil, deface, or mark any such building, wall, fence, or pale with chalk or paint, or in any other way whatsoever, or wilfully break, destroy, or damage any part of any such building, wall, fence, or pale, or any fixture or appendage thereunto, or any tree, shrub, or seat in any public walk, park, or garden :

11. Every common prostitute or nightwalker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passengers :

12. Every person who shall sell or distribute, or offer for sale or distribution, or exhibit to public view, any profane, indecent, or obscene book, paper, print, drawing, painting, or representation, or sing any profane, indecent, or obscene song or ballad, or write or draw any indecent or obscene word, figure, or representation, or use any profane, indecent, or obscene language to the annoyance of the inhabitants or passengers :

13. Every person who shall use any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned :

14. Every person, except the guards and postmen belonging to her Majesty's Post-office in the performance of their duty, who shall blow any horn or use any other noisy instrument, for the purpose of calling persons together, or of announcing any show or entertainment, or for the purpose of hawking, selling, distributing, or collecting any article whatsoever, or of obtaining money or alms :

15. Every person who shall wantonly discharge any fire-arm, or throw or discharge any stone or other missile, to the damage or danger of any person, or make any bonfire, or throw or set fire to any firework :

16. Every person who shall wilfully and wantonly disturb any inhabitant by pulling or ringing any door-bell or knocking at any door without lawful excuse, or who shall wilfully and unlawfully extinguish the light of any lamp :

17. Every person who shall fly any kite or play at any game to the annoyance of the inhabitants or passengers, or who shall make or use any slide upon ice or snow in any street or other thoroughfare, to the common danger of the passengers.

And it shall be lawful for any constable belonging to the Metropolitan Police force to take into custody, without warrant, any person who shall commit any such offence within view of any such constable.

L.V. And be it enacted, that no person other than persons acting in obedience to lawful authority shall discharge any cannon or other fire-arm of greater calibre than a common fowling-piece within three hundred yards of any dwelling-house within the said district to the annoyance of any inhabitant thereof, and every person who, after being warned of the annoyance by any inhabitant, shall discharge any such fire-arm, shall be liable to a penalty not more than five pounds.

LVL And be it enacted, that after the first day of January next, every person who, within the Metropolitan Police district, shall use any dog for the purpose of drawing or helping to draw any cart, carriage, truck, or barrow shall be liable to a penalty not more than forty shillings for the first offence, and not more than five pounds for the second or any following offence.

(To be continued.)

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, October 12, 1839.

The Legal Guide.

VOL. II.]

SATURDAY, OCTOBER 19, 1839.

[No. 25.

LEX LOCI DOMICILII.

PART II.

As to the manner in which instruments, executed in *England* by a domiciled *Englishman*, are to be construed and dealt with in respect of evidence by a Scotch Court, in so far as these instruments relate to the distribution of personal property, situated within the territory of *Scotland*.

LAW OF EVIDENCE in these cases.

WHETHER the ENGLISH RULE OF CONSTRUCTION is to be applied?

WHETHER the ENGLISH RULE OF EVIDENCE is to be applied?

(Continued from p. 370.)

LORD BROUGHAM continued.—

I will state to you my only difficulty, and see whether you can help me over it;—because I agree with you, generally speaking, that the *lex loci domicilii* is applicable to the course of procedure: that the Court is to proceed by its own course of procedure, the law of the Court being the course of the Court, and consequently, I am inclined to think that the admission of evidence, being rather matter of procedure, than a substantial matter of law, it is to be governed by the law of the Country where the Court sits. But then in all questions of jurisprudence it is easy to say how things are here and there, when there is a very great difference between the points; but when you come to the

confines, and when the one province runs into the other, then arises the difficulty, and then we get *inter apices juris*. Here is a case which partakes of the nature of the law of evidence, and also of the substance of the weightier matter of law. I will put the case I have already hinted at:—Suppose the English law were to change, as it is now (1835) in the course of changing, and that no will of personality could henceforth be valid, unless it was attested by two witnesses. Now observe, an Englishman domiciled in England, makes his will, touching Scotch property; *mobilia sequuntur personam*, and therefore the *lex loci* of England prevails. You go into a Court of Scotland, and tender the will, in order to get, by the rules of the English law, possession of the fund; the Scotch Court says, “Willingly you shall have it; whoever would get it in England shall get it here, whether it would be the same person our law would give it to or no, because the English law is to govern: but,” says the Court, “let us look at the will.” The will is produced, it has only one witness, or no witness at all, then the Court says, “This is no will, it would not in England be held to pass the property to any human being. The law has said, that in order to pass property, to extend after a man’s death the right that he has to his chattels during his life time, which is not a natural right, but entirely conventional, he must have complied with the formality of

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2 c

two witnesses attesting it." Now, my Lord Advocate, how would you deal with that matter? Would it be by the English or the Scotch law? because, if it be by the Scotch law, there is a great difficulty, which is neither more nor less than this, that Englishmen would acquire personal property by the English law, though that property was only attached by a will executed without complying with the formality of that law; that is the difficulty.

I admit that no Probate could be had of any but the second will, in England. It does not, however, follow that the Scotch Court may not look at both instruments; at that which has not probate, as well as at that which has. That Court will give faith to what has been sanctioned by a court of competent jurisdiction, but it does not follow that, upon a matter in which no court has exercised any judgment, the Scotch Court would reject that matter, because it was not proved in an English Court, if it is not contrary to the rules of evidence, and to the practice of the Scotch Court to receive it. It is going too far to suppose the Scotch Court would say, "If this instrument had been offered to an English Court, it would not be admitted, and we therefore reject it." Do you think, my Lord Advocate, you can, for your argument, throw overboard the first will of 1828? Could you rely safely on the passage in the deed of the 1st April, 1829— "Now, if this transaction should not be closed before my death, I have, in a separate will which respects my property in England, directed my trustees or executors in that will to assign or indorse the notes or receipts of the Royal Bank to my said trustees, to be kept by them in the same depository where they now are till the above defects are cured?" Would that sustain your argument without the first will? This is a subsisting trust deed, a conveyance *inter vivos*, operative at this moment. I mean your argument respecting the appropriation; does it

require no other aid, and can it stand without the first will of 1828 as well as without the cancelled will?

The *Lord Advocate*.—Certainly, I apprehend it is quite sufficient if a person declares, "I deposit this money," meaning it should be paid for a certain debt.

The *Lord Brougham*.—Suppose now, Dr. *Lushington*, there had been a will, not proved in Scotland, but a will which, by the law of Scotland, for want of two witnesses (a will of personality) could not be admitted to probate there, and suppose probate had been sought of that will here, would probate be refused here for want of two witnesses?

The *Dr. Lushington*.—Decidedly; the case of *Stanley v. Bernes* (3 Hagg. 373) is in point.

The *Lord Brougham* then addressed the House:—My Lords, another reason—besides the importance of the matter—for which I wish to postpone the consideration of this question is, that though the subject is of great importance, and some parts of it are not without difficulty—though, undeniably, the decision, if pronounced, will be for the first time pronounced in this House upon those points—though, undeniably also, the decision upon the same points in the Court below has been pronounced *for the first time in any Court of England or Scotland*—though, therefore, these points are matters of first impression, yet in this case I desiderate that which is a great help to any Court of Review, dealing with the judgment of a Court below, brought before it by appeal;—I desiderate the reasons of the learned Judges who pronounced the decision in the Court below. I find four learned Judges have given their opinions, but not one of them has given one tittle of reason for his opinion. The question that arises here, and which brings the laws of the two countries into conflict, is the first and general question. Shall the Scotch practice or the English practice respecting the law of evidence, as well as the Scotch principle or the English principle in respect of the con-

struction of the instrument prevail as the governing rule in this case? That is the first and general question, and for solution of that question, one should look to the opinions of learned Judges and for their reasons, to know the view which they take of so important a matter. But that is not the only question; there is another and much more material one; and that is one upon which above all things, it is material to know the views of the Scotch Judges. Granting that the Scotch law is to prevail in construing the instrument, and the Scotch practice also in admitting or rejecting evidence, what is the Scotch practice, and what is the Scotch law; the Scotch law respecting construction of instruments, and the Scotch practice respecting the admission or rejection of evidence? I desiderate the authority, the authentic, and consequently the most valuable statement which can be had as to what is the Scotch law and practice, but particularly the Scotch practice as to admitting or regulating evidence. I desiderate that the more, because one wishes to know how these things are dealt with in the Scotch Courts, and to see exactly what the difference is, and upon the highest authority, between the Scotch and the English Courts in the administration of the important law of evidence. Unfortunately we are left without any light from that quarter, from which, above all others, I should wish to receive it, and that is an additional reason for wishing your Lordships to postpone the further consideration of this case. (a)

Following up, therefore, the principle that the *lex loci domicili* governs the distribution of personal estate, the Scotch and all Foreign Courts are bound, in the interpretation of a testator's written declarations of intention, touching his personal estate, situated within the Foreign jurisdiction, to adopt the principles of construction applicable to such instruments by the law of the testator's domicile, and that law, being matter of fact, is to

be inquired after, like other facts; but they are not bound to adopt foreign rules of evidence, every Court having its own technical rules of procedure.

(*To be continued.*)

PROBLEM XXV.

VOL. 2.

HEIRS SPECIAL OR GENERAL.

What is the present state of the Law with respect to limitations to Heirs Special or General?

Law Reports.

COURT OF CHANCERY.—June 19.

BUNBURY v. BUNBURY.

Appeal from the Master of the Rolls.

JURISDICTION OF THE COURT acting upon THE PERSON HERE in restraining him by INJUNCTION from proceeding to sue out execution in a foreign country.—LEX LOCI REI SITE.

Mr. Hugh Mills Bunbury, residing in the English colony of St. Vincent's, there married an English woman, and, previous to the marriage, executed a settlement of land and slaves in that island, the ultimate remainder in which was limited to the issue of such marriage in equal shares. He afterwards left that island, and went to reside at Demerara (then ceded to England), where he also purchased lands, and where his wife died, leaving two children, *Hugh Mills Bunbury the younger* and *Lydia Jane*, wife of the *Count de Vigny* (a Frenchman). He then (in 1812) returned to England with his children, and there (in 1822) married again; and, previous to this marriage, he also executed a settlement of his lands in Demerara for securing a jointure to his wife, and limiting those lands to the issue of that marriage, reserving to himself a power of appointment over £30,000, which, in default, was limited to the issue of both marriages in equal shares. In 1832 he made a will, at which time there were five children of the second marriage, and to whom he devised a moiety of his lands in Demerara, and the other moiety to all his children equally. He made several codicils to this will, by one of which he gave compensation slave money among his chil-

(a) 3 Clark & Fin. Rep. 581.

dren, and directed that if the children by his first wife should trouble his wife by litigation, the devise to them should be void; and he appointed his wife executrix. He died in England in 1838, leaving the two children by his first wife and eight children by his second wife, who also survived him. Mr. H. Bunbury and the Countess de Vigny filed a bill in *Demerara*, to have themselves declared to be exclusively entitled to a moiety of the land purchased by their father in Demerara, and to a moiety also of the slaves, and of the compensation money lately awarded under the provisions of the Act of Parliament. The ground of the claim set forth by the bill was, that according to the Dutch law, which regulated the distribution of property in Demerara, there was a community of property and goods between the husband and wife, and, therefore, that a moiety of the property descended to them on the death of their mother, the father having no power to make any settlement of that moiety, or to dispose of it by will. The children of the second marriage filed the present bill in *this Court* against the executrix of the will, the trustees of the settlement made on the second marriage, and the children of the first marriage, all which parties, except the Countess de Vigny, were resident in *England*, and prayed that the trusts of the last-mentioned settlement might be established and carried into execution, or that the will and codicils of the testator might be carried into execution without reference to the settlement, if inconsistent with it; also an account of the profits of the property in *Demerara*, and also prayed an injunction against the children of the first marriage, restraining them from proceeding with the suit in *Demerara*, and that a receiver or manager be appointed. The defendants *all appeared*, and put in their answers; and, upon motion for the injunction, the Master of the Rolls thought, that as all the parties claiming a beneficial interest in the property had appeared, and were within the jurisdiction of the Court of Chancery in this country, it would be more convenient to have the ultimate question decided in this country; but his Lordship, while he so decided, gave the plaintiffs in the *Demerara* suit leave to go on and obtain a verdict, if they could, merely restraining them from taking execution afterwards. His Honour therefore granted the injunction, against which the children of the first marriage appealed.

It was admitted that, by the law of *Demerara*, the Dutch law, though the law of community of goods prevails, the parties may by contract and settlement preclude themselves from being bound by that law, and therefore exempt the property from a succession according to that law. The first wife having died leaving children, the father, after a certain time, married again and had a

second family, and he took on himself to deal with the property which he had in community with his first wife as his own, making it the subject of settlement on the second wife and family, and the subject of disposition by his will; and the object of this bill is to have the property administered according to the disposition made by the father, either under the settlement on the second marriage, or under the will. The children of the first marriage meet that claim by saying, "The author of this instrument had no right to deal with a portion, at least, of that property, because that property was subject to the law of Holland, and by the law of Holland our mother was entitled, and we, who are her children, claiming in her right, have a right to the division of the property according to the principles applicable to the law of community; and therefore, though the father exercised, or attempted to exercise, a power over the property, he had no right so to do, and we therefore have a right to succeed in obtaining possession, and to have the enjoyment of that portion of the property, which, according to the law of community, belonged to us."

For the appellants it was contended that the parties, by putting in their answer, had submitted to the jurisdiction of the Court of Chancery; but it was not the practice of the Court to interfere in cases like the present, although the Court did hold that the administration of the personalty belonged to the tribunals of this country when the testator was domiciled in this country at the time of his death. With respect to real property, it had, however, been decided, in several instances, that the courts of the colony were the proper tribunals for the decision of questions relating to its distribution, according to the laws of the colony.

The LORD CHANCELLOR said that he had no doubt of the jurisdiction of the Court, nor did he question the proposition that questions relating to the title to land were to be decided by the law of the country where the land was situated, and by the tribunals of that country; but that was not the question which the Court was called on to decide. The question was, whether the father of the parties had or had not, by his second marriage and by the settlement made on that occasion, excluded the operation of the law of *Demerara*. If the property in dispute was partnership property, to be regulated by the terms of a contract, the rights of the parties would depend on the law of the country in which the contract was made, and not on the law of the country where the property was situated. In that case the parties to the contract made a law for themselves. But independent of the considerations arising out of that view of the question, the courts of this country were bound to entertain the suit,

and to adjudicate on it, whether the law of community of goods was to prevail or not, because the Court was bound to administer the personal property. So that there is a cause pending in this Court, and which this Court must adjudicate on the question of foreign law, that is, adjudicate on the question of the settlement; on the adjudication of which the question of foreign law will depend, to the extent, at least, of part of the property which is to be administered. Nothing can be more inconvenient when this Court is in a situation to make it absolutely necessary to adjudicate on a principle, than not to be able to adjudicate on the whole principle. But suppose the Court proceeds so far, and finds the law of community does apply to this case, and that the parties have not made a law for themselves, and taken this property out of the principles of the law of community, then the Court must, as far as the personality is concerned at least, make those inquiries and direct those accounts to be taken, which are necessary in order to ascertain what the estate in community was. I think it would be a great inconvenience, almost an impossibility, and contrary to all the principles where accounts and inquiries affect a mass of property, to confine the adjudication to a particular description of property, and in which the Court cannot do justice without having the whole under its jurisdiction. For these reasons, though the case is one involving great difficulty, and there is a good deal of novelty in it, his Lordship thought the order made by the *Master of the Rolls* to be right. His Lordship said it is not interfering with any foreign jurisdiction; it is only taking to itself the adjudication of the whole subject matter, part of which is admitted to be necessarily within its jurisdiction. There was, however, a difficulty in the matter. The children of the second marriage did not appear to have been made parties to the suit in Demerara, and their rights could not therefore be defended there.

Mr. *Burge* here undertook that the children of the second marriage should be made parties to that suit *pro forma*, and should submit to any order this Court should make.

The LORD CHANCELLOR.—It is true, if the permitting of these proceedings to go on in Demerara would enable this Court to go on more satisfactorily to dispose of the question between the parties, it would be my duty so to do; and there might be good reason for doing that which was done in Lord Minto's case, viz. permitting the proceedings to go on to an adjudication in the Court of Session, in order to ascertain what the Scotch law was. In one view of this case there was no necessity for that course. If it is found that the settlement does preclude the law of community, there is no necessity for inquiring what the law of Holland would be as to the law

of community; but I do not find the proceedings in Demerara are at all calculated to bind the rights of all these parties. As I understand, it is a proceeding by which the children of the first marriage are claiming possession of land, not against the children of the second marriage, with whom this contest is, but against those who are, under the instrument executed by the father, in the possession of that estate. I have no means of knowing, nor can I trust the interest of the children of the second marriage to such defence as those parties might think proper to make; and whatever, therefore, is the adjudication of the Court of Demerara between those parties, it is not possible to preclude the question which the children of the second marriage may think proper to raise against the children of the first marriage. I think it would be exceedingly inconvenient to adopt a course which might lead to a different adjudication on the same question between tribunals which have no control one over the other. So that if this Court were to proceed and adjudicate on the question, which will be the primary question to be decided, and decide that this settlement precludes the law of community from being applied, and so distribute the property which it has under its jurisdiction according to the instrument executed by the father; and the Court of Demerara should adjudicate precisely the reverse with regard to the land; and the one decision goes to the House of Lords, and the other to the Privy Council, adverse decisions on appeal may take place upon the very same question, one applicable to one part of the property, and the other to the other. Sir J. *Leach*, in one of the cases referred to, saw the inconvenience of that, and said, "I will not permit these parties to go on in the Court of Session; and one reason is, because as the matter must ultimately be disposed of here, and as this Court has possession of the subject-matter, by having the party here against whom the allegation is made, he ought not to be permitted to use the instrument which he has obtained. If I permit the party to proceed against the land in Scotland, there may be a decision by this Court another way, which will be extremely inconvenient." In this case, undoubtedly, the apprehension of that inconvenience ought not to prevail, provided the party was in a situation in which he had a right to say, "The law of Demerara is to prevail, and I have a right to assert my title according to the law of Demerara." But when I find the case does not turn on the Dutch law, in the first instance at least, though it may ultimately; but it turns on a preliminary question which this Court is not only as competent as the Court of Demerara to decide upon, but according to the position of the parties, much more competent, inasmuch as it has all the parties here; I think, as a matter of discretion, it would be

exceedingly inconvenient and improper to allow the proceedings to go on, involving the same question with the chance of their coming to opposite conclusions. For these reasons, with this preliminary question existing between these parties, which this Court is perfectly competent to decide, and which, if decided one way, will prevent the necessity of any further litigation anywhere, I am of opinion the order of the *Master of the Rolls* is the right order to pronounce. As this Court was competent to go on with the case, and all parties were before it, there seemed to be some doubt whether the suit in Demerara ought, under such circumstances to go on. What might be expedient in the progress of the case was, however, matter for consideration.

His LORDSHIP affirmed the order of the *Master of the Rolls*. (a)

VICE-CHANCELLOR'S COURT.—*July 31.*

IRVING v. THOMPSON.

UNDERWRITERS—DEMURRER—PRACTICE—

Whether a party, the principal insurer in a Policy of Insurance, on which an action had been brought by his agent in this country against the Underwriters, can be made a Defendant with the agent to a bill of discovery by the Underwriters in aid of their defence to the action.

This case involves a point of great interest to Underwriters. The general question the demurrer raised was whether a party could be made a defendant to a bill of discovery in aid of a defence to an action at law, who was not a plaintiff on the record in the action.

This bill was filed on behalf of the Alliance Marine Insurance Company by Mr. Irving, its chairman, in whose name, by their act of incorporation, all actions and suits by and against the Company were directed to be brought, stating that William Thompson, one of the defendants, effected a policy of Insurance with the Company on the 4th of August, 1837, on the freight of a foreign vessel called the *Gustave*, which was to sail from Dantzig, and that Thompson and the

other defendant, K. G. Krugen, claimed to be solely and exclusively interested in all benefit to be derived from the policy; and that the ship was lost, and that the Company had recently discovered, long since the policy was effected, that the ship was not sea-worthy at the time she left Dantzig, and also that none of the merchandise mentioned in the policy was ever on board the ship, or, if ever shipped, that it was unshipped again before she sailed. The bill then stated that Thompson had brought an action last Trinity term to recover the sum of £680. upon the policy, and had delivered a declaration averring that the interest in the ship and the goods comprised in the ship was in himself and Krugen, or one of them, and that the ship was lost by the perils and the dangers of the sea. The bill then went on to show circumstances tending to prove that the insurance was a fraud on the Company, and prayed a discovery from Thompson and Krugen, and an injunction meanwhile to restrain Thompson's action. To this bill Krugen demurred, on the ground that he was not a party to the action, and it was argued that the demurrer ought to be overruled on the authority of *Glyn v. Soares*, which came both before Sir John Leach at the Rolls, and Lord Abinger in the Exchequer, and was reported in the former court in 3 Myl. & Kee, and in the latter in You. and Coll. The argument in support of the bill was, that it had been the practice in this court, as well as the Court of Exchequer Chamber for the last fifteen years, to make the principal insurer a defendant to bills of discovery brought by the Underwriters in aid of their defence to actions against them, although such actions were brought in the name of the agent only. For the demurrer it was contended, on the authority of "Fenton v. Hughes," 7 Ves. 237, that the party only who was plaintiff on the record in action could be made a defendant to such a bill; and that if it were necessary to make other persons parties, the proper course was by a bill for relief, on which the Court would have jurisdiction to put the plaintiff on terms of bringing the money into Court, or otherwise dealing with the case as should seem proper.

The VICE-CHANCELLOR said, the circumstances of the case of *Glyn v. Soares*, were extremely long and complicated, and he would be extremely unwilling to be thought, for the purpose of deciding the present case, to give any opinion on the judgment delivered by the *Lord Chief Baron*; but he could not help observing on some parts of it, which appeared to him to proceed on a mere misapprehension of the circumstances in the cases to which his Lordship referred. *Lord Abinger* spoke very largely upon the case of *Fenton v. Hughes*, and after stating the circumstances, his Lordship thus proceeded

(a) See *White v. Hall*, 12 Ves. J. 321; *Kennedy v. The Earl of Cassilis*, Swanst. 323; *Attorney-General v. Stewart*, 2 Mer. 143; *Dalrymple v. Dalrymple*, 2 Hag. 81; *Harrison v. Gurney*, 2 Jac. and W. 563; *Bushby v. Munday*, 5 Mad. 297; *Elliott v. Lord Minto*, 6 id. 16; *Beckford v. Kemble*, 1 Sim. and Stu. 7; *Farquharson v. Seton*, 5 Russ. 45; *Martin v. Martin*, 2 Russ. and Myl. 537; *Lord Portarlington v. Soulby*, 3 Myl. and Ke. 104.—ED.

to describe *Lord Eldon's* judgment:—" *Lord Eldon* says, that he has looked with great anxiety into the bill to see if he could discover any sort of interest that Bate had to make him anything but a witness, and he goes through the topics to show that Bate was clearly a witness at law for the party who had filed the bill, and that if he could not be a witness on the other side by reason of any interest yet undiscovered that was for the advantage of the plaintiff in equity; and he comes to the conclusion that there is not such a charge of interest in Bate as justified him in retaining the bill against him." *Lord Abinger* then went on to say that "if the bill had stated that the plaintiff in the action and Bate had agreed to divide the profits, or if it had stated that Bate had some such interest in the suit as identified him in interest with the plaintiff in the action, though not himself a plaintiff on the record, I should have thought it probable, from *Lord Eldon's* judgment, that he would not have allowed the demurrer." His Honour had, however, sent for the original brief in *Fenton v. Hughes*, and was unable to find that Bate had any interest, although it was charged by the bill that he was interested in the event of the action, and was entitled to the money and so forth. So that in fact there were those things in that which induced *Lord Abinger* to think that if they had been in the bill, *Lord Eldon* would have come to a different conclusion. The fact was, that *Lord Eldon*, seeing these things stated in the bill, came to the conclusion he is reported to have come to. Then again in the *Bishop of London v. Fytche*, 1, "Bro. Chan. C." which was a bill filed by the Bishop against the patron of a living. The Bishop having understood that Eyre, the clerk, had given Fytche, the patron, a bond to resign on demand, refused to admit Eyre, conceiving the bond to be simoniacial; and, upon a *quare impedit* being brought against him, he filed a bill for a discovery in aid of his defence at law. *Lord Abinger* assumed that the bill was filed against both Fytche and Eyre. In page 687 of the report he says, "From this it seems clear that the clerk was no more a party to the record from his name being inserted in the declaration than any individual is a party whose name is found in an allegation of special damages by reason of the loss of his custom and trade. Therefore, the case of the *Bishop of London v. Fytche* is a direct decision that where a party is interested in the subject matter of the suit, a bill of discovery may be sustained against him, though not a party to the record at law, as well as against an individual who is a party on that record." But the fact was, the bill was filed against Fytche alone, and *Lord Thurlow* overruled the demurrer. His Honour next proceeded to notice the case of *Powell v. Yates*, be-

fore Sir Thomas Pulmer, in which his Honour had been counsel, and which supported the principle of *Fenton v. Hughes*. And his Honour saw nothing in the present case to show that Krugen was a party who might derive any benefit from the action; he should therefore allow the demurrer. The case of *Few v. Guppy*, in *Mr. Hare's* work on discovery, was carried from this Court before *Lord Lyndhurst*, although not in the form of an appeal. In that case the same principle was correctly stated by *Lord Lyndhurst*, although his Lordship made some observations which were extrajudicial. On the whole he was of opinion, notwithstanding what had been so prominently stated, that a practice had prevailed in the Court of Exchequer for the last fifteen years of filing bills of discovery against parties who were not on the record at law; that *Lord Eldon* did not think that could be done, and he would, therefore, follow the decisions in this Court. He could not help thinking, however, that there was some mistake; for if such had been the uniform practice for fifteen years, it was strange no such bill had been produced other than that which was brought before *Lord Abinger*.

Demurrer allowed.

ROLLS' COURT.—July 15.

MEHRTERS v. ANDREWS.

Executors — their liabilities — BREACH of TRUST not complying with the will of the Testator by selling his property.

This was a suit by the five next of kin of Joachim Gerard Baas against the representatives of the trustees and executors of his will. Baas in 1761 made his will, by which he bequeathed two leasehold houses and other personalities to John and James Savage, his executors, upon trust, for his (testator's) wife, Mary, for her life, with remainder to Sarah, his daughter, for her life, with remainder to her issue, and in default of issue, then to the testator's next of kin, and he directed the executors to convert the leasehold houses into money. The testator died in 1767, and the executors proved the will. They, however, permitted the testator's widow, and afterwards his daughter, to enjoy the leasehold property, and did not sell or convert it into money. The daughter Sarah survived her mother, and died without issue in 1831. The leases had expired in her lifetime. Upon her death the plaintiffs, who were then the next of kin of Baas, filed a bill against the defendants, the representatives of James Savage, the surviving trustee; and on the cause coming on, there was a reference to the Master, who reported that the plaintiffs were entitled each to one-fifth part of

what remained of the personal property of the testator Baas, exclusive of the leaseholds, and a decree according to that report was made, but no declaration was made as to the leasehold property, of the existence of which the plaintiffs were at that time ignorant. The plaintiffs afterwards obtaining better information, filed the present bill, praying to have the value of the leasehold property ascertained, as if it had been converted into money and invested in the funds at the time of the testator Baas's decease.

Mr. Pemberton, for the plaintiffs, insisted that the defendants, who were representatives of the testator Baas, of his widow, his daughter, and of James Savage, the surviving executor of Baas, had been guilty of a breach of trust in not converting the leasehold houses into money, and were liable to the plaintiffs to make good the loss they had sustained thereby.

Mr. Kindersley and Mr. Shadwell, *contra*, said that one of the leases was of no value, and that the length of time which had elapsed since the testator's leasehold property ought to have been sold was so great that the Court would not now give relief.

Lord LANGDALE.—Time was no bar to the suit, because the plaintiff's right only accrued upon the death of the daughter of Baas in 1831; but he could not give the plaintiff costs, because the question ought to have been brought before the Court in the former suit. He should direct an inquiry to ascertain what the value of the lease was a year after the death of Baas, the testator, having regard to the amount of the rent at that time.

COURT OF EXCHEQUER.—*July 1.*

Sittings in Equity before Mr. Baron ALDERSON.

TOWNSEND v. CHAMPERNOWNE.

VENDOR and PURCHASER—Specific performance—COMPENSATION—date of Conveyance—PRACTICE—COSTS.

This bill was filed in the year 1817, and it prayed that the defendant might be compelled specifically to perform an agreement, and to accept a conveyance according to the draft prepared, and to pay the residue of the purchase-money, with interest from the date of the agreement in 1816. The case having been heard, a decree was pronounced in 1821, referring it to the Master to examine whether the plaintiff could not make out a good title; also to report at what time he was able to do so, and at what time he had shown to the defendant that he was so able, with liberty to the Master, if he thought necessary, to report specially. Upon this refer-

ence various objections to the title were taken by the defendant, and answered formally by the plaintiff, with the exception of one, and upon that one the Master reported against the title; exceptions were taken to the Master's report, and were allowed on the ground that he had not come to a fair conclusion in reporting against the title, without taking into consideration several additional abstracts of title which were not contained in the plaintiff's original showing to the defendant, but which were brought into the Master's office, after he had framed, but before he had actually made, his report. The Master having proceeded with the inquiry by direction of the Court, made his final report in 1827, and reported that the plaintiff had made out a good title; that the plaintiff had been able to make good his title to the whole of the premises, with a slight exception, since the commencement of the suit, but that he first showed that title in January, 1825, when the whole of the abstracts of title were brought into the Master's office. The cause now came on upon further directions.

ALDERSON, B. said the Court had to proceed to give its further directions in the case, which consisted in a series of most unfortunate litigation to both parties, the only result of which was heavy expense and great delay. What further direction was the Court to give? It was conceded by the defendant, and very properly, that the Court must decree that the agreement must be specifically performed; and as to the small portion of the property about which the title was not clearly shown, and which was the only subject of compensation to the defendants, there must be a reference to the Master to settle the conveyance, and to estimate the compensation. The next point was as to the period of time from which the conveyance was to bear date, it being contended, on the part of the plaintiff, that it should bear date from 1816, and, on the part of the defendant, that it should only bear date from the time of execution. He did not think either party right on this point. The ground upon which the Court was acting was the prevention of several additional abstracts of title in 1825. Now, if he decided as the plaintiff contended, he would be overruling the previous judgment of the Court, which, upon further directions, he had only to carry into effect. He did not think that the plaintiff had made out that the objection had been waived by the defendant; and, if he did think so, he doubted whether he could act upon that opinion, as it would be contrary to the original decree of the Court. For the defendant's advantage it was required that the conveyance should bear date from the earliest period when a good title was shown. He thought that the plaintiff ought to have the purchase-money with interest, and the defendant to have the rents and

profits of the estate from the earliest date of the conveyance, which he had come to the conclusion ought to bear date from January, 1825. With respect to costs, it was true that the rule was, that the party succeeding should have his costs, but there might be equitable circumstances to exempt the failing party from that penalty. The plaintiff was entitled to a specific performance, but he thought the defendant ought to have the general costs of the suit, with the exception of that part of the Master's report which referred to mutual compensation, in which he thought the plaintiff ought to receive his costs. As to the contest in the Master's office, he thought that many unnecessary and insufficient objections had been taken, which had occasioned expense and delay; and his opinion was, that neither party should receive, but that each should pay his own costs in the Master's office. With these exceptions the defendant was to have his general costs.

PREROGATIVE COURT.—Oct. 8.

WILL OF MARIA BRAMFIELD.

When the Will of a person is lost by accident. Whether Probate will be granted of a Copy 'till the Will shall be found.

In this case the deceased, Miss Maria Bramfield, who died at Oswestry, on the 25th of April last, had previously made her will, and appointed Mr. Lewis Jones sole executor. After her decease, a commission was issued out of this Court into the country, which was executed and returned with the will by the Holyhead mail, but never reached its destination, and the parcel was supposed to be lost.

Dr. Haggard now moved for a decree, ordering probate to be granted of a copy of the will, until the original should be found and produced to the Court.

Order granted.

INSOLVENT DEBTORS' COURT.—Oct. 28.

GEORGE CONNARD'S CASE.

OATHS.—Necessity for an Insolvent to believe in a future state of rewards and punishments before allowed to take the Oaths required—Whether, upon a denial by an Insolvent of such belief, the Court may dismiss the Order for hearing the Petition.

The insolvent applied for a new order for hearing at Lancaster.

Mr. Cooke, in support of the application, put in an affidavit of service of notice on the detain-

ing creditor, Mr. Ainsworth, and an affidavit sworn by the insolvent, in which he stated that he had been committed to Lancaster Castle on the 28th of June, and remained there ever since he filed his petition and schedule, and appeared to be heard on the 1st of August last, at Lancaster, before the Chief Commissioner, and then and there took the oath tendered to him, and was asked questions as to his religious opinions. His case was adjourned till the 5th of August, when he was questioned as to his religious notions of a state of rewards and punishments before he was sworn, and, upon his answers, his order for hearing was dismissed, the Court recommending a settlement out of court, but no settlement took place. The insolvent, shortly before the rising of Parliament, petitioned both Houses, complaining of the manner in which his case had been treated. He had avowed his disbelief in a future state of rewards and punishments, and, in consequence, the order for hearing had been dismissed by the Chief Commissioner, as he could not be sworn.

The case of the Rev. Mr. Taylor, who had been discharged under the Act, was cited as being analogous to this case.

Mr. Commissioner Bowen asked whether that person was questioned as to his belief in a future state of rewards and punishments?

Mr. Cooke said he was not prepared to say whether he had been questioned or not as to that point; the notes of the examination could be referred to.

The CHIEF COMMISSIONER said he had no objection to a new order for hearing being granted. He was glad the application had been made, because he had been made the object of no inconsiderable remark and attack elsewhere. He had been exposed to public remark in a place in which he had no opportunity of answering. He was, therefore, exceedingly glad the insolvent had applied for a fresh order for hearing: he could then appear before one of his learned brother Commissioners. He understood the law to be, that a person taking an oath was required to believe in a future state of rewards and punishments, no matter whether Christian, Jew, Hindoo, or Mahometan. The insolvent had disavowed that belief. He had put extreme cases to him; but he had replied he believed God to be a God of benevolence and mercy, and that he would inflict pain on no one, not even on a murderer. He had therefore refused to take his oath. He was aware that it was laid down by the legal authorities that the questions as to belief were to be tendered before the oath was administered; but in this case there were two oaths to be administered—one when the party was examined, and the other when he was to be sworn to his schedule, and the adjudication to

be pronounced. The objection had been taken before the second oath was administered, and he had felt bound by it. He should rejoice to find the insolvent had altered his opinions. If he had acted contrary to the decisions of the legal authorities, he should be glad to be set right; but he believed he had acted according to law. He thought it hard that it had been said, in a place in which he could not give an answer, that he had acted illegally; and, with the concurrence of Mr. Commissioner BOWEN, granted the application.

Oct. 8.

CHARLES MORRISON'S CASE.

BAIL CASES.—Insolvents out on Bail, and not appearing to be heard on the day for hearing—determination of the Court in such cases.

The insolvent, who was out on bail, was not in attendance when called to be heard.

Mr. Thomas appeared to oppose on the part of some creditors, and complained of the absence of the party. He prayed that the case might be adjourned.

The CHIEF COMMISSIONER said, the best way in these cases would be to adjourn them, and send the insolvents to prison, instead of enlarging the protection on bail.

Mr. Thomas had no doubt two or three instances would be of some service. The insolvents would, no doubt, then appear in proper time.

The COURT ordered the case to stand adjourned to Saturday.

The insolvent afterwards appeared, and gave a good reason for his absence.

The CHIEF COMMISSIONER said, he would not remand him to prison, but he wished other insolvents to understand that the Court would be strict in requiring their attendance.

BRENTFORD PETTY SESSIONS.—Oct. 12.

RANGERSHIP OF BUSHY PARK.—Right of the Ranger (HER MAJESTY THE QUEEN DOWAGER) to pursue and kill Game upon Hounslow Heath, now become private property. (a)

This case was again brought on before the Magistrates. The question involved was, whether the Queen Dowager, as *femme sole*, retained a right of free warren over the manor of Hampton, together with Hounslow-heath, granted

to her Majesty under letters patent by William IV., under which instrument she and her deputies derived an authority to shoot and to follow game over any part of the said manor, as well on the heath as on other men's lands. It was urged, in support of the information, that the letters patent not having been renewed after the death of the late king, the rights they conferred expired.

Mr. Gurney, for Mr. Sawyer, put in the letters patent under which the Queen Dowager derived a right of free warren over the land in question, either in her own person or by deputy, and contended that the defendant Sawyer having gone in pursuit of game in the present instance by virtue of a deputation received from his Royal mistress, could not be held as having committed a trespass.

In reply to a question from the Bench as to whether, with a view to a continuance of the right conferred by the letters patent after the demise of the late Sovereign, it was not necessary that they should have been renewed by his Majesty's successor,

Mr. Gurney said such a course was not necessary, inasmuch as the appointment was vested in the possessors during "the will and pleasure" of the Sovereign; and in proof of that position cited, amongst other matters, a proclamation published in the *Gazette* shortly after Queen Victoria's accession to the throne, by which she renewed all such appointments "during her royal will and pleasure." He therefore submitted, that Sawyer having been deputed by the Queen Dowager under the powers of the appointment granted to her by the letters patent, could not be regarded as having committed the offence set forth in the information.

The solicitor for the Duke of Northumberland here produced a deed which showed that James I. had made a grant to the ninth Duke of Northumberland, conferring unconditionally on his Grace the right of free warren over the manor of Isleworth. That grant, the learned gentleman stated, had never been recalled, and he should contend, inasmuch as the manor of Isleworth constituted a part of the space of lands nominated in the letters patent to the Queen Dowager, that his late Majesty did not possess the power to grant the right of free warren thereover, seeing that the right in that manor had already been vested in the Duke of Northumberland by a preceding sovereign.

Sir F. Pollock, having disclaimed any participation in the institution of the proceedings, entered into a long history of the manor in question, as well as of other manors adjoining and in its vicinity. Of the necessity of a renewal of the letters patent he entertained no doubt. That renewal not having been made, the right which

(a) See the report of the first hearing of this case ante, p. 370.

the Queen Dowager had derived, as a matter of course, had lapsed to the Crown. Under the letters patent a right of free warren had been granted over all the manors situate between Brentford and Staines-bridge, and there not having been any renewal of those letters, he would call upon the solicitor to the Queen Dowager to say whether it was intended, either on behalf of her Majesty or of the Crown, to make a *bond fide* claim of free warren over the lands named. If such were the case, then he should have no hesitation in declaring that he should advise Mr. Dawes to resist it. If, however, he should be told that there existed no such intention, then his advice to Mr. Dawes would be to abandon the present proceeding, and withdraw the information altogether. He trusted there would be an explicit avowal as to the course which it was proposed to pursue, either that the Crown or the Queen Dowager was prepared *bond fide* to support the claim, or that they were not, because he should wish it not to be said that the proceeding had been instituted and gone on with for the purpose of sustaining or trying another party's right.

Mr. Gurney said that it was impossible for him to state what course the Crown might deem it necessary to pursue, whether the Crown would think it requisite to dispute the matter; neither was he prepared to declare that the Queen Dowager would defend the right by supporting the claim. He could not say that her Majesty would do so.

Colonel CLITHEROW thought the Bench indebted to Sir F. Pollock for the information he had introduced into the case. He was of opinion it was highly desirable, if that gentleman was in a condition to do so, that the solicitor for the Queen Dowager should inform the Bench whether it was likely that the Crown, if her Majesty declined to take that course, would make a *bond fide* claim.

Mr. Gurney was unable to give any other answer than that which he had already made. The matter might probably be arranged; but with regard to what might be done by the Crown, all he could say was, that on carrying the case before the Commissioners of Woods and Forests, the determination of the Crown would be obtained.

Sir F. Pollock said that the course which would be the most satisfactory to himself was, that the proceedings should be adjourned in order to afford time to ascertain whether or not it was the intention of the Crown to make a *bond fide* claim to this right. If the claim was abandoned, then, as he had before stated, he should advise Mr. Dawes to withdraw the prosecution. There could be no object in pursuing the defendant Nichols, who was without any ground of defence;

but with regard to the defendant Sawyer, who had a defence—the defence derived under the claim of a right conferred on the Queen Dowager by certain letters patent, which had expired with the demise of her royal husband—the question would depend on the course taken by the Crown.

Mr. POWNALL was of opinion that the grant to the Duke of Northumberland was a grant which overrode the right given by the letters patent.

Sir F. Pollock would suggest that some person should come forward, if such were the intention, and declare that he was prepared to claim *bond fide* the right of free warren on the manor in question. Let that be done, and from that moment he would undertake to try the question in a higher Court. Until that was done he was rather at a loss. If neither the Queen Dowager nor the Crown came forward and made the claim, he could scarcely tell how to deal with the affair.

After some further discussion,

Sir F. Pollock again suggested the propriety of an adjournment of the case. The object of that adjournment would be that the Bench should neither convict nor dismiss the parties without knowing what was the precise nature of the claim set up and intended to be enforced. The best way then would be, that the solicitor of the Queen should communicate with the Commissioners of Woods and Forests, and then if it was ascertained that on the part of the Crown it was intended to claim the right over the manor of Isleworth, in which the land in question was situated, the Duke of Northumberland as well as himself would at once know what course to take.

Mr. POWNALL said the solicitor for the Crown had already had fourteen days to get all the information that was to be obtained. Surely the Bench could at once determine the question. Besides, there appeared to be a former positive grant of right over the manor in which this land was situated.

Mr. ARMSTRONG was inclined to think that the Duke of Northumberland ought to be the claiming party.

Mr. POWNALL could not see that the Bench would be in any better position with regard to the fact of knowing how they ought to decide the question by the proposed adjournment.

Colonel CLITHEROW wished to know how the Bench were to get over the feeling that the defendant Sawyer had acted under the impression that he was a legal deputy of the Queen Dowager? The adjournment would at least lead to some information as to the power of the Queen Dowager to give that deputation, or whether the Crown would make the claim.

Sir F. Pollock remarked, that the solicitor for the Queen Dowager had stated that he did not know whether, if an action were brought for the

trespass, he should defend it, in maintenance of the alleged right.

Mr. Gurney.—That was to say, if the action were defended it must be defended by the Crown, for no defence would be offered by the Queen Dowager.

Colonel CLIFFORD could not, as the case at present stood, convict, when the defendant produced his deputation to shoot over this land from the Queen Dowager.

Sir F. POLLOCK contended it was therefore the more necessary that it should be ascertained what was the intention of the Crown as to pressing the claim.

Adjourned to the 2nd of November, for the purpose of Mr. Gurney communicating with the Commissioners of Woods and Forests on the subject.

CITY OF LONDON.

COURT OF COMMON COUNCIL.—Oct. 8.

Power of the Mayor, Aldermen, and Common Council to increase or reduce the number of Members of the Court of Common Council.

OPINION of the RECORDER and COMMON SERJEANT.

Mr. CORNELIUS WHEELER (Aldgate Ward) moved that the following report be agreed to:—“ We, whose names are hereunto subscribed, your committee in relation to corporation inquiry, to whom, on the 29th day of April last, it was referred to prepare and bring into this Court a bill to assimilate as nearly as may be convenient the number of representatives to be returned to this Court from the several wards to the relative number of house and warehouse keepers, and the amount of rateable property therein, do certify that we directed returns to be prepared and laid before us, showing the number of houses and the amount of rateable property in the several wards of this city, and having received such returns, we turned our attention to the best mode to be adopted for altering the present number of representatives in the several wards; and after the best consideration we have been able to give the subject, we are of opinion that the following should be the number of representatives to be elected in future, viz. Aldergate, 8; Aldgate, 8; Bassishaw, 4; Billingsgate, 6; Bishopsgate, 14; Bread-street, 6; Bridge, 6; Broad-street, 8; Candlewick, 6; Castle Baynard, 8; Cheap, 8; Coleman-street, 6; Cordwainer, 6; Cornhill, 6; Cripplegate within, 8; Cripplegate without, 8; Dowgate, 6; Farringdon within, 12; Farringdon without, 16; Langbourne, 8; Lime-street, 4; Portsoken,

8; Queenhithe, 6; Tower, 8; Vintry, 6; Walbrook, 6. We therefore directed the City Solicitor to prepare the draught of a bill in conformity with the reference of this Hon. Court and the above numbers; and Mr. Solicitor having prepared the draught of the bill accordingly, has since reported to us that he has submitted the same to the Recorder and Common Serjeant, who have approved thereof; and we, your committee, having considered the said bill, agree therewith, and recommend it to this hon. Court for adoption; and inasmuch as the bill will make a change of a very important character in the constitution of this Court, we recommend that the same be printed; and a copy sent to the alderman, deputy, and common council of each ward, for them to adopt such proceedings thereon in their respective wards as they may think most requisite; and for the further information of this hon. Court, we have annexed hereto an abstract of the returns. All which we submit,” &c. He (Mr. Wheeler) had heard, both in and out of that Court, that reform was most necessary in their body, and that, in fact, if they did not proceed at once to make the requisite improvements and alterations, a new system would be introduced from a quarter not very favourable to their privileges. He then entered into an historical detail of the original constitution of the Court. The members were at first selected by the aldermen to assist them in their duties, and afterwards they became a popular body, and were chosen by the citizens at large. At the first appointment the number of members was in proportion to the relative number of inhabitants and the amount of property, but, by a variety of circumstances, inequalities were produced, and the disproportion became at last a serious evil. To remedy the mischief, Mr. Wheeler thought the bill that had been proposed ought to be adopted.

The motion was lost by a majority of one.

OPINION OF THE RECORDER AND COMMON SERJEANT.

“ We are of opinion that the Mayor, Aldermen, and Commons, in Common Council assembled, possess the power, by an act of Common Council, to increase or reduce the number of members now returned by the several wards as representatives in the Court of Common Council, and that the sanction of Parliament is not necessary to such alterations.

“ To sustain and render such an act of Common Council valid, this power must be exercised in such a manner that good faith and reason can justify, regard being had to the rateable property and population of the wards, to a fair representation of the citizens, the convenient despatch of public business, and the common benefit of the city.

"The number of commoners returned to serve in the Court of Common Council has been the subject of regulation by ordinances and acts of Common Council at different periods.

"The qualification of the electors is fixed by statute 11 Geo. I. c. 18; but the statute is silent in respect of the aggregate number of the members, or the quota of the respective wards, and has left the power of the Corporation in this particular untouched.

"C. E. LAW, Recorder,
"JOHN MIREHOUSE, Common-Serjeant."

UXBRIDGE PETTY SESSIONS.—Oct. 8.

UNION WORKHOUSES—*Their Liability to be rated for Poor Rates.*

The important question, whether Union workhouses are liable to be rated for the relief of the poor, was brought under the notice of the Bench a fortnight since, when the magistrates present entertaining doubts as to their competency to decide the question, they being *ex officio* guardians, the matter was postponed until this day.

Mr. Woodbridge, clerk to the Board of Guardians, said this was an appeal on the part of the Board of Guardians of the Uxbridge Union, against two rates for the relief of the poor, assessed on the Union workhouse at Colham-green, by the parochial officers of Hillingdon, the assessment being at £300. per annum.

Mr. Walford, vestry clerk of Hillingdon, called upon Mr. Woodbridge to prove the service of the notices necessary under the Act, when it appeared that the notices of the appeal served on the parish officers were one against a rate made on the (blank) day of (blank) month, and the other against a rate made on the (blank) day of August, 1839; in answer to which

Mr. Woodbridge contended, that on the first opening of the case, Mr. Walford had agreed to waive all technical observations.

Mr. Walford said, he had certainly agreed to waive all technical objections, but not substantial ones.

Mr. Woodbridge then said, that according to the decision of the Court of Queen's Bench, in the case of "*The Queen v. the Guardians of the Wallingford Union*," determined in Trinity Term last, property of the description of Union workhouses under the New Poor Law Amendment Act was property clearly liable to be rated. He then contended that magistrates were perfectly competent to decide appeals of this kind, though they were *ex officio* guardians. He then called

Mr. T. Morton, surveyor, of Uxbridge, was

examined on the part of the appellants. He deposed that he had been over the Union workhouse, and had fixed the rateable value at £169., the gross value being £225. The allowances he made were for insurance £5., poor-rate £25., Highway Act £4., church-rate £2., and annual repairs, &c. £20., being a total deduction from £225. of £56.

Mr. J. Dean, surveyor, of Tottenham, in business upwards of fifty years, valued the gross annual value at £230., and the assessable value at £164.

Mr. Walford then called.

Mr. Tyerman, the architect who superintended the erection of the Union workhouse, who considered the gross annual value as £275., and the rateable value as £250., or thereabouts. He thought it would let for £275. It had been built with the strictest regard to economy, and without any great profit to the builders.

Mr. T. Murray, surveyor, of Uxbridge, took nearly the same view as to the value.

The magistrates said, that having attentively considered the evidence brought before them, they were of opinion that the *Union workhouse should be rated at £200. per annum, subject to the deductions under the Act of Parliament.*

Mr. Woodbridge then applied for costs, which, after much discussion, was allowed.

Mr. Walford gave notice that he should appeal to the sessions.

NEW METROPOLITAN POLICE ACT. 2 & 3 Vict. CAP. XLVII.

An Act for further improving the Police in and near the Metropolis.—[17th August, 1839.]

(Continued from p. 384.)

LVII. And be it enacted, That it shall be lawful for any householder within the Metropolitan police district, personally, or by his servant, or by any police constable, to require any street musician to depart from the neighbourhood of the house of such householder on account of the illness of any inmate of such house, or for other reasonable cause, and every person who shall sound or play upon any musical instrument in any thoroughfare near any house after being so required to depart shall be liable to a penalty not more than forty shillings.

LVIII. And be it enacted, That every person who shall be found drunk in any street or public thoroughfare within the said district, and who while drunk shall be guilty of any riotous or indecent behaviour, and also every person who shall be guilty of any violent or indecent behaviour in any police station-house, shall be liable

to a penalty of not more than forty shillings for every such offence, or may be committed, if the magistrate before whom he shall be convicted shall think fit, instead of inflicting on him any pecuniary penalty, to the House of Correction for any time not more than seven days.

LIX. And be it enacted, That every person who shall ride upon or cause himself to be carried or drawn by any carriage within the Metropolitan Police district without the consent of the owner or driver thereof, shall be liable to a penalty not more than five shillings; or if a child apparently under the age of twelve years, it shall be lawful for the magistrate to cause such child to be detained until his parent or guardian can attend for the purpose of having such child delivered into his care, and if such parent or guardian do not so attend before the closing of the Police Court for the day, it shall be lawful for the magistrate to order such child to be discharged.

LX. And be it enacted, That every person who, in any street or public place within the limits of the Metropolitan Police district, shall be guilty of any of the following offences, shall be liable to a penalty not more than forty shillings for every such offence: (that is to say,)

1. Every person who in any thoroughfare shall burn, dress, or cleanse any cork, or hoop, cleanse, fire, wash, or scald any cask or tub, or hew, saw, bore, or cut any timber or stone, or slack, sift, or screen any lime:

2. Every person who shall throw or lay in any thoroughfare any coals, stones, slates, shells, lime, bricks, timber, iron, or other materials (except building materials, or rubbish thereby occasioned, which shall be placed or inclosed so as to prevent any mischief happening to passengers):

3. Every person who in any thoroughfare shall beat or shake any carpet, rug, or mat (except door-mats before the hour of eight in the morning), or throw or lay any dirt, litter, or ashes, or any carrion, fish, offal, or rubbish, or throw or cause any such thing to fall into any sewer, pipe, or drain, or into any well, stream, or watercourse, pond or reservoir for water, or cause any offensive matter to run from any manufactory, brewery, slaughterhouse, butcher's shop, or dunghill, into any thoroughfare, or any uncovered place, whether or not surrounded by a wall or fence; but it shall not be deemed an offence to lay sand or other materials in any thoroughfare in time of frost to prevent accidents, or litter or other materials to prevent the freezing of water in pipes, or in case of sickness to prevent noise, if the party laying any such things shall cause them to be removed as soon as the occasion for them shall cease:

4. Every person who shall empty or begin to empty any privy between the hours of six in the morning and twelve at night, or remove along

any thoroughfare any night soil, soap lees, ammoniacal liquor, or other such offensive matter, between the hours of six in the morning and eight in the evening, or who shall at any time use for any such purpose any carriage not having a proper covering, or who shall wilfully or carelessly slop or spill any such offensive matter in the removal thereof, or who shall not carefully sweep and clean every place in which any such offensive matter shall have been placed, slopped, or spilled; and in default of the apprehension of the actual offender, the owner of the cart or carriage employed for any such purpose shall be deemed to be the offender: Provided always, that this enactment shall not be construed to prevent the Commissioners of any Sewers within the Metropolitan Police district, or any person acting in their service or by their direction, from emptying or removing along any thoroughfare at any time the contents of any sewer which they are authorized to cleanse or empty:

5. Every person who shall keep any pigsty to the front of any street or road in any town within the said district, not being shut out from such street or road by a sufficient wall or fence, or who shall keep any swine in or near any street, or in any dwelling, so as to be a common nuisance:

6. Every occupier of a house or other tenement in any town within the said district who shall not keep sufficiently swept and cleansed all footways and watercourses adjoining to the premises occupied by him; and if any tenement be empty or unoccupied, the owner thereof shall be deemed the occupier with reference to this enactment:

7. Every person who shall expose any thing for sale in any park or public garden, unless with the consent of the owner or other person authorized to give such consent, or upon or so as to hang over any carriageway or footway, or on the outside of any house or shop, or who shall set up or continue any pole, blind, awning, line, or any other projection from any window, parapet, or other part of any house, shop, or other building, so as to cause any annoyance or obstruction in any thoroughfare:

8. Every person who, to the danger of passengers in any thoroughfare, shall leave open any vault or cellar, or the entrance from any thoroughfare to any cellar or room underground, without a sufficient fence or handrail, or leave defective the door, window, or other covering of any vault or cellar, or who shall not sufficiently fence any area, pit, or sewer left open in or adjoining to any thoroughfare, or who shall leave such open area, pit, or sewer without a sufficient light after sunset to warn and prevent persons from falling thereinto.

(To be continued.)

COURT OF QUEEN'S BENCH.

Sittings appointed to be held in Middlesex and London, before the Right Honourable THOMAS Lord DENMAN, Lord Chief Justice of the Court of Queen's Bench, in and after Michaelmas Term, 1839:—

IN TERM.

<i>Middlesex.</i>		<i>London.</i>	
Monday	Nov. 4	Saturday	Nov. 23
Thursday	Nov. 7		
Friday	Nov. 22		

AFTER TERM.

<i>Middlesex.</i>		<i>London.</i>	
Tuesday	Nov. 26	Wednesday	Nov. 27

The Court will sit at eleven o'clock in term, in Middlesex; at twelve in London; and in both at half past nine after term.

N.B. Long causes will probably be postponed from the 4th and 7th of November to the 26th; and all other causes on the lists for the 4th and 7th of November will be taken from day to day until they are tried.

Undefended causes only will be taken on Nov. 22nd.

Short defended as well as undefended causes entered for the sitting on Nov. 23rd, will be tried on that day, if the plaintiffs wish it, unless there be a satisfactory affidavit of merits.

Causes standing over with judgment of the term in Middlesex will be taken on the 26th November; and in London any defended causes specially appointed on the 27th of November.

COURT OF COMMON PLEAS.

Sittings appointed in Middlesex and London before the Right Honourable Sir NICOLAS CONYNGHAM TINDAL, Knight, Lord Chief Justice of Her Majesty's Court of Common Pleas at Westminster, in and after Michaelmas Term, 1839:—

IN TERM.

<i>Middlesex.</i>		<i>London.</i>	
Friday	Nov. 8	Wednesday	Nov. 13
Friday	Nov. 15	Wednesday	Nov. 20

AFTER TERM.

<i>Middlesex.</i>		<i>London.</i>	
Tuesday	Nov. 26	Wednesday	Nov. 27

N.B. The Court will sit at ten o'clock in the forenoon on each of the days in term, and at half past nine precisely on each of the days after term.

The causes in the list for each of the above sitting days in term, if not disposed of on those days, will be tried by adjournment on the days following each of such sitting days.

On Wednesday, the 27th of November, no causes will be tried, but the Court will adjourn to a future day.

EXCHEQUER OF PLEAS.

Sittings in Middlesex and London before the Right Honourable JAMES Lord ABINGER, Chief Baron of Her Majesty's Court of Exchequer, in and after Michaelmas Term, 1839:—

IN TERM.

<i>Middlesex.</i>		<i>London.</i>	
1st Sittings . . . Wednesday . . . Nov. 6		1st Sittings . . . Monday . . . Nov. 11	
By adjournment (if necessary) . . . Thursday . . . Nov. 7		2nd Sittings . . . Thursday . . . Nov. 21	

<i>Middlesex.</i>		<i>London.</i>	
2nd Sittings . . . Friday . . . Nov. 15		By adjournment (if necessary) . . . Friday . . . Nov. 22	
By adjournment (if necessary) . . . Saturday . . . Nov. 16			

<i>Middlesex.</i>		<i>London.</i>	
By adjournment (if necessary) . . . Monday . . . Nov. 18			

AFTER TERM.

<i>Middlesex.</i>		<i>London.</i>	
Tuesday	Nov. 26	Wednesday	Nov. 27

The Court will sit during term at ten o'clock.

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The Legal Guide.

VOL. II.]

SATURDAY, OCTOBER 26, 1839.

[No. 26.

LEX LOCI DOMICILII.

PART II.

(Continued from p. 387.)

THE limits of this publication will not allow of our further pursuing this international subject, upon which so little is to be found in any of our Libraries, and although we could further illustrate the opinions and arguments we have ventured upon, by reference to foreign jurists, we find ourselves at the close of this volume, compelled to desist, so that we may enter upon other matter, equally interesting to our Subscribers, and perhaps of more general practical utility.

We have shewn the law as it now stands in cases of LEGITIMACY and of ILLIGITIMACY, and we have also shewn the nature of the claim of the Crown in this country, the true foundation of that claim, and whether the circumstance of a British born subject, dying domiciled in a *foreign* state, intestate, being a *Bastard*, makes any and what difference (a). We have also shewn the important changes which the law of *Adulterine Bastardy* has undergone, without the intervention of any act of the Legislature.

Although the maxim of the *civil law*, that *pater est quem nuptiae demonstrant* was early adopted by the Common Law, the

latter admitted of certain exceptions; and it therefore became necessary to define under what circumstances, and in what manner, the presumption in favour of the legitimacy of the offspring of a married woman, could be rebutted.

Bracton and *Britton* state several grounds upon which the legitimacy of a child born in wedlock might be disputed; but they do not mention the generic appellation which the *Year Book* gives to a class of children, who though legitimate, and inheritable, were not begotten by the husband on their mothers; and it is singular, that this distinction should have been so little attended to in modern cases, as almost to have fallen into desuetude. Nor has sufficient notice been taken of the fact, which explains many apparent contradictions, that a man may in *England* be legitimate according to one law, and illegitimate according to another law.

The distinction between a *de jure* and a *de facto* was marked by a specific legal title. A child born of a married woman, whose legal status was at variance with his actual paternity, was called *mulier*, but he enjoyed all the municipal rights of legitimacy. By the Spiritual Law, a child born in adultery was a bastard; but by the Common Law he was *mulier*, unless the husband was impotent, or was separated from his wife by sentence of divorce, or was beyond sea, when the child was begotten; and

(a) See ante, p. 273.

converso. On the other hand, a child whose parents married after its birth, was *mulier* by the Ecclesiastical Law, and a bastard by the Common Law. It seems therefore indisputable, that the Common Law always contemplated the possibility of a child being the heir of his father, though it might owe its existence to an adulterer; and the Law did so on account of the difficulty of ascertaining the real paternity, in cases where another man than the husband had sexual intercourse with a married woman, and to prevent the indecency which would attend such investigations, and after all, legitimacy in its strictest sense, is but a presumption; for the fact of issue of a woman by a particular man is not capable of direct proof.

SIR JOHN LEECH, M.R. in *Bury v. Phillipot*,^(a) said, that "access is such access as affords an opportunity of sexual intercourse: and where the fact of such access between a husband and wife, within a period capable of raising the legal inference as to the legitimacy of an after-born child, is not disputed, probabilities can have no weight, and a case ought never to be sent to a jury. There is here nothing against the evidence of access except evidence of the adulterous intercourse of the wife, which does not affect the legal inference; for if it were proved that she slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate. The interest of the public depends upon a strict adherence to the rule of law."^(b)

So that let the husband and wife be once brought together, under circumstances which afford the husband an opportunity of becoming the father of the child, born in due time afterwards, and the woman may have slept with another man every night in the year,

the law will fix the husband with the paternity. Legitimacy itself is therefore but a mere creature of the law; that though so closely associated with the best feelings and usages of society, as to be scarcely separable in idea from the corporeal functions of procreation by the husband, legitimacy may, nevertheless, be produced in other ways; as by inference and presumption, or by an Act of Parliament, or, in other countries, by the will of the Sovereign. *Moral justice* certainly renders it desirable that none but the real issue of the body of a man, begotten upon his wife, shall inherit his rank and lands; but *society* merely requires that property shall have an owner, and the bastard, or supposititious child, may be as competent to hold, and to perform all the duties annexed to it as the true heir. Marriage, the only source of legitimacy, was instituted for the universal advantage of mankind; and there is no greater moral injustice in making marriage, in some instances, sanction the admission of a bastard to legal rights, than there is in entirely preventing the actual issue of a man's body from succeeding to his property, because the child was not born within its pale. In both cases it is a question of comparative good; and no rational doubt can exist of the wisdom and utility of attaching to marriage that responsibility, and that legal presumption of legitimacy which it has so long possessed. (c.)

PROBLEM XXVI.

VOL. 2.

SOCAGE TENURE.

Describe what it is.

(a) 2 Myl. & K. 352.

(b) See *Head v. Head*, 1 Sim. & Stu. 150; affirmed on appeal 1 Tern. & Russ. 138.

(c) See Nicholas's Treatise on the Law of Adulterine Bastardy, where all the cases are collected.

Imperial Parliament.**HOUSE OF LORDS.—Oct. 23.**

The two Houses of Parliament met this day, to which time it had been prorogued, and the Commons having been summoned, the Lord CHANCELLOR then said—"My Lords, and Gentlemen of the House of Commons, By virtue of Her Majesty's commission under the Great Seal, to us and other lords directed, and now read, we do in Her Majesty's name, and in obedience to her commands, prorogue this Parliament to Thursday, the 12th of December next, to be then here holden; and this Parliament is accordingly prorogued to Thursday, the 12th of December next."

Law Reports.**ROLLS COURT.—July 29.****LINK v. STALLARD.**

EXECUTORS purchasing property of their Testator—Whether Equity will support the Sale against Creditors of the deceased, although the price may be fair.

The suit was instituted by James Link, a simple contract creditor of Thomas Bennett, a deceased farmer of Herefordshire, against William Stallard, the principal defendant, and others, praying for the usual accounts of testator's estates, and seeking to have rectified or declared void a deed executed by Thomas Bennett to Stallard, of conveyance of a farm called Brockhampton, in Herefordshire; and the plaintiff also sought to render the defendant liable for money received by him on a policy of assurance on the life of Thomas Bennett.

Mr. Kindersley, for the plaintiff, contended that the deed (dated March, 1833) sought to be set aside, was not drawn up according to the instructions given, and the agreement made between the parties. He said that the agreement was that a debt (which amounted to £4,450) from the deceased Bennett to Stallard, on which Stallard had assured Bennett's life for £4,450, was to be entirely gone, for which Bennett gave up a lease he held of an estate called the Brockhampton farm, and also conveyed a cottage and certain pieces of land near the farm, his own fee simple, to Stallard; and Bennett also agreed to pay the premium to grow due on the policy at the expiration of five years from the date up to the time of his (Bennett's) death.

Lord LANGDALE said, the bill was filed by a simple contract creditor of Thomas Bennett, the

deceased, who had not been paid, and who had a clear right to an account of the estate of his debtor. The defendant, William Stallard, was Thomas Bennett's legal personal representative, and was liable to the account, and if nothing else but an account and payment were sought, it would be a case of ordinary occurrence; but the plaintiff had included several transactions between the defendant and the testator in his lifetime, and particularly a transaction in 1833, which the bill alleged put an end to a debt due to Stallard from Bennett. It appeared that Stallard and Bennett had been intimately acquainted from early life, and that Stallard, who had been a prosperous man, had made several accommodations to Bennett. In 1824, Bennett had obtained an agreement for a lease for 14 years of the Brockhampton farm, at a rent of £1. per acre, and he was the occupier of Fawley farm. The first evidence of any debt due from Bennett to Stallard was a warrant of attorney, dated January, 1827, to secure £3,600. That debt was afterwards increased, and Bennett had great reliance on the kind feeling of Stallard towards him. The family of the Protheroes were owners of Brockhampton farm, which they were desirous of selling, and it was offered for sale as one property by Mr. Collins as the mutual agent of all the owners, but he was not to sell for less than £30. an acre. Collins asked £35. per acre. Bennett, the tenant and occupier, wished to become the purchaser, but the Protheroes were not willing to sell to him, as the farm consisted of 556 acres, and they doubted his ability to pay the purchase money, on which he applied to Stallard through Bird, Stallard's agent. Stallard gave—what he thought was very imprudent—Bird leave to make what use he pleased of his (Stallard's) name, and Bird thought he had authority to enter into a contract for Stallard. On the 3d of June, 1831, the Protheroes agreed with Bird to sell the Brockhampton farm to Bennett and Stallard, at £32. 10s. per acre. Bennett, who was a speculating man, thought he had made a profitable purchase, and was well pleased to enter into the contract, although he did so by drawing Stallard, who was to advance the purchase-money, into the burden. Stallard, however, thought differently, and reproached Bird for going too far, but admitted himself to be bound, although he would have been very glad to have got rid of the contract.—Bennett immediately began endeavouring to sell the estate again, and requested Stallard to assist him in the resale, but Stallard was not so confident. On the 15th of August they came to an agreement that Bennett should have to the end of January next (1832) to resell the farm, but in case he failed in selling it, Bennett (who was farming it) was to pay a rent of £700. a-year; it being understood that the purchase would not

answer to Stallard if he were to take less rent; and Bennett, if he resold at profit, was to have the whole benefit. Bennett agreed to pay the £700. rent without regard to the sale, in order to satisfy Stallard, but used every endeavour to farm, and laid out money in improvement and advised with various persons whose selling he requested; and it appeared that he avoured to sell it in lots, but found he was inhibited by the particulars of the agreement with the Protheroes. He complained of this to Elad, and that Collins, the agent of the Protheroes, had defrauded him in making the agreement in that form. The vendors called upon the purchasers to perform the contract, and Stallard consulted as to the title; and so little desirous was he of the purchase, that he did not abstain from making all objections; but when he found a title could be made out, he submitted to accept it. Bennett being unable to sell, thought of letting the land, and procured from two tenants, Watkins and Barrow, rent at the rate of 28*s.* an acre. Stallard was engaged in a milk company, and Bennett, although greatly in debt, thought, by selling his stock, he could raise money for that speculation, and for that purpose, at the end of 1831, he sold a portion of his stock. The milk speculation failed. The accounts between him and Stallard were not made out, but the statement was that some of the proceeds of the stock was applied in payment of part of his debt. The next thing was an agreement entered into, dated March, 1832, that Bennett should relinquish to Stallard, for a nominal consideration, his contract for the purchase of Brockhampton farm, and the benefit of the lease he had on it; and Bennett agreed to join in and execute all proper conveyances to Stallard, who was to pay the whole of the purchase-money, and to be put in possession of the farm, subject to the leases to Watkins and Barrow. In May, 1832, Bennett wrote to Stallard that he could not go on without raising money, and that he would come to Stallard, at Worcester, on the next Saturday, and would explain every thing to his satisfaction. Applications were also made to Stallard by Protheroe, and Webb his solicitor, urging that whatever debt was owing from Bennett to Stallard ought to be given up in consideration of what Bennett had done, and Stallard promised to consider of it; but those applications, according to Protheroe's evidence, led to no conclusion. It was then thought an arrangement might be made for giving to Bennett a release, and yet not insure Stallard, by policy of assurance. There then appeared in evidence a letter of the 23d December, 1832, from an agent of the Guardian office, offering to take £200. per annum for assuring £5,000 at the death of Mr. Bennett, but certificates of health would be required. Mr.

Price, the agent for the Eagle, also wrote to Stallard on the 14th of January, 1833, forwarding proposals for the assurance. Stallard agreed to those proposals, and in consequence a policy for £4,450. was effected on the 23d of January, 1833, on Bennett's life, in the Eagle office. His Lordship then read the depositions of Messrs. Webb, Finch, and other witnesses, as to the previous conversations and understanding with respect to the policy, and its intended effect upon the debt due from Bennett to Stallard. It was the determination of Bennett to extricate himself from the debt due to Stallard, who, on being applied to, and told by a friend of Bennett that the debt due to him from Bennett was arranged, said, "How do you make out that?" and being answered it was in consideration of Bennett's giving up the Brockhampton farm, replied, "It would be a very serious matter." Stallard was then told that, in addition to Bennett's interest in the Brockhampton estate, Bennett would give up the cottage and the bits of land which were his own property, and he might effect an assurance on Bennett's life. Stallard then asked how the premiums on the assurance were to be paid? He was answered that he (Stallard) should have immediate possession of the Brockhampton estate for the five years which remained of Bennett's lease from the Protheroes, which lease was worth £200. a-year; and that after the expiration of the lease, Bennett should pay the annual assurance money, and the policy should be an assurance for the debt owing from Bennett to Stallard. In February the arrangement was carried into effect; deeds were prepared for the conveyance of the cottage and bits of land by Finch. The parties met on the 14th of February. It was then agreed that Stallard should give up the warrant of attorney, should have the benefit of the policy, and pay the premium for five years, and Bennett then to pay them for the remainder of his life. The deed was afterwards executed. It recited that Bennett was debtor to Stallard in £4,487 10*s.*; it then recited the policy that the warrant of attorney had been delivered up, provided that the executors of Bennett should pay the debt, and contained a covenant that they should pay it one month after Bennett's death. No question arose upon the debt during the life of Bennett. Shortly after its execution, Bennett wrote to Stallard, hoping he would always be pleased with the purchase, and Bennett joined in the conveyance of the farm to Stallard, and during his lifetime no complaint was made. Bennett did not rest long before he entered into another speculation. In 1833 he purchased an estate in Herefordshire, called the Hampton-court estate, for 10,300*l.* for which various persons became his security. That purchase was completed in his life-time, for the estate was con-

veyed to him on the 9th of May, 1834, and he died on the 22nd of the same May. His will was dated in November, 1826, and in consequence, the Hampton-court estate did not pass by it, but descended to his heir-at-law. He appointed his wife executrix, but who made an appointment to somebody else, which rendered it doubtful to whom the representation belonged. C. Bennett, the heir at-law, conveyed the Hampton-court estate to Mrs. Bennett, who put it up to sale by auction, but it was bought in, not fetching sufficient to pay the incumbrances on it, and a purchaser could not be found until Mr. Evans, the solicitor of Mrs. Bennett, procured Stallard to purchase it, which he did upon the terms of Mrs. Bennett, renouncing the executorship to her husband in favour of him (Stallard), who then took out administration to Bennett, and agreed to secure her a debt of 500*l.* and also an annuity of 50*l.* a year, and the Hampton-court estate was conveyed to him. A question arose with the Eagle Company on the policy granted by them. Bennett died suddenly of a disease to which he was subject at the time the policy was granted, and the company objected to pay. Stallard brought an action, which was tried on the 13th of March, 1835. The first witness proved the nature of Bennett's disorder. A compromise was agreed to, and about one-half of the sum assured was received, which, after deducting costs, left only about 900*l.* recovered on the policy. The present bill was shortly afterwards filed, which prayed in a most obscure and unsatisfactory mode to have the deed of March, 1833, rectified. That which the plaintiff's counsel asked for, was intelligible, viz. that the debt due from Bennett to Stallard, ought to be considered as satisfied. There was a statement that the Brockhampton estate was of the value of 35*l.* per acre, which might have been got by the family of the Protheroes, but that they had a particular favour for Bennett, and agreed to let him have it at 32*l.* 10*s.* per acre. The instruments did not support that statement. The Protheroes were desirous of getting the best prices they could, and did not show, or intend to show, any particular favour for Bennett. It was then said that Bennett had an agreement for a beneficial lease. Bennett was in possession under no other right. The value of that agreement did not appear, but Bennett, a sanguine man, thought it beneficial. Stallard was involved against his own judgment in the purchase. He (Lord Langdale) thought the arrangement was proved by the deeds. It was easy to conceive that the parties intended to put an end to the transaction in the way stated by the defendant, that Bennett was not to be further troubled for his life; there was nothing unreasonable in that. There was a debt sub-

sisting on personal security, enabling Stallard immediately to proceed against Bennett, and Stallard was to have the policy payable immediately after Bennett's death, but it was not intended to exclude Stallard from the benefit of Bennett's death. With respect to the next transaction, the purchase of the Hampton-court estate, without meaning to impute anything to Stallard, that purchase cannot stand. This descended estate was a portion of the assets of Bennett, and Stallard was purchasing it for himself, by the very act in which he was enabled to become the personal representative of Bennett. The price might have been perfectly fair, but the policy of the Court did not allow such transactions in trustees. He could not direct an account in any other than the ordinary form, having regard to the bill, and the charges of fraud contained in it. He would dismiss with costs so much of it as sought to rectify or set aside the deed of March, 1833.

When a trustee wishes to purchase the trust estate, he must first be prepared to give more for it than any other person; and the only thing a trustee can do to protect his purchase is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else (and such is the rule), that a bill should be filed and he should apply to the Court by motion to let him be the purchaser, and there are cases in which the Court would permit it. The Court will divest him of his character of trustee, and prevent all the consequences of his acting both for himself and for the *cestui que trust*; the reason of the rule being that no man shall sell to himself. The Court will examine into the circumstances as to who had the conduct of the transaction, whether there is any reason to suppose the estate could be sold better, and upon the result of that inquiry would let another person prepare the particular, and let the trustee bid.—WESTERN'S CONVEYANCING, Vol. 3, p. 174.

As assignees cannot buy the estate of the bankrupt, so also they cannot for their own benefit buy an interest in the bankrupt's estate; because they are trustees for the creditors. In that respect there is *no difference*.

ference between assignees and executors, who cannot for their own benefit buy the debts of the creditors. I do not say, there may not be cases of that kind, in which, in a moral view, the transaction between the executor and the creditor may not be blameable: but the Court must act upon general principles. Unless the policy of the law makes it impossible for them to do any thing for their own benefit, it is impossible to see in what cases the transaction is morally right: but it is enough to say, an assignee is a trustee for the benefit of those entitled to the interest in the residue. He must buy for them, and not for himself.—(*Id. p. 176.*)

The rule is this. A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he became a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have entrusted him. It does not preclude him from bargaining that he will no longer act as a trustee. The *cestuis que trust* may by a new contract dismiss him from that character; but even then that transaction by which they dismiss him must, according to the rules of this Court, be watched with infinite and the most guarded jealousy; and for this reason, that the law supposes him to have acquired all the knowledge a trustee may acquire, which may be very useful to him, but the communication of which to the *cestui que trust* the Court can never be sure he has made, when entering into the new contract by which he is discharged.—(*Id. p. 174, 175, et seq.*)

PREROGATIVE COURT.—July 15.

WILL AND CODICILS OF SARAH PECHELL.

NEW WILL ACT.—As to the presumption the Court will give to an undated Codicil to a Will made before this Act came into operation, whether it was written before or after that time.

The testatrix made her will in 1830, and subsequently added several codicils, some of which

bore no date; and there was no evidence to satisfy the Court that one of the undated codicils, by which Mrs. Jenkinson, the daughter of the testatrix, and wife of the Bishop of St. David's, would (if effective) be deprived of £3000, was executed either *before or after* the 1st January, 1838, (when the new Act came into operation.)

Sir H. JENNER said—By the old law the codicil would be good, and the Court has no doubt that it was the intention of the deceased that it should operate as part of her will. The effect of the codicil in question is to deprive Mrs. Jenkinson of £3000, and the question is *what is the presumption* that it was written *before* the 1st of January, 1838. Is the Court to presume, because a codicil is without date, that it is thereby brought under the new law. Where a case is entirely bare of circumstances, and where a deceased is as likely to have made an alteration before as after the Act came into operation, the presumption is rather that it was *before*; because every person is presumed to know the law, and the Court is bound to presume that the deceased executed this codicil according to the old law, since if it had been after the alteration of the law, the codicil would have been executed according to the new law. If there were circumstances which could have afforded the Court any confirmation, the result might have been different; but if the case is bare of circumstances, like the present, the presumption is that the paper was executed before the Act came into operation.

Decree, that the codicil was part of the will, and entitled to probate.

MIDDLESEX SESSIONS.—Oct. 15.

CHARGE OF THE CHAIRMAN (MR. SERGEANT ADAMS) TO THE GRAND JURY.

TRANSFER OF BUSINESS hitherto sent to these Sessions to the CENTRAL CRIMINAL COURT by the new POLICE COURTS ACT.

The CHAIRMAN, in delivering his charge to the grand jury, said, he held in his hand a paper containing the amount of the criminal business which would come before them during the present session, and from it he found that the charges of larceny consisted of two only, and, although it would have afforded him sincere satisfaction could he from that fact have congratulated the jury that the smallness of the number had arisen from, or was attributable to, a diminution of crime in the county, still he lamented to say that the result had not been led to by that circumstance. They were, he doubted not, all aware of a matter which at the present time occupied much of the attention of the country and of the public in general—namely, that much of

the business which legitimately belonged to that court had, from some cause or other—what that cause was he was unable to conceive—been transferred to the Central Criminal Court, and they had all in consequence been summoned that day for the purpose, in the performance of a duty to the public, of trying two cases only. They had been called to that court to-day to hear and to decide such small cases of larceny as it had been intended formerly should be tried by the Court of Quarter Sessions. But it was discovered that nearly every one of those charges had been transferred to a court where they were already overwhelmed by a great pressure of business which properly attached to it, and where the expense and inconvenience to the prosecutor as well as to the county at large were vastly more than they would have been had cases been sent, as in former days, to the Quarter Sessions. Now, he thought it to be his duty to state to the grand jury why it was that they had been so frequently called together, and to show them that such an act had not been the immediate result of any directions which had gone forth from the bench of magistrates. The increase in the number of their sittings had been by the advice and with the consent of his late Majesty's Government, for the system had been, as he might say, established under the sanction of Lord Melbourne, who, at the time when the additional sittings had been made, was the Secretary of State for the Home Department. It had been found in the year 1832 that very great inconvenience arose from the vast multiplicity of the business of the Old Bailey, and therefore an application was made to the Government for the purpose of procuring the consent of the Secretary of State for the Home Department to a proposition, that all the small cases of felony commonly called larcenies should be sent to the Sessions for trial. To that application an answer was received from the Under Secretary, to the effect that Lord Melbourne not only approved of and gave his consent and sanction to the proposed plan, but would issue directions that all committals for trial of the small cases should be made to the Sessions. A short time after the Central Criminal Court was established. He ought to tell them that in the ancient and barbarous days of their forefathers almost every species of felony was held to be a capital offence, and in those times of ignorance the grand jury would probably be aware the law knew of no punishment for such crimes other than that of loss of life or removal from the country. By degrees, however, education advanced, and the people became proportionately enlightened, until the modes of punishment were diminished in severity. All this time the Court of Quarter Sessions had taken notice of those offences only which were not capital—offences

which were now denominated larcenies. During the past quarter of a century the benefits of education had so extended, and the means of attaining knowledge had become such as, he trusted, would produce a great moral improvement, such as to induce and lead to an alteration in the law, until at length in the present day there did not remain more than two offences which were held as capital. There were, in fact, but two species of crime which were now punishable by death. These crimes were that of murder and cases where violence to the female sex constituted the accusation against the prisoner. The result of this change had been, that the Court of Quarter Sessions had assumed a jurisdiction over all those cases which were not capital, or accompanied with some act of violence, and it was now found, that except in London, such charges were tried by that tribunal. When the Central Criminal Court was established, an arrangement had been made by which all the more important cases should be taken there to be tried, before judges who, from their standing, legal knowledge, and long experience, were more fully qualified for the duty, and that the residue should be carried to the Quarter Sessions. The consequence had been, that the latter Court had become the tribunal for trying all simple and common cases of larceny, all those which were unaccompanied with violence. That arrangement had proved satisfactory to all parties. In the first place, it relieved the prosecutor from the inconvenience of the long attendance to which he was subjected at the Central Criminal Court, which oftentimes continued for very many days, and prevented a party who had merely had his pocket picked, or had been robbed of articles of no very great value, from quitting the Court with a feeling of disgust and dissatisfaction with the ancient and valuable institution of trial by jury—an impression which he feared had but too frequently arisen. It was a feeling, however, which he individually should deeply lament to find had taken root in the breast of any man. But there was another feature in the matter, with reference to the Court over which he had the honour to preside. In the course of the proceedings of that Court there were matters with which the public generally were unacquainted, for it appeared to have been commonly imagined that in their courts of criminal jurisprudence the duties of a judge terminated at the very moment when the jury had found their verdict, and had quitted the box, and the sentence had been pronounced from the bench upon the prisoners. Those persons who entertained such an impression were not aware, or had but little idea, of the extremely anxious and laborious duties which the magistrates of that Court were constantly and voluntarily taking upon themselves subsequently to the passing of

the sentence on the convicted prisoner. It was an old but a very just observation, that the prerogative of mercy was one of the brightest jewels of the Crown. In the general run of cases which were disposed of in that Court, wherever the circumstances were such as to create or to induce a feeling in the mind of the Bench that the prisoner was a proper object for the exercise of mercy towards him, the magistrates on every occasion entered into a minute enquiry after the trial of the various circumstances connected with his case, and it was through their representation of the result of that investigation that an alteration was frequently made in the party's sentence. In making those enquiries he was proud and happy to state that his brother magistrates had at all times rendered him every assistance, and it had often happened, after having devoted many hours, and even days, to their enquiry, where the result would justify such a course, that with some further exertion they had succeeded in procuring the admission of a youthful prisoner into one of the numerous institutions which the benevolent feeling of the country had caused to spring up in the metropolis. Now, in the other Court to which he had occasion to allude there was so great a pressure of business, in fact, the duties of the parties were so heavy, that it was impossible for a very frequent after-investigation to be gone into, and the consequence was, that a number of prisoners underwent incarceration who might, had they been tried at the Quarter Sessions, through the merciful intervention of the magistrates, have been placed in some establishment where they would have received such instruction and advice as would have been the means of paving the way for their future well-doing in the world. He had mentioned these matters, because he felt that every facility ought to be given with a view to the preservation of that ancient institution of the country the trial by jury, so long as it could be preserved, without causing serious inconvenience to the parties affected by, or compelled to have recourse to, its operation. There should be some regard paid to the public by sending the smaller cases to a Court where they would be disposed of quickly, instead of to a tribunal where from its very nature the parties were made to wait until all the more important charges had been gone through. This detention, in many instances, lasted ten or fourteen days. The Learned Chairman then adverted to what was termed summary convictions, and pointed out a case, of which there were, he said, without the least doubt, many, wherein a party had been committed for trial for stealing a drinking glass of the value of 9d. The case against the prisoner had been clearly made out, but when called on for his defence, he stated that he knew nothing about the matter, as he

was not sober at the time, other than that he had found the glass in his hat; and then went on to say, that when he had gone into the house he had taken a basket containing some pork of the value of 2s. 6d. with him but on leaving he had been unable to find it. This statement had led to an enquiry, in the course of which, although the witness for the prosecution had at first denied the fact, it came out that on the following day the man's basket and pork had been discovered hidden in the grate of the room in which he had been sitting the previous night. Upon this it had been fairly deemed that the man was innocent, inasmuch as it was not very likely that he would exchange a piece of pork worth 2s. 6d. for a glass of the value of 9d. only. It was plain, then, that time should be given in these cases. He did not mean to impute blame in any quarter for the committal of the man in question, for it was a proper case for such a course of legislation; but it was perfectly clear, had the man been summarily convicted, that he would have been condemned unjustly. After a few further remarks, the Learned Chairman expressed a hope, that when the observations which he had felt it necessary to offer on that occasion had gone forth to the world, and were understood, the officers of that Court would not have to call the juries together for the purpose of trying two cases only. He trusted that ere long the business of the Court would return to its former state.

The CHAIRMAN, on receiving some bills from the grand jury, said, there had been as many as six committals of cases for trial at those Sessions, the whole of them yesterday, a greater number in that one day than there had been during the preceding month. He had been made acquainted with this fact after he had charged the grand jury.

SOUTHWARK. COURT AND VIEW OF FRANKPLEDGE.

Oct. 23.

THE METROPOLITAN POLICE ACT relates only to COURTS LEET in the CITY of WESTMINSTER, and does not extend to the BOROUGH of SOUTHWARK.

This ancient Court Leet was yesterday held at the Sessions-room, Town-hall, Southwark, before the Stewards and other officers.

The RECORDER addressed the jury and said, he felt great pleasure in having to meet them again upon an occasion like the present—the more so when he beheld Acts of Parliament passed containing enactments which were innovations on the rights and privileges of Englishmen. They (the leet jury), however, still had the right left to them to meet and to perform

those duties which were as essential and beneficial to themselves as to the community at large. The duties which they were called upon to perform had existed from time immemorial; hence it was a privilege which they ought to value and maintain. They were called upon to go amongst their neighbours and friends, and examine places and to make presentments, and that without fee, favour, or reward. They were bound to present all dangerous and dilapidated buildings, houses of ill-fame, and all descriptions of nuisances; but their most important duty was one of a domestic character—that of going to the houses of those with whom they were living in amity and examining their weights and measures, for the purpose of ascertaining that the poor had full weight or measure in what they purchased. He regretted to say that those persons whose condition in society only enabled them to make small purchases, were too often robbed by the individuals with whom they dealt. Thus, while they were robbed, the individual who so acted assumed a power which neither the Queen, Lords, nor Commons possessed, for he set himself above the law of the land by acting dishonestly, in imposing upon his poorer neighbours. This was contrary to the law of England, a law which, if strictly acted upon, gave equal justice to the rich and the poor. He would here observe, that the fines which the leet jurors of late years had levied were, in his opinion, much too small, and consequently did not produce the desired effect.

The foreman of the late jury said, that the reason why they had levied such small fines arose from the conviction, that the offence was not intentional, but that the deficiency was occasioned by the parties neglecting to take their weights and measures to the proper officer and get them repaired.

The RECORDER said, no doubt they had acted properly, but still, in all cases where they found a glaring defect, he should advise them to visit the offence rather heavily, for the poor had considerable difficulty in obtaining the common necessities of life, and therefore ought not to be cheated, especially as they had not the power to protect themselves. He would here advert to one part of their duties—namely, the propriety of seizing weights and measures which might be found secreted, and, perhaps, in giving them advice on this subject he could not do better than follow the opinion of his learned predecessor; that learned personage advised the leet jury not to seize and carry away any weight or measure found secreted, for upon examination it might be found perfect, and in that case the jury would be liable to an action for trespass; but if the deficiency was very great, then destroy the weight or measure on the premises. Having

thus far explained the duties which they had to perform, he would advert to one or two other circumstances connected with the office of leet juries. He had been given to understand that many of them had been led to believe that the recent acts of Parliament had entirely abrogated the courts of frankpledge and leet juries; these acts, he was happy to say, did not touch those courts, which were established by ancient prescription and custom, and the present court (the King's manor) was as efficient, and possessed all the powers and jurisdiction, as when it was first established by the wisdom of their ancestors, who, from experience, knew that the best way to maintain their liberties was to carry justice to every man's door, and that it would still be found that these courts were of the utmost importance to the county at large; at the same time, he felt great pleasure in informing them that their duties would be but slight.

A constable said, he wished to know whether the New Police and the Metropolitan Police Courts Bill interfered with the privileges of the town and borough of Southwark?

The RECORDER said, he was of opinion those acts did not interfere with the borough of Southwark. The Metropolitan Police Act, which took notice of court leets, related only to that of the city of Westminster, a court established by Act of Parliament, but it had no power to abolish any court leet established by charter, custom, or prescription in any part of the kingdom; it was, therefore, with pleasure that he still was able to say that the present court had the power to appoint its own constables and officers, and that they could carry on their business and proceedings as usual. As some doubts, he believed, had arisen respecting the billeting of soldiers, and as, under the impression that that power was taken from them by the New Police Act, the constables had given up their billeting books to the police, he would state that he did not believe it to be their duty to billet soldiers; still he should advise them to continue doing it until the question was settled by a higher authority than his.

A juror inquired if they could go out oftener than twice a-year?

The RECORDER — Yes, as often as they thought proper; in fact, leet juries formed a most important part of the constitution of England, for they had the power to fine and imprison, and from their decision there was no appeal, although of late years the punishment of imprisonment had fallen into disuse.

ESSEX QUARTER SESSIONS.—Oct. 20.

COMBINATION AMONG RAILWAY WORKMEN TO ENFORCE LARGER WAGES.—How far Punishable under Statute 6 Geo. 4. c. 129. s. 3.

John Bigsby and Thomas Hammond, labourers, were indicted for conspiring together to raise the rate of wages, preventing others from working at the usual rate of wages, and also for assaulting William Peters of South Weald.

Mr. James, who appeared as counsel for the prosecution, stated, that this proceeding was instituted by Mr. Burge, the contractor for the works upon the Eastern Counties Railway, then in progress between Runford and Brentwood, in this county, and it became his duty to take these steps in consequence of the insubordinate conduct which the prisoners at the bar, together with others, had manifested. It appeared that upon the evening of the 21st of September last, a number of the workmen assembled together, and evinced a disposition to demand a higher rate of wages than that which had been paid by Mr. Burge; the determination not to work at 12s. a-week, which was then being paid, had been come to by the workmen assembled at the different public-houses in the neighbourhood, and it was upon this occasion that they endeavoured to carry that determination into effect. Several of the men who were assembled, of whom the two prisoners at the bar appeared the ring-leaders and the most active, seeing the prosecutor about to proceed to his work as usual with his horses harnessed, endeavoured by threats to intimidate him and others, and finally made a most gross and aggravated assault upon him. The learned counsel, after stating the facts of the case, explained to the jury the nature of the several counts contained in the indictment, and referred to the 6th Geo. 4. cap. 129. sec. 3. by which it is enacted, "That if any person should by violence to the person, or by threats, or by intimidation, or by molesting, or in any way obstructing another, prevent or endeavour to prevent any journeyman, workman, or other person, from accepting work or employment from any person or persons, every person or persons so offending should be subject to imprisonment and be kept to hard labour for any time not exceeding three calendar months."

Evidence was produced proving the facts of the case.

The Jury found the prisoner Bigsby *guilty* upon all the counts, and Hammond *guilty* upon the count for the combination only.

Mr. James, in answer to a suggestion from the COURT, intimated that it was not the wish of the prosecutor to press for severe punishment against the prisoners, but that, for the sake of

example, it must be known by them that they are amenable to the law.

The prisoner Hammond was then sentenced to one month's imprisonment and hard labour, and the prisoner Bigsby to the same sentence for the period of two months.

**NEW METROPOLITAN POLICE ACT.
2 & 3 Vict. CAP. XLVII.**

An Act for further improving the Police in and near the Metropolis.—[17th August, 1839.]

(Continued from p. 398.)

LXI. And be it enacted, That it shall be lawful for any constable belonging to the Metropolitan Police force to destroy any dog or other animal reasonably suspected to be in a rabid state, or which has been bitten by any dog or animal reasonably suspected to be in a rabid state; and the owner of any such dog or animal who shall permit the same to go at large after having information or reasonable ground for believing it to be in a rabid state, or to have been bitten by any dog or other animal in a rabid state, shall be liable to a penalty not more than five pounds.

LXII. And be it enacted, That every person who, by committing any offence herein forbidden within the said district, shall have caused any hurt or damage to any person or property, may be apprehended, with or without warrant, by any constable, and if he shall not, upon demand, make amends for such hurt or damage to the satisfaction of the person aggrieved, he shall be detained by the constable in order to be taken before a magistrate, and upon conviction shall pay such a sum, not more than ten pounds, as shall appear to the magistrate before whom he shall be convicted to be reasonable amends to the party aggrieved, besides any penalty to which he may be liable for the offence, and the evidence of the person aggrieved shall be admitted in proof of the offence: Provided always, that if the person aggrieved shall have been the only witness examined in proof of the offence, the sum ordered as amends shall be paid and applied in the same manner as a penalty.

LXIII. And be it enacted, That it shall be lawful for any constable belonging to the Metropolitan Police district, and for all persons whom he shall call to his assistance, to take into custody, without a warrant, any person who, within view of any such constable, shall offend in any manner against this Act, and whose name and residence shall be unknown to such constable, and cannot be ascertained by such constable.

LXIV. And be it enacted, That it shall be lawful for any constable belonging to the Metropolitan Police to take into custody, without a

warrant, all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the morning lying or loitering in any highway, yard, or other place, and not giving a satisfactory account of themselves.

LXV. And be it enacted, That it shall be lawful for any constable belonging to the Metropolitan police force to take into custody, without warrant, any person who, within the limits of the Metropolitan Police district, shall be charged by any other person with committing any aggravated assault, in every case in which such constable shall have good reason to believe that such assault has been committed, although not within view of such constable, and that by reason of the recent commission of the offence, a warrant could not have been obtained for the apprehension of the offender.

LXVI. And be it enacted, That any person found committing any offence punishable either upon indictment or as a misdemeanor upon summary conviction, by virtue of this Act, may be taken into custody, without a warrant, by any constable, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorized by him, and may be detained until he can be delivered into the custody of a constable to be dealt with according to law; and every such constable may also stop, search, and detain any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that any thing stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner any thing stolen or unlawfully obtained; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, or that the same or any part thereof has been stolen or otherwise unlawfully obtained, is hereby authorized, and if in his power is required, to apprehend and detain, and as soon as may be to deliver such offender into the custody of a constable, together with such property, to be dealt with according to law.

LXVII. And be it enacted, That it shall be lawful for any constable to stop and detain, until due inquiry can be made, all carts and carriages which he shall find employed in removing the furniture of any house or lodging between the hours of eight in the evening and six in the following morning, or whenever the constable shall have good grounds for believing that such removal is made for the purpose of evading the payment of rent.

LXVIII. And be it enacted, That whenever any person having charge of any horse, cart, carriage, or boat, or any other animal or thing, shall be taken into the custody of any constable under the provisions of this act, it shall be lawful for any constable to take charge of such horse, cart, carriage, or boat, or such other animal or thing, and to deposit the same in some place of safe custody, as a security for payment of any penalty to which the person having had charge thereof may become liable, and for payment of any expenses which may have been necessarily incurred for taking charge of and keeping the same; and it shall be lawful for any magistrate before whom the case shall have been heard to order such horse, cart, carriage, or boat, or such other animal or thing, to be sold, for the purpose of satisfying such penalty, and reasonable expenses in default of payment thereof, in like manner as if the same had been subject to be distrained, and had been distrained for the payment of such penalty and reasonable expenses.

LXIX. And be it enacted, That every person taken into custody by any constable belonging to the Metropolitan Police, without warrant, except persons detained for the mere purpose of ascertaining their name or residence, shall be forthwith delivered into the custody of the constable in charge of the nearest station-house, in order that such person may be secured until he can be brought before a magistrate, to be dealt with according to law, or may give bail for his appearance before a magistrate, if the constable in charge shall deem it prudent to take bail in the manner herein-after mentioned.

LXX. And be it enacted, That whenever any person charged with any offence of which he is liable to be summarily convicted before a magistrate, or with having carelessly done any hurt or damage, shall be, without the warrant of a magistrate, in the custody of any constable of the metropolitan police in charge of any station-house during the time when the police courts shall be shut, it shall be lawful for such constable, if he shall deem it prudent, to take the recognizance of such person, with or without sureties, conditioned as herein-after mentioned.

LXXI. And be it further enacted, That whenever any person charged with any felony, or any misdemeanor punishable by transportation, or other grave misdemeanor, shall be, without warrant, in the custody of any constable of the metropolitan police, at any station-house during the time when the police courts shall be shut, it shall be lawful for the constable in charge of the station-house to require the persons making such charge to enter into a recognizance conditioned as herein-after mentioned, and upon his or her refusal so to do, it shall be lawful for such constable, if he shall deem it prudent, to discharge

from custody the person so charged, upon his or her recognizance, with or without sureties, conditioned as herein-after mentioned.

LXXII. And be it enacted, That every recognizance so taken shall be without fee or reward, and shall be conditioned for the appearance of the person thereby bound before a magistrate of the district in which such station-house shall be situated, at his next sitting, and the time and place of appearance shall be specified in the recognizance; and the constable shall enter in a book, to be kept for that purpose at every such station-house, the name, residence, and occupation, of the party, and his surety or sureties (if any) entering into such recognizance, together with the condition thereof, and the sum thereby acknowledged, and shall return every such recognizance to the magistrate present at the time and place when and where the party is bound to appear.

LXXIII. And be it enacted, That for every misdemeanor or other offence against this Act for which no special penalty is herein-before appointed, the offender shall, at the discretion of the magistrate before whom the conviction shall take place, either be liable to a penalty not more than five pounds, or be imprisoned for any time not more than one calendar month in any gaol or house of correction within the jurisdiction of such magistrate.

LXXIV. Provided always, and be it enacted, That nothing herein contained shall be construed to prevent any person from being indicted for any indictable offence made punishable on summary conviction by this Act, or to prevent any person from being liable under any other Act or Acts to any other or higher penalty or punishment than is provided for such offence by this Act, so nevertheless that no person be punished twice for the same offence.

LXXV. And be it enacted, That in the construction of this Act the word "Magistrate" shall be taken to mean and include every justice of the peace appointed to be a magistrate of the police courts of the metropolis, and also every justice of the peace acting in and for any part of the metropolitan police district for which no police court shall be established.

LXXVI. And be it enacted, That every such magistrate shall be empowered summarily to convict any person charged with any offence against this Act, on the oath of one or more witnesses, or by his own confession, and to award the penalty or punishment herein provided for such offence; and the matter of such complaint shall be heard and determined by one of the justices appointed to be a magistrate of the police courts of the metropolis at one of the said police courts; or if the offence shall have been committed or the offender apprehended in any part of the metropolitan police district for which no police court

shall be established as aforesaid, the matter of such complaint may be also heard and determined by any two or more justices acting in and for the county in which the offence was committed or the offender apprehended.

LXXVII. And be it enacted, That in every case of the adjudication of a pecuniary penalty or amends under this Act, and non-payment thereof, it shall be lawful for the magistrate to commit the offender to any gaol or house of correction within his jurisdiction, for a term not more than one calendar month, where the sum to be paid shall not exceed five pounds, the imprisonment to cease on payment of the sum due; and the costs for the recovery thereof, and so much of every such pecuniary penalty as shall not be awarded to the informer or other persons who have contributed to the conviction, shall be paid to the receiver of the metropolitan police for the purposes of this Act; and the residue thereof, under the direction of the magistrate by whom the same shall have been adjudged, shall be paid and applied either to the use of the informer alone or to the use of such persons as shall have contributed to the conviction of the offender, in such shares and proportions as such magistrate shall think fit.

LXXVIII. And be it enacted, That in the construction of this act, unless there be something in the context repugnant thereunto, any word denoting the singular number of the male sex shall be taken to extend to any number of persons or things, and to both sexes; and that all things herein authorized to be done by the commissioners of police of the metropolis may be done by either of them.

LXXIX. And be it enacted, That this Act shall be construed as one Act with the said Act passed in the tenth year of the reign of King George the Fourth, for the improvement of police in and near the metropolis; and that all the provisions of the said Act, except so far as is herein otherwise provided, shall extend to this Act, and to all things done in execution of this Act.

LXXX. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this present Session of Parliament.

ARTICLED CLERKS RELIEF BILL.

2 & 3 VICT. CAP. XXXIII.

An Act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and for extending the time limited for those purposes respectively until the twenty-fifth day of March one thousand eight hundred and forty; and for the relief of Clerks to Attorneys and Solicitors in certain cases.

[29th July, 1839.]

Whereas divers persons who, on account of their offices, places, employments, or professions,

or any other cause or occasion, ought to have taken and subscribed the oaths or assurance respectively appointed to be by such persons taken and subscribed in and by an Act made in the first year of the reign of his Majesty King George the First, of glorious memory, intituled "An Act for the further security of his Majesty's person and government, and the succession of the crown in the heirs of the late Princess Sophia, being Protestants; and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors;" or to have qualified themselves according to an Act made in the thirteenth year of the reign of his Majesty King Charles the Second, intituled "An Act for the well governing and regulating of Corporations;" or to have qualified themselves according to another Act made in the twenty-fifth year of the reign of his Majesty King Charles the Second, intituled "An Act for preventing the dangers which may happen from Popish recusants;" or according to another Act made in the thirtieth year of the reign of his Majesty King Charles the Second, intituled "An Act for the more effectual preserving the King's person and government, by disabling Papists from sitting in either House of Parliament;" or according to another Act made in the eighth year of the reign of his Majesty King George the First, intituled "An Act for granting the people called Quakers such forms of affirmation or declaration as may remove the difficulties which many of them lie under;" or according to another Act made in the ninth year of the reign of his Majesty King George the Second, intituled "An Act for indemnifying persons who have omitted to qualify themselves for offices within the time limited by law, and for allowing further time for that purpose; and for amending so much of an Act passed in the second year of the reign of his present Majesty as requires persons to qualify themselves for offices before the end of the next term or Quarter Sessions, and also for enlarging the time limited by law for making and subscribing the declaration against Transubstantiation; and for allowing a further time for enrolment of deeds and wills made by Papists; and for relief of Protestant purchasers, devisees, and lessees;" or according to another Act made in the eighteenth year of the reign of his Majesty King George the Second, intituled "An Act to amend and render more effectual an Act passed in the fifth year of his present Majesty's reign, intituled 'An Act for the further qualifications of Justices of the peace;'" or according to another Act made in the sixth year of the reign of his Majesty King George the Third, intituled "An Act for altering the oath of abjuration, and the assurance; and for amending so much of an Act made in the seventh year of the reign of her

late Majesty Queen Anne, intituled ' An Act for the improvement of the union of the two Kingdoms,' as after the time therein limited requires the delivery of certain lists and copies therein mentioned to persons indicted for high treason or misprison of treason;" or according to another Act passed in the ninth year of the reign of his Majesty King George the Fourth, intituled " An Act for repealing so much of several Acts as imposes the necessity of receiving the Sacrament of the Lord's Supper as a qualification for certain offices and employments;" or according to another Act passed in the tenth year of the reign of his said Majesty, intituled " An Act for the relief of his Majesty's Roman Catholic subjects," so far only as the said Act relates to any civil or military offices or places of trust, or places of profit or corporate offices; have through ignorance of the law, absence, or some unavoidable accident, omitted to take and subscribe the oaths and assurance and make and subscribe the declaration required by the said recited Acts or either of them, or otherwise to qualify themselves as aforesaid, within such time and in such manner as in and by the said Acts respectively required, whereby they have incurred, or may be in danger of incurring, divers penalties and disabilities: For quieting the minds of her Majesty's subjects, and for preventing any inconvenience that might otherwise happen by means of such omissions, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this Parliament assembled, and by the authority of the same, That all and every person or persons who, at or before the passing of this Act, hath or shall have omitted to take and subscribe the oaths and declarations, or otherwise to qualify him, her, or themselves, within such time and in such manner as in and by the said Acts or any of them is required, and who, after accepting any such office, place, or employment, or undertaking any profession or thing, on account of which such qualification ought to have been had and is required, before the passing of this Act hath or have taken and subscribed the said oaths or made the declarations required by law, or who, on or before the twenty-fifth day of March one thousand eight hundred and forty shall take and subscribe the oaths, declarations, and assurance respectively, in such cases wherein by the said several Acts or any of either of them the said oaths, declarations, and assurance ought to have been taken and subscribed, in such manner and form, and at or in such place or places, as are appointed in and by the said several Acts or any or either of them, shall be and are hereby indemnified, freed, and discharged from and against all penalties, forfeitures, incapacities, and disabilities incurred or to be in-

curred for or by reason of any neglect or omission previous to the passing of this Act of taking or subscribing the said oaths or assurance, or making or subscribing the said declarations respectively, or taking or subscribing the said oath, according to the above-mentioned acts, or any of them, or any other Act or Acts; and such person or persons is and are and shall be fully and actually re-capacitated and restored to the same state and condition as he, she, or they were in before such neglect or omission, and shall be and be deemed and adjudged to have duly qualified him, her, or themselves according to the above-mentioned Acts and every of them; and that all elections of, and acts done or to be done by, any such person or persons, or by authority derived from him, her, or them, are and shall be of the same force and validity as the same or any of them would have been if such person or persons respectively had taken the said oaths or assurance, and made and subscribed the said declarations respectively, and taken and subscribed the said oath, according to the directions of the said Acts and every or any of them; and that the qualification of such person or persons qualifying themselves in manner and within the time appointed by this Act, shall be to all intents and purposes as effectual as if such person or persons had respectively taken the said oaths and assurance, and made and subscribed the said declarations respectively, and taken and subscribed the said oath, within the time and in the manner appointed by the several Acts before mentioned.

II. And whereas several persons well affected to her Majesty's Government, and to the United Church of England and Ireland, have, through ignorance of the law, neglected, or been, by sickness or other unavoidable causes, prevented from taking and subscribing the declaration according to the directions of an act passed in the Parliament of Ireland in the second year of the reign of her Majesty Queen Anne, intituled "An Act to prevent the further Growth of Popery;" be it therefore enacted, that all persons who have incurred any penalty or incapacity in the said recited Act mentioned, by neglecting to qualify themselves according to the said Act, shall be and are hereby indemnified, freed, and discharged from all incapacities, disabilities, penalties, and forfeitures incurred by reason of such omission or neglect as aforesaid; and that no Act done by any of them, not yet avoided, shall be questioned or avoided by reason of such omission or neglect, but that all such acts shall be and are hereby declared to be as good and effectual as if such persons respectively had taken and subscribed the said oath, and made and repeated and subscribed the said declaration, at such time and place and manner as in the said Act is mentioned; any thing in the said Act to the contrary notwithstanding:

Provided always, that such person or persons do and shall take and subscribe the said oaths, and make, repeat, and subscribe the said declaration, in such manner and form, and in such place or places respectively, as are directed and appointed by the said last-recited Act, on or before the twenty-fifth day of March, one thousand eight hundred and forty.

III. Provided always, and be it enacted, that this Act, or any thing herein contained, shall not extend or be construed to extend to indemnify any person against whom final judgment shall have been given in any action of debt, bill, plaint, or information, in any of Her Majesty's courts of record, for any penalty incurred by having neglected to qualify himself within the time limited by law.

IV. Provided also, and be it enacted, that nothing contained in this Act shall extend or be construed to extend to exempt any Justice of the peace within Great Britain from the penalties to which he is subject, for acting as such without being possessed of the qualification required by the laws now in force.

V. And whereas the appointment of divers clerks of the peace, town clerks, and other public officers, and the admission of divers members and officers of cities, corporations, and borough towns in Great Britain and Ireland, or the entries of such admissions in the court books, rolls, or records of such cities, corporations, and borough towns, which by several Acts are directed and required to be stamped, may not have been provided, or the same not stamped, or may have been lost or mislaid; be it enacted, that for the relief of such persons whose appointments and admissions, or the entries of whose admissions as aforesaid, may not have been provided, or not duly stamped, or where the same have been lost or mislaid, it shall and may be lawful to and for such persons in Great Britain or Ireland, on or before the twenty-fifth day of March, one thousand eight hundred and forty, to provide or cause to be provided appointments and admissions, or entries of admissions, as aforesaid, duly stamped; or in case where such appointments, admissions, or entries of admissions as aforesaid have been made or provided, but have not been duly stamped, to produce such appointments, admissions, or entries of admissions as aforesaid, to the commissioners appointed to inspect and manage the revenues of the stamp duties, to be duly stamped, which such commissioners are hereby authorized and empowered and required to duly stamp, on payment of double the amount of the duties first payable or to have been paid on such appointments, admissions, or entries as aforesaid, without any other fine or forfeiture thereon; and in order to denote the said duties, the said commissioners are hereby authorized and

empowered to use such stamps as shall have been heretofore provided to denote any former duties on stamped vellum, parchment, and paper, or to cause new stamps to be provided for that purpose, and to do all other things necessary for putting this act in execution, in the like and in as full and ample manner as they or the major part of them are authorized to put in execution any former law concerning stamped vellum, parchment, and paper; and such persons so providing appointments, admissions, or entries of admissions as aforesaid, duly stamped, or procuring the same to be duly stamped in manner aforesaid, are and shall be hereby confirmed and qualified to act as clerk of the peace, town clerk, and other public officer, or member or members, officer or officers of such cities, corporations, and borough towns respectively, to all intents and purposes, and shall and may hold and enjoy and execute such offices, or any other office or offices into which he or they hath or have been elected, notwithstanding his or their omission, or the omission of any of their predecessors in such cities, corporations, or borough towns as aforesaid, and shall be indemnified and discharged of and from all incapacities, disabilities, forfeitures, penalties, and damages by reason of any such omission; and none of his or their acts shall be questioned or avoided by reason of the same.

VI. And whereas many persons who may have paid the proper stamp duties, either before or within six months after the execution of the contracts in writing entered into by them to serve as clerks to attorneys or solicitors, scriveners or notaries public, in Great Britain, have omitted to cause affidavits to be made, and afterwards to be filed in the proper office, of the actual execution of such contracts, and have also omitted to cause such contracts and the indentures thereof to be enrolled within the time in which the same ought to have been done; and many solicitors, attorneys, notaries public, and others have omitted to take out annual certificates, or to enter the same in the proper office; and many infants and others may thereby incur certain disabilities: for preventing thereof, and relieving such persons, be it enacted, that every person who shall, either before or within six months after the execution of such contract or indenture, have paid the proper stamp duty in that behalf, and who at the passing of this Act shall have neglected or omitted to cause any such affidavit or affidavits as aforesaid to be made and filed, or such contract or indenture to be enrolled, and who, on or before the first day of Hilary Term one thousand eight hundred and forty, shall cause such contract or indenture to be enrolled with the proper officer in that behalf, and one or more affidavit or affidavits to be made, and afterwards to be filed, in such manner as the same ought to have been made and filed in due time, shall be and is hereby indemnified, freed,

and discharged from and against all penalties, forfeitures, incapacities, and disabilities in or by any Act or Acts mentioned, and incurred or to be incurred for or by reason of such neglect or omission; and every such affidavit or affidavits so to be made, and which shall be duly filed on or before the first day of Hilary Term one thousand eight hundred and forty, shall be as effectual to all intents and purposes as if the same had been made and filed within the respective times the same ought, by the laws now in being for that purpose, to have been made and filed; and that the respective officer or officers who ought to receive, file, enter, or register such contract or indenture, or affidavit or affidavits, shall not refuse to receive, file, enter, or register the same by reason that the attorney, solicitor, or notary public to whom such infant or other person shall have been articled or have contracted to serve shall have neglected to take out his annual certificate, or to register the same, but such officer or officers are hereby directed and empowered to receive, file, enter or register the same, notwithstanding such omission; and that every person who shall have regularly served any attorney or attorneys, solicitor or solicitors, notary public or notaries public, for the term of years required by law, shall not be prevented or disqualified from being admitted an attorney, solicitor, or notary public, by reason of any omission of the person or persons to whom he served for the same term, or for any part thereof, having so neglected to take out his annual certificate, or to register the same, provided that such person is otherwise entitled to be created and admitted to such office by the laws now in force relating thereto.

(To be continued.)

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